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CITE THIS VOLUME
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MOTIONS

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CROSS-REFERENCES:

Notice;
Orders;

Striking Out and Withdrawal;
Summary Proceedings.

Motions in particular actions or proceedings, see the specific titles.

For forms in addition to those found in this article, see 9 STANDARD PROC. 852, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

Scope of Article. — The following article deals with the subject of motions in a general way, the treatment being confined to a discussion of the scope and nature of the remedy and the principles of procedure controlling its application in general. Throughout the work, under appropriate heads, motions for particular kinds of relief are treated in detail.¹

I. DEFINITION AND NATURE. — A motion may be defined as an application to the court by one of the parties in a cause or his counsel in order to obtain some rule or order of court which he thinks becomes necessary in the progress of the cause, or to get relieved in a summary manner from some matter which would work injustice.² It is not an original and independent proceeding but is collateral to some pending or proposed action or special proceeding,³ and must be relevant to the main litigation.⁴ The relief which it seeks is some

1. See the specific titles, such as "Arrest of Judgment;" "Certainty in Pleading;" "Continuances;" "Indictment and Information;" "Judgments," etc.

2. 3 Bouvier's Law Dict. 2265. See the following cases: *Cal.*—Brownell v. Superior Court, 157 Cal. 703, 109 Pac. 91; Weldon v. Rogers, 151 Cal. 432, 90 Pac. 1062; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762. *Pac.*—Nobach v. Scott, 20 Idaho 558, 119 Pac. 295. *Ill.*—City of Marengo v. Eichler, 245 Ill. 47, 91 N. E. 758. *Ia.*—Mengel v. Mengel, 157 Iowa 630, 138 N. W. 495. *Kan.*—Taylor v. Woodbury, 86 Kan. 236, 120 Pac. 367. *Mo.*—Smith v. Mosley, 234 Mo. 486, 137 S. W. 971; Ewing v. Vernon County, 216 Mo. 681, 116 S. W. 518. *N. Y.*—*In re* Dietz, 138 App. Div. 283, 122 N. Y. Supp. 1063; Thompson v. Thompson, 52 Hun 117, 4 N. Y. Supp. 842, 16 Civ. Proc. 317, 22 N. Y. St. 471; Brodie v. O'Donnell, 71 Misc. 530, 130 N. Y. Supp. 805.

[a] **Other Definitions.**—(1) An application to the court for relief of some kind. *Hammer v. Campbell Automatic Safety Gas Burner Co.*, 74 Ore. 126, 144

Pac. 396. (2) "Application for an order." *Idaho Rev. Codes*, §4880; *Nobach v. Scott*, 20 Idaho 558, 119 Pac. 295. See also *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91; *Thompson v. Thompson*, 52 Hun 117, 4 N. Y. Supp. 842, 16 Civ. Proc. 317, 22 N. Y. St. 471; *Bank of Silver Creek v. Browning*, 16 Abb. Pr. (N. Y.) 272. (3) "A motion is a request to the court to grant the mover some right which he claims. It is a notification that he considers himself entitled to what he asks." *Arnold v. Regan*, 29 R. I. 71, 69 Atl. 292.

3. *Ill.*—*Mutual Reserve Fund Life Assn. v. Smith*, 77 Ill. App. 259. *La.* *Thomas v. Bourgeat*, 6 Rob. 435; *White v. Comrs. of Merchants' Bank*, 4 Rob. 363. *Mo.*—*State ex rel. Shackelford v. McElhinney*, 241 Mo. 592, 145 S. W. 1139. *N. Y.*—*In re Dietz*, 138 App. Div. 283, 122 N. Y. Supp. 1063.

[a] **The nature of the application** determines whether it is a motion or not. *Christy v. Kiersted*, 47 How. Pr. (N. Y.) 467.

4. *Ill.*—*Mutual Reserve Fund Life Assn. v. Smith*, 77 Ill. App. 259. *La.*—

order of court⁵ falling short of the dignity of a judgment.⁶ In the notes are collected a number of cases to illustrate proceedings which have been considered motions,⁷ as well as those which have not been so considered.⁸

II. SCOPE OF REMEDY. — A. IN GENERAL. — The scope of the remedy by motion depends largely upon the statutes and the practice acts of the jurisdiction, and the particular motion resorted to must be recognized by them.⁹ In general a motion is a proper method of raising a question of regularity in the proceedings in a cause,¹⁰ but not of deciding questions relating to the merits¹¹ and depending upon disputed facts.¹² A pleading may be challenged by motion for errors

Thomas *v.* Bourgeat, 6 Rob. 435; White *v.* Comrs. of Merchants' Bank, 4 Rob. 363. **N. Y.**—*In re* Dietz, 138 App. Div. 283, 122 N. Y. Supp. 1063.

5. See the title "**Orders.**"

6. State *ex rel.* Shackelford *v.* McElhinney, 241 Mo. 592, 145 S. W. 1139; Ewing *v.* Vernon County, 216 Mo. 681, 116 S. W. 518; Christy *v.* Kiersted, 47 How. Pr. (N. Y.) 467.

[a] The remedy by motion has been adopted because it is less expensive, and more simple and expeditious than the more cumbersome and technical remedies which it replaced. Shuford *v.* Cain, 1 Abb. 302, 22 Fed. Cas. No. 12,823.

7. See *infra*, this note.

[a] Application for attachment process. Allen *v.* Meyer, 73 N. Y. 1.

[b] Mandamus.—An application for a mandamus against public officers. People *ex rel.* Cagger *v.* Supervisors of Schuyler, 2 Abb. N. S. (N. Y.) 78.

[c] Refund of Docket Fee.—An application for a rule commanding party to refund a docket fee is a motion. Thorne *v.* Ornauer, 8 Colo. 353, 8 Pac. 568.

[d] Application for judgment because of frivolous pleadings. Erwin *v.* Voorhees, 26 Barb. (N. Y.) 127; Sturges *v.* Weed, 13 How. Pr. (N. Y.) 130.

[e] Application for Order To Revoke.—Brian *v.* Jeffrey, 5 Kan. App. 98, 48 Pac. 875.

[f] An application to set aside a judgment and amend an order directing exceptions to be heard in the first instance at the general term is a motion as defined by §768, Code Civ. Proc. Thompson *v.* Thompson, 52 Hun 117, 4 N. Y. Supp. 842, 16 Civ. Proc. 317, 2 N. Y. St. 471.

For particular applications of the remedy by motion, see *infra*, II, B.

8. See *infra*, this note.

[a] Payment by Receiver.—An application for an order compelling a receiver to pay over trust money is not a motion. People *v.* City Bank of Rochester, 96 N. Y. 32.

[b] Taxing Costs.—An application to have costs of appeal taxed, not a motion. Brockway *v.* Jewett, 16 Barb. (N. Y.) 590.

[c] Presenting claim for attorney's fees for allowance is not a motion as contemplated by a statute requiring motions to stand over one day before hearing or determination. Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451.

9. Steel *v.* Yoder, 58 Ind. App. 633, 108 N. E. 783. See also *supra*, I.

[a] Motion to modify and restate conclusions of law is not recognized under the practice of Indiana. Steel *v.* Yoder, 58 Ind. App. 633, 108 N. E. 783.

10. U. S.—Shuford *v.* Cain, 1 Abb. 302, 22 Fed. Cas. No. 12,823. Ind. Knowlton *v.* Dolan, 151 Ind. 79, 51 N. E. 97. La.—Junek *v.* Hezeau, 11 La. Ann. 731.

11. Perkins *v.* Dow, 1 Root (Conn.) 535; Ellis, Milbank & Co. *v.* Fisher, Burgess & Co., 10 La. Ann. 479; Succession of Edward C. Mielke, 8 La. Ann. 11; White *v.* Comrs. of Merchants' Bank, 4 Rob. (La.) 363.

12. Conrad *v.* Conrad, 123 App. Div. 384, 107 N. Y. Supp. 1093.

[a] The validity of a divorce where the question depends upon disputed facts cannot be determined upon motion. Conrad *v.* Conrad, 123 App. Div. 384, 107 N. Y. Supp. 1093.

[b] Abandonment.—It is not proper to determine on motion a question as to whether the wife abandoned the husband, or the husband the wife.

not apparent on the face thereof,¹³ but a motion cannot be made to usurp the province of an appeal,¹⁴ nor perform the functions of a demurrer,¹⁵ except where so provided by statute.¹⁶

B. PARTICULAR APPLICATIONS.—There will be found collected in the notes particular illustrations of a proper,¹⁷ and what has held

Conrad *v.* Conrad, 123 App. Div. 384, 107 N. Y. Supp. 1093.

13. Oliver Ditson Co. *v.* Testa, 216 Mass. 123, 103 N. E. 381; State *v.* Springer, 40 Utah 471, 121 Pac. 976.

14. J. J. Spurr & Sons *v.* Empire State Surety Co., 122 App. Div. 449, 106 N. Y. Supp. 1009; Lee *v.* Bowling Green Sav. Bank, 55 Misc. 369, 106 N. Y. Supp. 568.

[a] An order of one justice cannot upon motion be overturned by another on the ground that it is contrary to law and the general rules of practice; the remedy in such cases is by appeal. J. J. Spurr & Sons *v.* Empire State Surety Co., 122 App. Div. 449, 106 N. Y. Supp. 1009; Lee *v.* Bowling Green Sav. Bank, 55 Misc. 369, 106 N. Y. Supp. 568.

15. Conn.—Freeman's Appeal, 71 Conn. 708, 43 Atl. 185. Minn.—McLaughlin *v.* City of Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134. Utah.—State *v.* Springer, 40 Utah 471, 121 Pac. 976.

See, however, 7 STANDARD PROC. 681.

[a] A motion to quash an information for defects not apparent on the face thereof cannot be treated as a demurrer. State *v.* Springer, 40 Utah 471, 121 Pac. 976.

[b] Motion for judgment on the pleadings cannot be used as a demurrer. McLaughlin *v.* City of Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

16. See the codes and practice acts.

[a] Demurrer Heard as Motion. §976, N. Y. Code Civ. Proc., as amended in 1909 (Laws, 1909, ch. 493), allows an issue of law to be brought on and tried at any term of court as a contested motion. See 6 STANDARD PROC. 981. See also Dedrick *v.* Port Jervis Light & P. Co., 172 App. Div. 260, 158 N. Y. Supp. 364; National Park Bank *v.* Billings, 144 App. Div. 536, 129 N. Y. Supp. 846.

17. See *infra*, this note.

[a] Action.—Motion to question plaintiff's right to bring the action. Comrs. of Excise *v.* Purdy, 13 Abb. Pr.

(N. Y.) 434; Mayor of New York *v.* Brett, 2 Hilt. (N. Y.) 560; Higgins *v.* Allen, 6 How. Pr. (N. Y.) 30.

Arrest in civil cases, motion for relief, see 2 STANDARD PROC. 970.

Admiralty.—Motion to dismiss libel in, see 1 STANDARD PROC. 530, 542; to dismiss appeal in admiralty, see 1 STANDARD PROC. 562.

Aliens.—Question of alienage raised by motion, see 1 STANDARD PROC. 803, 811.

Affidavits of Merits or Defense. Want of raised by motion, see 1 STANDARD PROC. 718.

Appeals.—Motion for appeal, see 2 STANDARD PROC. 293; to dismiss appeal, see 2 STANDARD PROC. 235, 387; for rehearing on appeal, see 2 STANDARD PROC. 407.

Attachment, motion to vacate, 3 STANDARD PROC. 771.

[b] Change of venue, motion for. Bohn *v.* Bohn, 164 Cal. 532, 129 Pac. 981. See generally 4 STANDARD PROC. 975; 5 STANDARD PROC. 16.

Continuances, motion for, 5 STANDARD PROC. 473.

[c] Costs.—Motion for order requiring costs to be paid pursuant to judgment therefor. Chambers *v.* Bacon, 153 App. Div. 194, 138 N. Y. Supp. 337.

[d] Decree.—Motion to procure an order carrying out decree. Salt Lake City *v.* Utah & Salt Lake Canal Co., 43 Utah 591, 137 Pac. 638.

Deposit in court, motion for, see 7 STANDARD PROC. 153.

[e] Depositions.—Motion to suppress deposition. Hoyberg *v.* Henske, 153 Mo. 63, 55 S. W. 83. See generally 7 STANDARD PROC. 441.

[f] Dismissal.—Motion to dismiss. Wade *v.* Wade's Admr., 81 Vt. 275, 69 Atl. 826. See generally 7 STANDARD PROC. 680.

[g] Election.—Motion to compel election of causes of action. Cassidy *v.* Daly, 11 Wkly. Dig. (N. Y.) 222. Motion to compel election in criminal cases, see 12 STANDARD PROC. 690.

[h] Error.—Motion in error. Treadway *v.* Coe, 21 Conn. 283.

to be an improper¹⁸ use of the remedy by motion.

Execution.—Motion as remedy to assert rights of third parties, see 16 STANDARD PROC. 124; motion to vacate writ of execution, see 16 STANDARD PROC. 425; motion to set aside execution against the person, see 16 STANDARD PROC. 309; motion to vacate sale on execution, see 16 STANDARD PROC. 206.

[i] **Findings.**—Motion to procure findings. *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85. See 8 STANDARD PROC. 1069.

Guardian ad litem, motion for appointment, see 10 STANDARD PROC. 733.

Intervention.—Motion for permission to intervene, see 14 STANDARD PROC. 314.

[j] **Judgment.**—(1) Motion in arrest of judgment. *United States v. McKnight*, 112 Fed. 982. See generally 2 STANDARD PROC. 1030. (2) Motion for judgment on the pleadings. *McLaughlin v. City of Breckenridge*, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134. See generally 14 STANDARD PROC. 926. (3) For judgment non obstante veredicto, see 14 STANDARD PROC. 965. (4) Motion to amend the judgment. *Union Nat. Bank v. Kupper*, 63 N. Y. 617. See generally 15 STANDARD PROC. 133. (5) Motion to open or vacate the judgment. *Silver Springs & W. R. Co. v. Koonce*, 56 Fla. 845, 47 So. 390. See generally 15 STANDARD PROC. 199. (6) As to confessed judgments, see 14 STANDARD PROC. 838. (7) Judgments by default, see 6 STANDARD PROC. 835. (8) Motion to have judgment declared satisfied (*Austin v. Byrnes*, 22 Jones & S. [N. Y.] 552, 12 Civ. Proc. 332); (9) to obtain release or discharge of judgment debtor. *Goldreyer v. Foley*, 154 App. Div. 584, 139 N. Y. Supp. 190. See generally 16 STANDARD PROC. 319.

Jury.—Motion for special venire or panel, see generally 16 STANDARD PROC. 981.

Misjoinder of Causes of Action. Motion as remedy for misjoinder, see 14 STANDARD PROC. 723.

[k] **New Trial.**—Motion for new trial. *Chadron Loan & Bldg. Assn. v. Scott*, 4 Neb. (Unof.) 694, 96 N. W. 220. See the title "New Trial."

[l] **Nonsuit.**—Motion for nonsuit. *Vanbebber v. Plunkett*, 26 Ore. 562, 38

Pac. 707, 27 L. R. A. 811. See generally 7 STANDARD PROC. 669.

[m] **Pleadings.**—(1) For leave to plead (*McLaughlin v. City of Breckenridge*, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134; *Johnson v. Success Brick Machinery Co.*, 104 Miss. 217, 61 So. 178, 62 So. 4); (2) to compel attorney to receive pleading (*Pattison v. O'Connor*, 23 Hun [N. Y.] 307, 60 How. Pr. 141); (3) to amend the pleading (*Ga. Kelly v. Murphy & Co.*, 135 Ga. 515, 69 S. E. 826. N. Y.—*Stickney v. Blair*, 50 Barb. 341. S. C.—*Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278. See generally 1 STANDARD PROC. 890); (4) to make more definite and certain (see 4 STANDARD PROC. 859); (5) to quash defective indictment or information. *State v. Springer*, 40 Utah 471, 121 Pac. 976. See generally, 12 STANDARD PROC. 633.

[n] **Receivers.**—Motion to fix receiver's compensation. *State ex rel. Sparks v. State Bank & Trust Co.*, 37 Nev. 55, 139 Pac. 505, 142 Pac. 627.

[o] **Striking Out.**—Motion to strike out pleading. *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; to strike out plea in abatement, see 1 STANDARD PROC. 66; to strike out interrogatories in admiralty, see 1 STANDARD PROC. 466. And see generally the title "Striking Out and Withdrawal."

[p] **Supersedeas and Stay.**—Motion for stay pending appeal. *Hull v. Hart*, 27 Hun (N. Y.) 21. See generally the title "Supersedeas and Stay of Proceedings."

[q] **Verdict.**—Motion to direct verdict. *Chicago, G. W. & R. Co. v. Healy*, 86 Fed. 245, 30 C. C. A. 11. See generally the title "Verdict."

18. See *infra*, this note.

[a] **To require county treasurer to pay over money deposited with him by mistake**, a motion is not a proper remedy since the county treasurer is not an officer of the court. An action must be resorted to. *In re Scarsdale Co.*, 159 App. Div. 912, 144 N. Y. Supp. 450.

[b] "Where the court had expressed an opinion upon a matter, it would not be reviewed on motion, but there must be a rule to show cause." *Den. ex dem. Van Arsdalen v. Hull*, 9 N. J. L. 390.

III. KINDS OF MOTIONS.—Motions may be classified as of course,¹⁹ and those not of course or special motions,²⁰ the latter consisting of *ex parte* motions²¹ and those on notice.²² In a few jurisdictions special motions are also divided into enumerated²³ and non-enumerated motions.²⁴

Execution.—As to when motion is not available to third persons to assert their rights in property levied on, see 16 STANDARD PROC. 124.

19. *Merchants' Bank v. Crysler*, 67 Fed. 388, 14 C. C. A. 444.

[a] **Motions of course** are those which are granted without the court being called upon to investigate the truth of any allegation or suggestion upon which they are founded. *Merchants' Bank v. Crysler*, 67 Fed. 388, 14 C. C. A. 444.

20. *Merchants' Bank v. Crysler*, 67 Fed. 388, 14 C. C. A. 444.

[a] **Special motions** are those which the court may or may not grant in his discretion, and which usually involve an investigation of the facts or circumstances on which the application is predicated. *Merchants' Bank v. Crysler*, 67 Fed. 388, 14 C. C. A. 444. See also: **III.**—*United States Express Co. v. Bedbury*, 40 Ill. 122. **Mich.** *Storey v. Child*, 2 Mich. 107; *Bertram v. McNaughton*, 1 Mich. N. P. 200. **N. J.**—*Trenton Mut. Life & Fire Ins. Co. v. Hodges*, 24 N. J. L. 673; *Den v. Fen*, 17 N. J. L. 354.

[b] **Special Motions Illustrated.** (1) Motion for time to plead (*Trenton Mut. Life & Fire Ins. Co. v. Hodges*, 24 N. J. L. 673); (2) motion to stay proceedings till former suit is decided (*Den v. Fen*, 17 N. J. L. 354); (3) for judgment as in case of nonsuit. *Storey v. Child*, 2 Mich. 107.

21. *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495.

[a] **Ex parte motions** are those heard on the application of one party only without notice to the other party or parties. *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495; *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514; *Hull v. Hart*, 27 Hun (N. Y.) 21.

[b] **Stay Pending Appeal.**—A motion for a stay of proceedings pending appeal is an *ex parte* one. *Hull v. Hart*, 27 Hun (N. Y.) 21.

22. See *infra*, this note.

A motion on notice is one that re-

quires notice to the other party. 2 Bouvier's Dict. 2265.

[a] **Litigated motions** are such as can be heard only on notice. *Sturz v. Fischer*, 15 Misc. 410, 36 N. Y. Supp. 893, 25 Civ. Proc. 202, 72 N. Y. St. 252, 2 N. Y. Ann. Cas. 365.

23. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

[a] **Enumerated motions** are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of §§1346 and 1349 of the Code, agreed cases submitted under §1279 of the Code and appeals from final orders and decrees of surrogates' courts, and matters provided for by §§2085-2099 and §2138 of the code. Rule 38.

[b] **Motions involving the merits** of the suit or proceedings are enumerated motions. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

[c] **Enumerated Motions Illustrated.** (1) A motion to overrule exceptions and for final judgment. *Rogers v. Pearsall*, 21 App. Div. 389, 47 N. Y. Supp. 551. (2) Report of referees,—motion to set aside (*Everitt v. Wood*, 7 Cow. [N. Y.] 414), (3) or confirm such report and give judgment thereon. *Rogers v. Pearsall*, 21 App. Div. 389, 47 N. Y. Supp. 551; *Anonymous*, 7 Cow. (N. Y.) 470.

24. *People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582.

[a] **Non-enumerated motions** include all other questions (than those submitted on enumerated motions) submitted to the court, and shall be heard at special term except when otherwise directed by law. Rule 38 New York Practice; *People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582; *McLean v. Tompkins*, 18 Abb. Pr. (N. Y.) 24.

[b] **Non-enumerated Motions Illustrated.**—(1) Motion for judgment upon the return to a writ of certiorari. *People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582. (2) Application to set aside a verdict for irregularity in

IV. PLACE OF MOVING.—A. **GENERALLY.**—The statutes and rules of practice generally require a motion to be made in the court where the cause is pending,²⁵ even though the court has ordered the papers in the cause transmitted to another county.²⁶ Ordinarily motions are made in open court but certain motions may be made in chambers,²⁷ or even outside of court.²⁸

B. **NEW YORK PRACTICE.**—1. **Motions in the Supreme Court.** A motion, upon notice, in an action in the supreme court, must be made within the judicial district in which the action is triable,²⁹ or

a jury. *Smith v. Cheetham*, 2 Caines (N. Y.) 381, *Colem. & C. Cas.* 425. (3) Trial by record is a non-enumerated motion. *McKenzie v. Wilson*, 2 Caines (N. Y.) 385, *Colem. & C. Cas.* 428.

25. *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514; *Parmenter v. Roth*, 9 Abb. Pr. N. S. (N. Y.) 385; *Ross v. Ross*, 10 Daly (N. Y.) 314; *Thomas v. Raymond*, 4 S. C. 347.

Motion to dissolve injunction, see 13 STANDARD PROC. 246.

Intervention.—Motion for permission to intervene, see 14 STANDARD PROC. 317.

26. *Parker v. Superior Court* (R. I.), 100 Atl. 305.

[a] Where the cause is not transferred, but the court orders the papers to be sent to another court, motions in the case should be filed in the county where the action is brought, even though the court has power to hear such motions in the county to which the papers are sent. *Parker v. Superior Court* (R. I.), 100 Atl. 305.

27. See 16 STANDARD PROC. 608.

28. *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495.

[a] **In Corridor of Court House.** Application for an ex parte order, which the judge could make in chambers, may be made to him any place in his district; consequently such application is properly made to him while he is leaving the court house. *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495.

29. *Wheeler v. Millar*, 61 How. Pr. (N. Y.) 396; *Hotchkiss v. Crocker*, 15 How. Pr. (N. Y.) 336; *Gould v. Chapin*, 4 How. Pr. (N. Y.) 185, 2 Code Rep. 107; *Hull v. Hart*, 27 Hun (N. Y.) 21.

[a] **Motions made on notice only** are within the section of the statute prescribing the rule stated in the text. *Hull v. Hart*, 27 Hun (N. Y.) 21.

[b] **Pending Action.**—(1) The rule

refers to motions in an action while it is pending, or such as relate in some way to its pendency or procedure (*Phillips v. Wheeler*, 67 N. Y. 104; *Curtis v. Greene*, 28 Hun [N. Y.] 294), (2) and not to such as may be made in proceedings instituted after the recovery and entry of final judgment therein. *Curtis v. Greene*, 28 Hun (N. Y.) 294.

[c] **Application for an order of supersedeas** is not within the section. It may be made to a judge of a district in which the action is not triable. *Wells v. Jones*, 2 Abb. Pr. (N. Y.) 20.

[d] **Motions to appoint receivers** are not within the rule. Such motions must be made in the district in which the principal business office of the corporation was located at the commencement of the action, or in an adjoining county. *United States Trust Co. v. New York, W. S. & B. Ry. Co.*, 67 How. Pr. (N. Y.) 390, 6 Civ. Proc. 90.

[e] **A motion to consolidate** two suits may be made anywhere in the district containing the county in which the venue of either of the suits to be consolidated is laid. *Percy v. Seward*, 6 Abb. Pr. (N. Y.) 326.

[f] **A motion made (1) outside the territorial limits** prescribed is coram non iudice (*Newcomb v. Reed*, 14 How. Pr. [N. Y.] 100), (2) although it has been considered a mere irregularity. *Blackmar v. Van Inwagen*, 5 How. Pr. (N. Y.) 367, 1 Code Rep. (N. S.) 80.

[g] **The district in which the venue** is laid is the one in which the action is triable within the meaning of the statute. *Gould v. Chapin*, 4 How. Pr. (N. Y.) 185, 2 Code Rep. 107.

[h] **Several Actions.**—The rule does not apply to a case where one motion is necessarily made and entitled in several actions pending in different

in a county adjoining the county in which it is triable,³⁰ except that when it is triable in the first judicial district the motion must be made in that district,³¹ and no motion can be made in the first district in an action triable in another district.³²

By agreement of counsel, moreover, the motion may be heard and decided at any special term in any county in the state.³³

Ex Parte Motions. — Where the order may be made out of court and without notice, the application therefor may be made to any judge of the court in any part of the state.³⁴

2. Motions in County Court. — In an action or special proceeding in the county court, a justice of the supreme court may entertain an ex parte motion in a case where the county judge in whose court the

counties and judicial districts. *Phillips v. Wheeler*, 2 Hun (N. Y.) 603, 6 Thomp. & C. 306.

[i] **Where a divorce is awarded in B county**, an application to modify it cannot be maintained in D county which is not in the same judicial district nor adjoining B county. *In re Haworth*, 59 App. Div. 393, 69 N. Y. Supp. 843.

30. *Rice v. Ehle*, 65 Barb. (N. Y.) 185; *Inglehart v. Johnsons*, 6 How. Pr. (N. Y.) 80, 1 Code Rep. (N. S.) 216.

31. *Moses & Heidenheimer Malt Co. v. Lawrence*, 60 Hun 137, 14 N. Y. Supp. 540, 38 N. Y. St. 858; *Thompson v. Thompson*, 52 Hun 117, 4 N. Y. Supp. 842, 16 Civ. Proc. 317, 2 N. Y. St. 471; *Phoenix Foundry & Mach. Co. v. North River Construction Co.*, 33 Hun (N. Y.) 156, 6 Civ. Proc. 106; *National Bank v. Goodwin*, 6 Hun (N. Y.) 481; *Smith v. Danzig*, 64 How. Pr. (N. Y.) 320, 3 Civ. Proc. 137.

[a] **Motions to amend the record** are within the rule. *Thompson v. Thompson*, 52 Hun 117, 4 N. Y. Supp. 842, 16 Civ. Proc. 317, 22 N. Y. St. 471.

[b] **Motion To Vacate Injunction.** *Phoenix Foundry & Mach. Co. v. North River Construction Co.*, 33 Hun (N. Y.) 156, 6 Civ. Proc. 106.

[c] **Renewal of Motion.**—A motion upon notice denied in the first district cannot be renewed at a special term held by the same judge in another district. *Moser & Heidenheimer Malt-ing Co. v. Lawrence*, 60 Hun 137, 14 N. Y. Supp. 540, 38 N. Y. St. 858.

[d] **Stay of Action.**—Where two actions are brought by the same plaintiff against the same defendant in New

York county, application for an order staying proceedings in one action until the other is determined cannot be made in another county. *Delahunty v. Canfield*, 106 App. Div. 386, 94 N. Y. Supp. 815.

32. *The Canal Bank v. Harris*, 1 Abb. Pr. (N. Y.) 192, 19 Barb. 587; *Wheeler v. Maitland*, 12 How. Pr. (N. Y.) 35; *Harris v. Clark*, 10 How. Pr. (N. Y.) 415.

[a] **That reference to a referee in the first district has been made of an action triable in another district does not permit a motion in that action to be made in the first district.** *Wheeler v. Maitland*, 12 How. Pr. (N. Y.) 35.

[b] **Injunction.**—An application for an injunction order can be entertained by a judge in an action pending in one judicial district to restrain the proceedings involving the same subject-matter between the same parties pending in another judicial district. *Platt v. Woodruff*, 61 N. Y. 378.

33. *Rice v. Ehle*, 65 Barb. (N. Y.) 185.

34. *Bank of Silver Creek v. Brown-ing*, 16 Abb. Pr. (N. Y.) 272; *Hull v. Hart*, 27 Hun (N. Y.) 21. See *Chubbuck v. Morrison*, 6 How. Pr. (N. Y.) 367.

[a] **Examination of Witness Before Trial.**—An application for an order requiring the adverse party to appear before the officer and attend the examination of a witness is within the rule. *Bank of Silver Creek v. Brown-ing*, 16 Abb. Pr. (N. Y.) 272.

[b] **Motion for an order staying proceedings pending appeal, in an action brought in the first judicial district covered by the rule.** *Hull v. Hart*, 27 Hun (N. Y.) 21.

action is pending could entertain such a motion out of court.³⁵

3. Court or Judge. — Whether a motion shall be made to the court or to a judge depends on the wording of the statutes,³⁶ and when these require a motion to be made to the court, it cannot be made to a judge out of court.³⁷

In Court. — Special motions made on notice to the opposite party, or on order to show cause can, unless the statute expressly provides otherwise, only be made to the court.³⁸

Out of Court. — Ex parte motions are ordinarily made out of court.³⁹ When the defendants have made default in appearing in the proceeding, a motion made therein may be made to a judge out of court.⁴⁰ But in the first judicial district, all motions, except those for a new trial on the merits⁴¹ may be made to a judge out of court.⁴²

4. Order To Show Cause. — The statute provides what judge shall make an order to show cause as a short notice of motion,⁴³ and such order is irregular if made by any other judge than those named.⁴⁴ The objection, however, must be raised or it is waived.⁴⁵

V. TIME TO MAKE MOTION. — The time for moving is provided by statute⁴⁶ or rule of the court,⁴⁷ and depends largely upon the nature

35. *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514.

[a] **Extending Time To Answer.** — In an action pending in the county court of Suffolk county a judge of the supreme court has jurisdiction of a motion to extend the time to answer the amended complaint. *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514.

[b] **An order to stay proceedings** may be made upon notice by a justice of the supreme court under circumstances stated in the text. See *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514.

36. See N. Y. Code Civ. Proc., §768, as amended by L. 1900, c. 147.

37. *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 31 N. E. 1009; *Matter of Wright, Peters & Co.*, 73 App. Div. 75, 76 N. Y. Supp. 775; *Aiken v. Aiken*, 96 Misc. 561, 160 N. Y. Supp. 876.

38. See *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y.) 439.

39. *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y.) 439.

40. N. Y. Code Civ. Proc., §768, as amended by L. 1900, c. 147.

41. N. Y. Code Civ. Proc., §770.

42. *Disbrow v. Folger*, 5 Abb. Pr. (N. Y.) 53; *Lachenmeyer v. Lachenmeyer*, 26 Hun (N. Y.) 542; *Boucicault v. Boucicault*, 21 Hun (N. Y.) 431, 59 How. Pr. 131.

[a] **Application for mandamus** not within the rule. *People ex rel. Lower*

v. Donovan, 135 N. Y. 76, 31 N. E. 1009.

43. *Conant v. American Rubber Tire Co.*, 37 Misc. 129, 74 N. Y. Supp. 409.

Orders to show cause as affecting notice, see *infra*, XI, C, 2, b.

[a] **Under §780 Code Civ. Proc.**, an order to show cause is made by "the court or a judge thereof, or a county judge of the county where the action is triable or in which the attorney for the applicant resides." See *Conant v. American Rubber Tire Co.*, 37 Misc. 129, 74 N. Y. Supp. 409.

[b] **In an action triable in Madison county** an order to show cause issued by a judge of Rensselaer county is irregular but such irregularity is waived if not properly objected to. *Conant v. American Rubber Tire Co.*, 37 Misc. 129, 74 N. Y. Supp. 409.

44. *Conant v. American Rubber Tire Co.*, 37 Misc. 129, 74 N. Y. Supp. 409.

45. *Conant v. American Rubber Tire Co.*, 37 Misc. 129, 74 N. Y. Supp. 409.

46. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91; *Spencer v. Branham*, 109 Cal. 336, 41 Pac. 1095; *Conklin v. Johnson*, 34 Iowa 266.

[a] **Filing notice of the motion** within the time prescribed by statute "to appear in court and move" is sufficient although the motion is not brought on for hearing in open court until after the time has expired. *Conklin v. Johnson*, 34 Iowa 266.

47. *Bowman v. Sheldon*, 5 Sandf.

and character of the motion.⁴⁸ The court may usually for good cause,⁴⁹ or even in the absence of good cause,⁵⁰ extend the time for moving.

Motions Based on Irregularities.—Motions constituting dilatory objections and those seeking relief from judgments or orders because of irregularities should be made promptly,⁵¹ or at the earliest opportunity,⁵² or within a reasonable time from the rendition or making of such judgment or order,⁵³ and it is sometimes further provided that such reasonable time cannot extend beyond a certain period.⁵⁴

(N. Y.) 657; *Gibson v. Gibson*, 68 Hun 381, 22 N. Y. St. 813, 51 N. Y. St. 897; *Siriani v. Deutsch*, 12 Misc. 213, 34 N. Y. Supp. 26, 67 N. Y. St. 892; *Wade v. Wade's Admr.*, 81 Vt. 275, 69 Atl. 826.

48. Attachment.—Motion to vacate, see 3 STANDARD PROC. 771.

Default.—Motion to vacate default, see 6 STANDARD PROC. 836.

Dismissal.—Time to move for dismissal, see 7 STANDARD PROC. 680.

Election.—Motion to compel election between counts, see 12 STANDARD PROC. 690.

Executon Sale.—Motion to vacate, see 16 STANDARD PROC. 207.

Guardian ad Litem.—Time to move for appointment of guardian ad litem, see 10 STANDARD PROC. 736.

Indictment or Information.—Motion to quash indictment or information, see 12 STANDARD PROC. 634.

Injunction.—Time to move for modification of injunction, see 13 STANDARD PROC. 206. For dissolution of injunction, see 13 STANDARD PROC. 249.

Judgment.—Time to move for judgment non obstante veredicto, see 14 STANDARD PROC. 968; for amendment of judgment, see 15 STANDARD PROC. 136; motion to vacate judgment, see 15 STANDARD PROC. 208; by confession, see 14 STANDARD PROC. 839.

49. *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631; *Wade v. Wade's Admr.*, 81 Vt. 275, 69 Atl. 826.

[a] It is within court's discretion to permit the filing of a motion out of time where the limitation of the time of filing is but a provision of the court's rules. *Wade v. Wade's Admr.*, 81 Vt. 275, 69 Atl. 826.

50. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

51. Ia.—*Keeney v. Lyon*, 21 Iowa 277. **Ky.**—*Bent v. Maupin*, 86 Ky. 271, 5 S. W. 425; *Carlile v. Carlile*, 7 J. J. Marsh. 624; *Cox v. Joiner*, 4 Bibb 94. **Mo.**—*St. Louis v. Meyer*, 13 Mo. App.

367. **N. Y.**—*Lawrence v. Jones*, 15 Abb. Pr. 110; *Low v. Graydon*, 14 Abb. Pr. 443; *Perse & Brooks Paper Works v. Willett*, 14 Abb. Pr. 119. **N. C.** *Howell v. Barnes*, 64 N. C. 626; *Waddell v. Wood*, 64 N. C. 624; *Cardwell v. Cardwell*, 64 N. C. 621. **S. C.**—*Hanks v. Ingram*, 2 Bailey 440.

[a] **What Term.**—(1) Under the old practice in New York prior to the code the motion against a mere irregularity had to be made at the first special term (*McEvers v. Markler*, 1 Johns. Cas. 248, *Colem. Cas.* 93); but (2) under the code the rule does not prevail. *Titus v. Relyea*, 16 How. Pr. 371, 8 Abb. Pr. 177.

52. Ga.—*Beall v. Blake*, 13 Ga. 217, 58 Am. Dec. 513. **Ill.**—*Leiferman v. Osten*, 167 Ill. 93, 47 N. E. 203, 39 L. R. A. 156; *Clifford v. Eagle*, 35 Ill. 444. **Ind.**—*State v. Leonard*, 7 Blackf. 223. **Mich.**—*O'Flynn v. Eagle*, 7 Mich. 306. **Vt.**—*Wade v. Wade's Admr.*, 81 Vt. 275, 69 Atl. 826.

[a] **Within Time To Plead.**—The earliest opportunity for making such motion cannot be later than the time allowed for dilatory pleadings by the rule of court, in a case governed by the rule. *Wade v. Wade's Admr.*, 81 Vt. 275, 69 Atl. 826.

[b] **After the lapse of a term** a motion based on the irregular action of the opposite party will not be entertained. *O'Flynn v. Eagle*, 7 Mich. 306.

[c] **A motion to dismiss for want of complaint** is of a dilatory character and should be made at the earliest moment. *Clifford v. Eagle*, 35 Ill. 445, 449.

53. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

54. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

[a] **Six Months.**—Motions to be relieved from a judgment or order must be made within a reasonable time not exceeding six months. *Brownell v.*

Motions affecting the substantial rights of the parties do not come within the foregoing rules requiring promptness and expedition on the part of the mover.⁵⁵

An excuse for delay in making a motion may save the right to move,⁵⁶ but unexcused laches will preclude the granting of the motion.⁵⁷

Motions in Vacation. — Application for certain orders may be made to a judge in vacation.⁵⁸

VI. PARTIES.⁵⁹ — **THE MOVANT.** — Motions should ordinarily be made by parties to the suit or action,⁶⁰ and not by strangers,⁶¹

Superior Court, 157 Cal. 703, 109 Pac. 91.

[b] Merely serving notice on the adverse party and filing it with the clerk within the time limit is not sufficient. It is in no sense an application to the court but merely a notice that at a future time, beyond the six months allowed such application would be made. *Thomas v. Superior Court*, 6 Cal. App. 629, 92 Pac. 739.

[c] Notice within that period to the adversary is not necessary. If the application to the court is made within the time limit it is immaterial that notice is not given till after such time limit has expired. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

55. *Doty v. Russell*, 5 Wend. (N. Y.) 129; *Callagan v. Hallett*, 1 Caines (N. Y.) 104. Compare *Patterson v. Graves*, 11 How. Pr. 91.

56. *O'Flynn v. Eagle*, 7 Mich. 306; *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28; *Lawrence v. Jones*, 15 Abb. Pr. (N. Y.) 110; *Rogers v. Bigelow*, 10 Wend. (N. Y.) 547; *Ogdensburgh Bank v. Paige*, 2 Code Rep. (N. Y.) 67.

[a] Ignorance of the practice on the part of the attorney is not a good excuse. *Moreland v. Sanford*, 1 Denio (N. Y.) 660.

57. Ala.—*Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495. Colo.—*Holliday v. Kirk*, 3 Colo. 324. Ga.—*McLendon v. Frost*, 57 Ga. 448. Ill.—*Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242; *Stewart v. Carbray*, 59 Ill. App. 397. Ind.—*State v. Leonard*, 7 Blackf. 223. Md.—*Benson v. Davis' Admr.*, 6 Har. & J. 272. N. J.—*Halsey v. Miller*, 16 N. J. L. 63. N. Y. *Lawrence v. Jones*, 15 Abb. Pr. 110; *Doty v. Russell*, 5 Wend. 129; *Robinson v. Hudson R. R. Co.*, 3 Abb. Pr. 115, 1 Hilt. 144; *Vanarsdale v. King*, 87 Hun 617, 33 N. Y. Supp. 858, 67 N. Y. St. 611; *Matter of McKenna*, 8 Misc. 482, 29 N. Y. Supp. 416, 31

Abb. N. C. 416, 60 N. Y. St. 168, 23 L. R. A. 835. N. C.—*Pugh v. York*, 74 N. C. 383.

[a] How Question Determined.—In determining whether a party has been guilty of laches in making a motion, a proper regard should be had to the just claim of other business, the terms of court and other material facts. *Butler v. Mitchell*, 17 Wis. 52.

[b] Seven months' delay in making a motion to set aside a report of a referee for irregularity was fatal to the motion although it was claimed that a substantial right was involved. *Patterson v. Graves*, 11 How. Pr. (N. Y.) 91.

58. See 16 STANDARD PROC. 608.

Motion to dissolve injunction, see 13 STANDARD PROC. 251.

Hearing and decision in vacation, see *infra*, XV, A.

59. See generally the title "Parties."

60. *Salt Lake City v. Utah & Salt Lake Canal Co.*, 43 Utah 591, 137 Pac. 638.

Costs.—Motion to tax costs, see 5 STANDARD PROC. 925.

Execution Sale.—Motion to vacate sale, see 16 STANDARD PROC. 206.

Injunction.—Motion to dissolve injunction, see 13 STANDARD PROC. 248.

Judgment.—Motion for judgment non obstante veredicto, see 14 STANDARD PROC. 965. Motion to amend judgment, see 15 STANDARD PROC. 136. Motion to open or vacate judgment, see 15 STANDARD PROC. 294; by confession, see 14 STANDARD PROC. 839.

[a] Joinder.—All the defendants must join in a motion to change the venue, or show an excuse why they do not. *Simmons v. McDougall*, 2 How. Pr. (N. Y.) 77; *Welling v. Sweet*, 1 How. Pr. 156.

61. *National German-American Bank v. St. Anthony Park North Real Estate Imp. Co.*, 61 Minn. 359, 63 N. W.

except for the purpose of making themselves parties to the proceeding.⁶²

Against Whom. — A motion can be made against any party to the cause. As against a stranger who appears and opposes a motion, it seems, the order would be binding.⁶³

VII. JOINDER OF MOTIONS. — A party may, in a proper case, combine several motions in one and ask to have various defects remedied on a single application.⁶⁴

VIII. FORM AND SUFFICIENCY.⁶⁵ — **A. FORM OF MOTION.**

1. Written or Oral. — Particular motions may be required by statute or rule of court to be in writing,⁶⁶ and sometimes a written statement of the reasons for the motion is required.⁶⁷ Under this latter provision

1068; *Collins v. Kiederling* (N. J. Eq.), 97 Atl. 948; *Linn v. Wheeler*, 21 N. J. Eq. 231. See *Chapin v. Freeman*, 138 La. 423, 70 So. 421.

[a] **Dismissal of motion filed by a stranger.** *Collins v. Kiederling* (N. J. Eq.), 97 Atl. 948.

62. *Collins v. Kiederling* (N. J. Eq.), 97 Atl. 948; *Linn v. Wheeler*, 21 N. J. Eq. 231.

Motion to set aside writ of assistance, see 3 STANDARD PROC. 157.

63. *Jay v. De Groot*, 2 Hun 205, 4 Thomp. & C. 670. *Compare Acker v. Ledyard*, 8 Barb. (N. Y.) 514.

Motion to dissolve injunction, see 13 STANDARD PROC. 249.

Execution Sale.—Motion to vacate sale, see 16 STANDARD PROC. 206.

64. *People v. McCumber*, 27 Barb. (N. Y.) 632.

[a] **Thus as illustrating the rule** a party may on the same motion, move to strike out sham and impertinent matter from the answer and for judgment on the expurgated answer as frivolous. *People v. McCumber*, 27 Barb. (N. Y.) 632.

65. **Forms of motion,** see 9 STANDARD PROC. 852.

66. **Ga.**—*Smith v. Equitable Mtg. Co.*, 98 Ga. 240, 25 S. E. 423. See *Livingston v. King*, 2 Ga. App. 178, 58 S. E. 395. **Mo.**—*Smith v. Moseley*, 234 Mo. 486, 137 S. W. 971. **Ohio.**—*Gardner v. Cline*, 2 Ohio Dec. (Reprint) 301. **Tex.**—*Houston v. Jones*, 4 Tex. 170.

Motion to amend, see 1 STANDARD PROC. 890.

Motion for guardian ad litem, see 10 STANDARD PROC. 734.

Motion to quash indictment or information, see 12 STANDARD PROC. 633.

Judgment.—Motion to vacate, see 15 STANDARD PROC. 217.

[a] **Special motions** are by rule of court required to be in writing. *United States Express Co. v. Bedbury*, 40 Ill. 122.

[b] **“Any written words which convey the idea that the supposed right is insisted upon are enough.”** *Arnold v. Reagan*, 29 R. I. 71, 69 Atl. 292.

[c] **Matters Outside Record.**—Where the powers of the court are invoked touching matters that lie outside the record a written motion is required. *Livingston v. King*, 2 Ga. App. 178, 58 S. E. 395.

[d] **Embodied in Other Papers.** Even though required to be in writing the motion need not be a separate and formal statement but may be embodied in other papers filed in the case. Thus a motion to dismiss a writ of error for insufficient notice may be contained in a brief which sets forth all the essential elements of such a motion. *Smith v. Moseley*, 234 Mo. 486, 137 S. W. 971.

[e] **In practice** the form of the application is often reduced to writing, though not required to be done. *People v. Ah Sam*, 41 Cal. 645.

[f] **In distinct courts,** under the law requiring the docketing of motions, they must be in writing. *Houston v. Jones*, 4 Tex. 170.

[g] **The entry of the motion upon the records of the court is sufficient,** though the general rule requires motions to be in writing. *Hartman v. Viera*, 113 Ill. App. 216.

67. *Smith v. Moseley*, 234 Mo. 486, 137 S. W. 971; *Meeks v. Clear Jack Mining Co.*, 141 Mo. App. 648, 124 S. W. 1084; *Jenkins v. Warren*, 25 App. Div. 569, 50 N. Y. Supp. 957.

[a] **Reason for Rule.**—“We do not understand that motions can be granted merely for reasons orally stated by

a party must put his motion in writing when the court requests him to do so.⁶⁸ In the absence of any statute or rule of court making a writing necessary the motion may be made orally.⁶⁹

2. Entitling and Address.—Motion papers should be properly entitled as to the cause⁷⁰ and the court,⁷¹ including the names of the par-

counsel. The opposing party is entitled to be served with the papers upon which the motion was founded; and the decision of the court cannot be based simply upon oral statements of counsel, and that was all that was before the court at the time of the granting of this motion. Either a party is entitled to know the grounds of a motion, or there is no necessity of serving any papers at all and the moving party may come into court and state orally to the court the grounds upon which he desires relief and his motion will be granted." *Jenkins v. Warren*, 25 App. Div. 569, 50 N. Y. Supp. 957.

[b] **Embodied in Brief.**—The written statement of the reasons upon which a motion to dismiss an appeal is founded may be embodied in the brief in the supreme court. *Smith v. Moseley*, 234 Mo. 486, 137 S. W. 971.

68. *Meeks v. Clear Jack Mining Co.*, 141 Mo. App. 648, 124 S. W. 1084.

[a] **Motion will be denied** where he does not comply with the request. *Meeks v. Clear Jack Mining Co.*, 141 Mo. App. 648, 124 S. W. 1084.

69. *Cal.*—*Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *People v. Ah Sam*, 41 Cal. 645. *Ill.*—*Reilly v. Wilkins*, 67 Ill. App. 104; *Washington Park Club v. Baldwin*, 59 Ill. App. 61; *Pick v. Glickman*, 54 Ill. App. 646. *Ind.*—*St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511; *Swinney v. Nave*, 22 Ind. 178. *Kan.*—*White-Crow v. White-Wing*, 3 Kan. 277.

Motion for appeal, see 2 STANDARD PROC. 293.

[a] **Defects apparent on the face of the record** can properly be taken advantage of by oral motion. *Livingston v. King*, 2 Ga. App. 178, 58 S. E. 395.

[b] **Motion Always Oral.**—Where the motion is regarded as the viva voce application to the court for an order it is necessarily oral. Consequently reducing the application to writing and filing it, is not to make the motion. The attention of the court must be called to such application; it

must be moved to grant the order. *People v. Ah Sam*, 41 Cal. 645; *Wallace v. Lewis*, 9 Mont. 399, 24 Pac. 22. See also *Morse Co. v. Eaton*, 91 Ill. App. 411.

[c] **Motions of Course.**—A standing rule of court, requiring all motions to be in writing, does not apply to motions of course made in the progress of a cause. *Johnson v. Adleman*, 35 Ill. 265.

70. *New York Loan & Improvement Co. v. De Navarro*, 38 Misc. 436, 77 N. Y. Supp. 1006, 11 N. Y. Ann. Cas. 360; *Morrall v. Pritchard*, 11 Jur. (N. S.) 969, 13 L. T. (N. S.) 425, 14 W. R. 172; *Holmes v. Williams*, 3 Caines 98, *Colem. & C. Cas.* 449.

[a] **A motion made in more than one action** should be entitled in each. *Parent v. Kellogg*, 1 How. Pr. (N. Y.) 70; *Kellogg v. Collier*, 47 Wis. 649, 3 N. W. 433.

[b] **Entitled in Another Suit.**—A motion to amend a clerical error in the amount of an execution may be entitled in a suit for false imprisonment brought for an arrest made under it. *Holmes v. Williams*, 3 Caines (N. Y.) 98, *Colem. & C. Cas.* 449.

[c] **Motion To Subordinate.**—Where an assignee of a junior judgment moves to subordinate supplementary proceedings upon certain prior judgments against the same debtor to the proceedings taken by himself under his judgment, he may entitle his motion in either action. *New York Loan & Improvement Co. v. De Navarro*, 38 Misc. 436, 77 N. Y. Supp. 1006, 11 N. Y. Ann. Cas. 360.

[d] **Where no suit is pending** the papers should not be entitled in any cause. *People ex rel. Roddy v. Tioga Common Pleas*, 1 Wend. (N. Y.) 291; *Haight v. Turner*, 2 Johns. (N. Y.) 371.

[e] **A motion to vacate attachment** need not be entitled in the original cause. *Heyn v. Farrar*, 36 Mich. 258.

71. *Clickman v. Clickman*, 1 N. Y. 611, 3 How. Pr. (N. Y.) 365, 1 Code Rep. 98.

ties.⁷² Original papers should be addressed to all attorneys opposed.⁷³

An error in entitling the papers will be disregarded where it is a mere irregularity,⁷⁴ but a mistake in this respect which misleads the opposite party is fatal to the motion.⁷⁵

3. **Signing.**—Certain motions must be signed or subscribed,⁷⁶ and even in the absence of statutory requirement, it may be usual in the practice of the jurisdiction to sign the motion.⁷⁷ The signing may be done by the parties themselves,⁷⁸ or their counsel.⁷⁹

4. **Verification.**—By statute⁸⁰ or rule of court,⁸¹ verification of

Judgments, motion to amend, see 15
STANDARD PROC. 135.

[a] **Surplusage.**—Where a motion should be addressed to a judge of the court and not to the special term, the words "at the next special term," etc., in the motion, after the name of the judge, may be rejected as surplusage. *People v. Sessions*, 10 Abb. N. C. (N. Y.) 192.

[b] **A motion to transfer a cause** from the common pleas to the supreme court is properly entitled in the common pleas. *Miller v. Dows*, 2 How. Pr. (N. Y.) 98.

[c] **Entitled in Appellate Court.** The motion should be entitled in the court to which the cause has been appealed. *Clickman v. Clickman*, 1 N. Y. 611, 3 How. Pr. 365, 1 Code Rep. 98.

[d] **Amendment.**—Motion papers entitled in the wrong court are defective and cannot be amended under 149th section of the code. *Clickman v. Clickman*, 1 N. Y. 611, 3 How. Pr. 365, 1 Code Rep. 98.

72. *Parkman v. Sherman*, 1 Caines (N. Y.) 344, *Colem. & C. Cas.* 260; *Felt v. Hyde*, 1 How. Pr. (N. Y.) 64; *Maury v. Van Arnum*, 1 Hill (N. Y.) 370; *Williams v. Field*, 1 How. Pr. (N. Y.) 214.

[a] **Where one defendant moves** in a cause in which there are other defendants his papers should be entitled with the defendant moving, impleaded with the others. *Foote v. Emmons*, 2 How. Pr. (N. Y.) 89; *Felt v. Hyde*, 1 How. Pr. (N. Y.) 64.

[b] **A motion made for all the defendants** may be entitled in the names of all of them. *Rowell v. Crofoot*, 3 How. Pr. (N. Y.) 15.

[c] **Parties Reversed.**—(1) When both notice and affidavit are wrongfully entitled by reversing the parties, the error is fatal (*Parkman v. Sherman*, *Colem. & C. Cas.* (N. Y.) 260, 1 Caines 344); but (2) though the

parties are reversed in the title of the notice, it is not fatal if they are rightly named in the affidavit. *Ryers v. Hillyer*, 1 Caines (N. Y.) 112.

73. *Anderson v. Vandenburg*, 1 How. Pr. (N. Y.) 212.

74. **N. Y.**—*Hazard v. Wilson*, 3 Abb. N. C. 50; *Hawley v. Donnelly*, 8 Paige 415. **S. D.**—*Jerauld County v. Williams*, 7 S. D. 196, 63 N. W. 905. **Wis.** *Kellogg v. Collier*, 47 Wis. 649, 3 N. W. 433.

[a] **Entitling the motion in a single action** when it should be entitled in both the actions in which it is made is an irregularity merely. *Kellogg v. Collier*, 47 Wis. 649, 3 N. W. 433.

75. *Parkman v. Sherman*, *Colem. & C. Cas.* (N. Y.) 260, 1 Caines 344; *Hawley v. Donnelly*, 8 Paige (N. Y.) 415; *Foote v. Emmons*, 2 How. Pr. (N. Y.) 89.

[a] **An objection to the entitling** of the moving papers cannot be based on the opposing papers which are entitled in the same way. *Atwater v. Williams*, 2 How. Pr. (N. Y.) 274.

76. **Motions to quash indictment or information, see 12** STANDARD PROC. 633.

77. *Nobach v. Scott*, 20 Idaho 558, 119 Pac. 295.

78. See *Nobach v. Scott*, 20 Idaho 558, 119 Pac. 295.

79. See *Nobach v. Scott*, 20 Idaho 558, 119 Pac. 295; *Simmons v. Fisher*, 46 Tex. 126.

Motion to quash indictment or information, see 12 STANDARD PROC. 633.

80. *Osborne v. Robbins*, 10 Mich. 277.

Motion for guardian ad litem, see 10 STANDARD PROC. 734.

[a] **When founded on matter outside the record** the motion should be verified. *Shellenberger v. Ward*, 8 Iowa 425.

81. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

the motion is sometimes required, in which latter case the court has discretion to waive the observance of the rule,⁸² but verification is not always necessary.⁸³

B. SUFFICIENCY OF STATEMENT.—1. Specifying Grounds.—A specific⁸⁴ and full⁸⁵ statement of the grounds and reasons for the motion is required to be set out in the moving papers. These must be set forth either in the motion or application for the order,⁸⁶ the notice

[a] **Affidavit of Merits.**—In Washington by rule of court no motion shall be filed by the clerk unless the same is accompanied by an affidavit of the attorney of record that he believes the same to be meritorious and well founded in law. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

82. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

83. *Union Iron Works v. Vekol Min. & Mill. Co.*, 11 Ariz. 47, 89 Pac. 539; *Wm. W. Kendall Boot & Shoe Co. v. August*, 51 Kan. 53, 32 Pac. 635.

[a] **A written motion to dismiss** for failure to comply with an order to give security for costs need not be verified. *Union Iron Works v. Vekol Min. & Mill. Co.*, 11 Ariz. 47, 89 Pac. 539.

84. **Colo.**—*Mullen v. Wine*, 9 Colo. 167, 11 Pac. 54; *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462. **Conn.**—*Hoey v. Hoey*, 36 Conn. 386. **Ill.**—*Metropolitan West Side El. R. Co. v. White*, 166 Ill. 375, 46 N. E. 978. **Ind.**—*Hadley v. Guttridge*, 58 Ind. 302. **Kan.**—*Am-brose v. Parrott*, 28 Kan. 693, 700. **Neb.**—*Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748. **Tenn.**—*Wilson v. Waters*, 7 Coldw. 323.

Indictment and information, motion to quash, see 12 STANDARD PROC. 633.

85. **Ala.**—*Street v. Street*, 113 Ala. 333, 21 So. 138. **Ill.**—*Consolidated Coal Co. v. Schaefer*, 135 Ill. 210, 25 N. E. 788; *Ottawa, O. & F. R. V. R. Co. v. McMath*, 91 Ill. 104. **N. Y.**—*Mills v. Thursby*, 11 How. Pr. 114. **S. C.**—*Hinson v. Catoe*, 10 S. C. 311. **Wis.**—*Bone-steel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

86. **Ala.**—*Street v. Street*, 113 Ala. 333, 21 So. 138. **Cal.**—*Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; *Silva v. Holland*, 74 Cal. 530, 16 Pac. 385; *Poehlmann v. Kennedy*, 48 Cal. 201. **Colo.**—*Mullen v. Wine*, 9 Colo. 167, 11 Pac. 54; *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462. **Conn.**—*Hoey v. Hoey*, 36 Conn. 386.

Ill.—*People v. Seibert*, 167 Ill. 639, 48 N. E. 687; *People v. Kipley*, 167 Ill. 638, 48 N. E. 688; *Metropolitan West Side El. R. Co. v. White*, 166 Ill. 375, 46 N. E. 978; *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210, 25 N. E. 788; *Stuve v. McCord*, 52 Ill. App. 331. **Ind.**—*Louisville, N. A. & C. Ry. Co. v. Thompson*, 62 Ind. 87. **Ia.**—*Hall v. Crouse*, 14 Iowa 487. **Mo.**—*Smith v. Moseley*, 234 Mo. 486, 137 S. W. 971; *Jackson v. Bowles*, 67 Mo. 609; *O'Connor v. Koeh*, 56 Mo. 253. **N. Y.**—*Potter v. Tuttle*, 2 Wend. 254; *Lanahan v. Henry Zeltner Brew. Co.*, 20 Misc. 551, 46 N. Y. Supp. 431. **Okla.**—*Hancock v. Youree*, 25 Okla. 460, 106 Pac. 841. **Ore.**—*Hammer v. Campbell Automatic Safety Gas Burner Co.*, 74 Ore. 126, 144 Pac. 396; *Meier v. Northern Pac. R. Co.*, 51 Ore. 69, 93 Atl. 691; *Ferguson v. Ingle*, 38 Ore. 43, 62 Pac. 760. **S. C.**—*Hinson v. Catoe*, 10 S. C. 311. **S. D.**—*Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876; *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073. **Tenn.**—*Odell v. Koppee*, 5 Heisk. 88; *Moore v. Webb*, 6 Heisk. 201; *Melton v. Edwards*, 6 Heisk. 250. **Vt.**—*State v. Nulty*, 57 Vt. 543; *Barnet v. Emery*, 43 Vt. 178. **Wis.**—*Corwith v. State Bank*, 8 Wis. 376.

Dismissal.—Setting out grounds for dismissal in motion, see 7 STANDARD PROC. 681.

Execution Sale.—Motion to vacate sale, see 16 STANDARD PROC. 208.

Indictment and Information.—Motion to quash indictment or information, see 12 STANDARD PROC. 633.

Injunction.—Motion to dissolve injunction, see 13 STANDARD PROC. 245.

Judgment.—Motion to amend judgment, see 15 STANDARD PROC. 135; to vacate judgment, see 15 STANDARD PROC. 217; judgment by confession, see 14 STANDARD PROC. 842.

[a] **"The reason for the enforcement of this rule is to advise the trial court and the plaintiff of the grounds upon which the mover will rely and**

thereof,⁸⁷ or the affidavits supporting the motion.⁸⁸ All the grounds must be embodied in the one motion,⁸⁹ for separate motions for each objection will not be entertained.⁹⁰

A written statement of the grounds of the motion is sometimes required.⁹¹

2. **Motion by Corporation.**—Where a corporation makes the motion it need not set out how it became a corporation.⁹²

3. **Demand for Relief.**—The relief desired should be stated⁹³ but the motion should not be too broad in its scope.⁹⁴ Demands for relief of a different nature may be combined,⁹⁵ although depending upon different facts and circumstances wholly unrelated.⁹⁶

4. **Waiver of Objections.**—Objections to the sufficiency of the motion are waived unless made in proper time and manner.⁹⁷

IX. SERVICE OF PAPERS.⁹⁸—NECESSITY.—A copy of the

to prevent surprise" (*Hammer v. Campbell Automatic Safety Gas Burner Co.*, 74 Ore. 126, 144 Pac. 396), and that the appellate court may know that it is not called upon to review issues not presented to the trial court. *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

[b] **Additional Grounds Orally.** Specifying grounds in a written motion, where the motion is not required to be in writing does not preclude the mover from assigning additional grounds orally. *Scotten v. Divilbiss*, 60 Ind. 37.

87. See *infra*, XI, C, 3.

[a] **If the notice of motion states the grounds, it is sufficient.** *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

88. See *infra*, XII, C.

89. Ill.—*Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210, 25 N. E. 788; *Stuve v. McCord*, 52 Ill. App. 331. Mo.—*Fox v. Young*, 22 Mo. App. 386. N. Y.—*McLean v. Hoyt*, 56 How. Pr. 351; *People v. McCumber*, 27 Barb. 632; *Mills v. Thursby*, 11 How. Pr. 114; *Desmond v. Wolf*, 1 Code Rep. 49, 2 Edm. Sel. Cas. 19. S. C.—*Hinson v. Catoe*, 10 S. C. 311. Wis.—*Bone-steel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

[a] **Waiver.**—Grounds not specified are waived. *The Consolidated Coal Company v. Schaefer*, 135 Ill. 210, 25 N. E. 788.

90. *McLean v. Hoyt*, 56 How. Pr. (N. Y.) 351; *Mills v. Thursby*, 11 How. Pr. (N. Y.) 114. And see the cases in the note immediately preceding.

91. See *supra*, VIII, A, 1.

92. *Grays v. Lynchburg & S. Turnpike Co.*, 4 Rand. (25 Va.) 578.

[a] **The doctrine governing suits brought by corporations, namely, that they need not set forth in their declaration by way of averment, how they were a corporation, is applicable to motions made by them.** *Grays v. Lynchburg & S. Turnpike Co.*, 4 Rand. (25 Va.) 578.

93. *Hammer v. Campbell Automatic Safety Gas Burner Co.*, 74 Ore. 126, 144 Pac. 396.

94. *Padgett v. State*, 64 Fla. 389, 59 So. 946, Ann. Cas. 1914B, 897.

95. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

[a] **Rule Illustrated.**—It is proper to combine in a single motion an application for judgment on the pleadings or, in the alternative, to vacate an order for the examination of the defendant. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

96. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

97. *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

[a] **Statement of Grounds.**—Failure to state the grounds for the application, waived when not objected to. *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

98. See generally "Service of Process and Papers."

Service of notice of motion, see *infra*, XI, D.

Service of affidavits upon which motion based, see *infra*, XIII, D.

papers upon which the motion is founded must sometimes be served on the opposite party⁹⁹ with the notice of motion.¹

Upon Whom. — Service of motion papers may be made on the attorney for the opposite party.²

Manner of Service. — Motion papers are served in the same manner as other papers in a cause generally.³ Service by mail is authorized,⁴ but in such case no part of the writing, composing any part of the papers served, should be upon the wrapper.⁵

X. FILING.⁶ — It is necessary, generally, to file with the clerk or enter upon the motion docket, motions⁷ that are required to be

99. *Rogers v. Pearsall*, 21 App. Div. 389, 47 N. Y. Supp. 551; *Bennett v. Pratt*, 2 How. Pr. (N. Y.) 77; *Corwith v. State Bank*, 8 Wis. 376.

[a] **Failure to serve motion papers** (1) as required will justify the court in refusing to sustain the motion (*Corwith v. State Bank*, 8 Wis. 376), or (2) in striking the cause from the calendar. *Rogers v. Pearsall*, 21 App. Div. 389, 47 N. Y. Supp. 551.

[b] **A reference to the records and papers** made in the notice of motion is not a compliance with the rule requiring a copy of motion papers to be served. *Corwith v. The State Bank*, 8 Wis. 376.

[c] **A certificate of the clerk or other officer** intended to be used as evidence on the motion, must be served with the other motion papers, otherwise it cannot be read in evidence. *Frost v. Flint*, 2 How. Pr. (N. Y.) 74.

[d] **Enumerated Motions.** — Except in the appellate division of the supreme court, a copy of papers supporting enumerated motions must be served on the opposite party, except upon trial of issues of law, at least eight days before the time for which the matter may be noticed for argument. *Rogers v. Pearsall*, 21 App. Div. 389, 47 N. Y. Supp. 551.

[e] **Where the other party procured a copy** of the papers at his own expense and for his own use, service of the papers as required by rule of court is not dispensed with. *Rogers v. Pearsall*, 21 App. Div. 389, 47 N. Y. Supp. 551.

[f] **Defects in the copies** of the papers served will be disregarded, where such defects do not exist in the papers themselves. *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun (N. Y.) 702, 4 Thomp. & C. 196.

[g] **Papers already used in the**

cause and which have recently been served on the other party need not again be served, to be available on a motion in that cause. Notice of intention to use such papers is all that is required. *Deutermann v. Pollock*, 36 App. Div. 522, 55 N. Y. Supp. 829.
1. *Corwith v. The State Bank*, 8 Wis. 376.

2. *Jackson ex dem. Payn v. Yale*, 1 Cow. (N. Y.) 215.

[a] **Service on the clerk** of the attorney, while in the office is sufficient, whether the attorney is present or not. *Jackson ex dem. Payn v. Yale*, 1 Cow. (N. Y.) 215.

3. See the title "**Service of Process and Papers.**"

4. *Van Benthuyssen v. Stevens*, 14 How. Pr. (N. Y.) 70.

5. *Birdsall v. Taylor*, 1 How. Pr. (N. Y.) 89.

6. See generally the title "**Filing.**"

7. **Ga.**—*Smith v. Equitable Mtg. Co.*, 98 Ga. 240, 25 S. E. 423; *Donaldson v. Dodd*, 79 Ga. 763, 4 S. E. 157. **Ill.**—*United States Express Co. v. Bedbury*, 40 Ill. 122; *Lewis v. Fireman's Ins. Co.*, 67 Ill. App. 195. **Ind.**—*Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263; *Louisville, N. A. & C. Ry. Co. v. Renicker*, 17 Ind. App. 619, 47 N. E. 239. **Kan.**—*Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670. **Mich.**—*Storey v. Child*, 2 Mich. 107; *Bertram v. McNaughton*, 1 Mich. N. P. 200. **Mo.**—*Daggs v. Smith*, 193 Mo. 494, 91 S. W. 1043. **N. Y.**—*Curtis v. Greene*, 28 Hun 294. **S. C.**—*Ward v. Western Union Tel. Co.*, 62 S. C. 274, 40 S. E. 670. **Wash.**—*Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

[a] **Docketing Anew.**—A motion in a cause already upon the calendar should not be docketed anew. *Ward v. Western Union Tel. Co.*, 62 S. C. 274, 40 S. E. 670.

in writing, the written statement of the grounds of the motion,⁸ and other motion papers.⁹

XI. NOTICE OF MOTION.¹⁰ — A. NECESSITY FOR. — 1. **In General.** — Notice of a motion is necessary when required by statute or rule of court, or when directed by a court or judge in pursuance thereof.¹¹ And if the statute does not define the cases in which notice of motion is necessary, the question whether notice should be given to the adverse party will depend upon the particular facts presented and the circumstances under which the application is made.¹²

2. **Notice From the Record.** — It is an accepted rule that a party over whom a court has obtained jurisdiction must take notice of all motions filed in the cause until final judgment is rendered therein,¹³

[b] **Special motion** must (1) be filed with the clerk (United States Exp. Co. v. Bedbury, 40 Ill. 122), and (2) entered in special motion book. Bertram v. McNaughton, 1 Mich. N. P. 200.

[c] **Motion After Final Judgment.** Where the motion is made after final judgment the place of filing is the office of the clerk of the county where the judgment was entered. Curtis v. Greene, 28 Hun (N. Y.) 294.

[d] **The record should show** (1) the filing of the motion (Daggs v. Smith, 193 Mo. 494, 91 S. W. 1043), but (2) the motion should not be copied into the record since that would be a useless and improper incumbrance of such record. Daggs v. Smith, 193 Mo. 494, 91 S. W. 1043.

[e] **Time of Filing.** — (1) Special motions must be filed at least one day before they are submitted to the court. United States Exp. Co. v. Bedbury, 40 Ill. 122. (2) That motion papers need not be filed before making the motion, see Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263; Corwith v. State Bank, 8 Wis. 376.

[f] **Failure to file the motion papers** as required by the statute or rule of practice will cause the order to be set aside. Curtis v. Greene, 28 Hun (N. Y.) 294.

[g] **Unless properly verified** the motion is not entitled to filing. Sylvester v. Olson, 63 Wash. 285, 115 Pac. 175.

8. Ottawa, O. & F. R. V. R. Co. v. McMath, 91 Ill. 104; United States Express Co. v. Bedbury, 40 Ill. 122.

9. See *infra*, XII, E.

10. See generally the title "Notice."

11. Cal.—Bohn v. Bohn, 164 Cal. 532,

129 Pac. 981. Colo.—Hughes v. McCoy, 11 Colo. 591, 19 Pac. 674; Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. 303; Cates v. Mack, 6 Colo. 401. Fla.—Dupuis v. Thompson, 16 Fla. 69. Ga. Brewer v. Ragan, 128 Ga. 441, 57 S. E. 701. Mich.—McCaslin v. Camp, 26 Mich. 390. Mo.—Konta v. St. Louis Stock Exchange, 150 Mo. App. 617, 131 S. W. 380. Nev.—State *ex rel.* Sparks v. State Bank & Trust Co., 37 Nev. 55, 139 Pac. 505, 142 Pac. 627. N. Y.—Rogers v. McElhone, 12 Abb. Pr. 292, 20 How. Pr. 441. N. C.—Harper v. Sugg, 111 N. C. 324, 16 S. E. 173. Ore.—Bush v. Geisey, 16 Ore. 267, 19 Pac. 122. S. C.—China v. Courtney, 85 S. C. 245, 67 S. E. 234.

12. Goldreyer v. Foley, 154 App. Div. 584, 139 N. Y. Supp. 190; Matter of Salmon, 34 Misc. 251, 69 N. Y. Supp. 215, 9 N. Y. Ann. Cas. 464.

13. Conn.—Treadway v. Coe, 21 Conn. 283. Ill.—Roby v. Title Guarantee & Tr. Co., 166 Ill. 336, 46 N. E. 1110. Ia.—Manning v. Nelson, 107 Iowa 34, 77 N. W. 503; Wagner v. Tice, 36 Iowa 599. Ky.—McCormick v. Young, 3 J. J. Marsh. 180; Riley v. Wiley, 3 Dana 75. Mo.—See Konta v. St. Louis Stock Exchange, 150 Mo. App. 617, 131 S. W. 380. N. C.—Stith v. Jones, 119 N. C. 428, 25 S. E. 1022; Jones v. Asheville, 114 N. C. 620, 19 S. E. 631. Ohio—See Gardner v. Cline, 2 Ohio Dec. (Reprint) 301.

[a] "In practice, courts are in the habit of requiring motions to be made with the knowledge or in the presence of opposite counsel when they are known. But this is a matter of courtesy and not of right. In legal strictness, counsel are presumed to be present when the court is in session on a day in which any step in a pending

unless actual notice is required to be given by some rule or order of court.¹⁴ But motions affecting materially the interests of the opposite party must be upon notice when made in causes not of record,¹⁵ or when depending upon matter not upon the record,¹⁶ or when made out of court or when the trial is not in progress,¹⁷ or after the action has been terminated by final judgment.¹⁸

3. Invoking Discretionary Powers.—Where the motion invokes the purely discretionary powers of the court and notice of it could serve no purpose, notice is necessary.¹⁹

4. Illustrative Applications.—Set out in the notes, are a number of motions which in accordance with the foregoing rules do,²⁰ or do

case may properly be taken." Seidel v. Hurly, 1 Woodw. (Pa.) 352.

14. See Roby v. Title Guarantee & Trust Co., 166 Ill. 336, 46 N. E. 1110.

15. Carpenter v. PePople, 19 Mich. 9; Beck v. Avondino, 20 Tex. Civ. App. 330, 50 S. W. 207.

16. Chaddie v. Wolfe, 5 J. J. Marsh. (Ky.) 668.

17. Thorne v. Ornauer, 8 Colo. 353, 8 Pac. 568; Nevitt v. Crow, 1 Colo. App. 453, 29 Pac. 749; Gardner v. Cline, 2 Ohio Dec. (Reprint) 301.

[a] **Order shortening time for taking depositions**, not made during trial must be upon notice. Nevitt v. Crow, 1 Colo. App. 453, 29 Pac. 749.

[b] **The provision is mandatory** which requires notice in such cases. Nevitt v. Crow, 1 Colo. App. 453, 29 Pac. 749.

18. **Ala.**—Stringer v. Echols, 46 Ala. 61. **Ill.**—Morgan v. Campbell, 54 Ill. App. 242. **Ind.**—Jenkins v. Corwin, 55 Ind. 21; Lake v. Jones, 49 Ind. 297; Yancy v. Teter, 39 Ind. 305, 309; Martindale v. Brown, 18 Ind. 284. **Ia.**—Perry v. Kaspar, 113 Iowa 268, 85 N. W. 22; Keeney v. Lyon, 21 Iowa 277. **Mo.**—George v. Middough, 62 Mo. 549; Laughlin v. Fairbanks, 8 Mo. 367; Konta v. St. Louis Stock Exchange, 150 Mo. App. 617, 131 S. W. 380; Parker v. Johnson, 22 Mo. App. 516. **N. C.**—Allison v. Whittier, 101 N. C. 490, 8 S. E. 338. **Ohio.**—Hettrick v. Wilson, 12 Ohio St. 136, 80 Am. Dec. 337. **Tex.**—Harvey v. Carroll, 72 Tex. 63, 10 S. W. 334; De Witt v. Monroe & Bro., 20 Tex. 289.

[a] **A motion for leave to issue execution** requires notice. Gardner v. Cline, 2 Ohio Dec. (Reprint) 301.

[b] **Damages on Injunction Bond.** A motion made after judgment to assess damages on an injunction bond re-

quires notice to the parties affected. Konta v. St. Louis Stock Exchange, 150 Mo. App. 617, 131 S. W. 380.

[a] **Notice to the attorney** who acted in the case is not sufficient after the judgment, except perhaps as to notice of appeal and notice of motion to retax costs or to amend the record. Perry v. Kaspar, 113 Iowa 268, 85 N. W. 22.

[d] **Motion To Restore Destroyed Judgment.**—George v. Middough, 62 Mo. 549.

[e] **But during the term** (1) at which a judgment or order is made, it may be set aside on motion without notice. Harper v. Sugg, 111 N. C. 324, 16 S. E. 173. (2) After such term a final judgment cannot be set aside except upon notice. Harper v. Sugg, 111 N. C. 324, 16 S. E. 173; Coor v. Smith, 107 N. C. 430, 11 S. E. 1089; Allison v. Whittier, 101 N. C. 490, 8 S. E. 338.

19. Benedict v. Cozzens, 4 Cal. 381.

20. **Amendments.**—Motion for leave to amend, see 1 STANDARD PROC. 894; the record, Thompson v. Thompson, 52 Hun 117, 4 N. Y. Supp. 842, 16 Civ. Proc. 317, 2 N. Y. St. 471. Amendment of judgment, see 15 STANDARD PROC. 138; amendment of bill for injunction, see 13 STANDARD PROC. 105.

Appeal.—Motion for rehearing on appeal, see 2 STANDARD PROC. 408.

[a] **Attachment**, motion to vacate. Kan.—Guest v. Ramsey, 50 Kan. 709, 33 Pac. 17. **S. C.**—Fort Mill Sav. Bank v. Sprunt & Son, 86 S. C. 8, 67 S. E. 955; China v. Courtney, 85 S. C. 245, 67 S. E. 234; Cureton v. Dargan, 12 S. C. 122. Wash.—Windt v. Banniza, 2 Wash. 147, 26 Pac. 189.

Default.—Motion to vacate default, see 6 STANDARD PROC. 835.

Deposit in court, motion for, see 7 STANDARD PROC. 154.

not,²¹ require notice. Others may be found under appropriate titles.

B. BY AND TO WHOM GIVEN.—Generally the notice of motion must be given by the attorney of record in the suit,²² and to all parties who have appeared in the suit whose rights will be affected by the motion.²³

C. FORM AND SUFFICIENCY.²⁴—**1. Form of Notice.**—The form of notice to be given the opposite party is a matter controlled largely by statute or rule of practice,²⁵ and the notice they contemplate is usually a written one,²⁶ or else a notice in open court of which a minute is made by the clerk.²⁷ The notice if in writing should be properly entitled and signed by the attorney of record for the moving party.²⁸

Execution Sale.—Motion to vacate sale, see 16 STANDARD PROC. 209.

Injunction.—Motion to dissolve injunction, see 13 STANDARD PROC. 253.

[b] **Dockets.**—Motion to have docket fee refunded. *Thorne v. Ornaucr*, 8 Colo. 353, 8 Pac. 568.

Judgment.—Notice of motion to vacate judgment, see 15 STANDARD PROC. 223; notice of motion for entry of judgment, see 14 STANDARD PROC. 1010; motion to amend judgment, see *supra*, this note.

[c] **Receivers.**—Motion to fix receiver's compensation. *State ex rel. Sparks v. State Bank & Trust Co.*, 37 Nev. 55, 139 Pac. 505, 142 Pac. 627.

[d] **Records.**—Motion to supply lost pleading. *People v. Cazalis*, 27 Cal. 522. *Compare Benedict v. Cozzens*, 4 Cal. 381. Motion to amend record, see *supra*, this note.

21. Motion for guardian ad litem, see 10 STANDARD PROC. 736.

[a] **Ex Parte Motion To Dissolve Attachment.**—*Thalheimer v. Hays*, 42 Hun 93, 3 N. Y. St. 441.

[b] **Motion To Strike Out a Brief.** *Connor v. Zachry*, 54 Tex. Civ. App. 188, 115 S. W. 867, 117 S. W. 177.

[c] **Motion in Error.**—*Treadway v. Coe*, 21 Conn. 283.

22. Bogert v. Bancroft, 3 Caines (N. Y.) 127, *Colem. & C. Cas.* 466.

[a] **A counsel for the attorney of record** may, however, give the notice where the latter has absconded. *Bogert v. Bancroft*, 3 Caines (N. Y.) 127, *Colem. & C. Cas.* 466.

23. George v. Middough, 62 Mo. 549; *Konta v. St. Louis Stock Exchange*, 150 Mo. App. 617, 131 S. W. 380.

Deposit in Court.—Motion to make, see 7 STANDARD PROC. 154; motion to distribute the fund, see 7 STANDARD PROC. 171.

Depositions, motion to take, see 7 STANDARD PROC. 230.

Execution Sale.—Notice of motion to vacate, see 16 STANDARD PROC. 209.

Motion to vacate attachment, see 3 STANDARD PROC. 776.

Judgment.—Notice of motion to vacate, see 15 STANDARD PROC. 225.

[a] **The principal obligor on a bond** given in injunction proceedings is entitled to notice of a motion made after judgment to assess damages on the bond. *Konta v. St. Louis Stock Exchange*, 150 Mo. App. 617, 131 S. W. 380.

24. Forms of notice of motion, see 9 STANDARD PROC. 852.

25. Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981.

26. Cal.—*Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981; *Borland v. Thornton*, 12 Cal. 440. **Ky.**—*Floyd v. Black*, Litt. Sel. Cas. 11. **Tex.**—*Beck v. Avondino*, 20 Tex. Civ. App. 330, 50 S. W. 207.

Judgment.—Notice of motion to amend judgment, see 15 STANDARD PROC. 140; of motion to vacate judgment, see 15 STANDARD PROC. 225.

[a] **Though written notice not expressly required** by the statute, the law in making notice necessary contemplates a written notice. *Floyd v. Black*, Litt. Sel. Cas. (Ky.) 11.

[b] **Merely calling the attention of the attorneys of record to the filing of the paper** is not sufficient where written notice is necessary. *Beck v. Avondino*, 20 Tex. Civ. App. 330, 50 S. W. 207.

27. Borland v. Thornton, 12 Cal. 440.

28. Demelt v. Leonard, 19 How. Pr. (N. Y.) 182; *Bogert v. Bancroft*, 3 Caines (N. Y.) 127, *Colem. & C. Cas.* 466.

[a] **If signed by the party** it is

2. Length of Notice.²⁹—a. *In General.*—The statutes or rules usually prescribe that notice of motion must be served a designated number of days before the hearing,³⁰ or that a reasonable notice shall be given,³¹ but the court or judge is sometimes empowered to prescribe a shorter time than therein stated.³²

irregular. *Halsey v. Carter*, 6 Robt. (N. Y.) 535.

29. Judgment.—Notice of motion to vacate judgment, see 15 STANDARD PROC. 226.

30. Mich.—*Cleland v. Clark*, 111 Mich. 336, 69 N. W. 652. *Minn.* *Blake v. Sherman*, 12 Minn. 420. *Mont.* *Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239, Ann. Cas. 1913B, 479. *N. C.* *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173.

[a] **New York Rules.**—(1) Unless a rule of practice or special provision of law prescribes otherwise, eight days' notice is required where the same is personally served. *Citizens' Sav. Bank v. Bauer*, 49 Hun 238, 1 N. Y. Supp. 450, 14 Civ. Proc. 340, 17 N. Y. St. 81; *Rogers v. McElhone*, 12 Abb. Pr. (N. Y.) 292, 20 How. Pr. 441; *Anonymous*, 2 Wend. (N. Y.) 288. (2) There is no absolute right to a notice of eight days. *People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582. (3) The time may be shortened by an order to show cause, see *infra*, XI, C, 2, b. (4) In certain cases a shorter notice than eight days is provided for. Thus by sec. 537 of the Code a notice of not less than five days is required in an application for judgment upon a frivolous demurrer. *Singleton v. Thornton*, 45 Hun 589, 9 N. Y. St. 600. (5) Sixteen days' notice is required where the service is by mail. *Code Civ. Proc.*, §780. (6) Notice of motion to prove exhibits at the hearing must be served four days before the hearing. *Consequa v. Fanning*, 2 Johns. Ch. (N. Y.) 481.

[b] **Fifteen Days' Notice.**—*Hanks v. Lyons*, 92 Va. 30, 22 S. E. 813.

[c] **Ten Days.**—*Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173; *Branch v. Walker*, 92 N. C. 87; *Bush v. Geisey*, 16 Ore. 267, 19 Pac. 122.

[d] **Six Days.**—*Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1130.

[e] **Five days** before the hearing if both parties reside in the county; otherwise ten days. And if service is by mail the time of service must be increased by one day for every twenty-

five miles between the place of deposit and the place of service. See *Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239, Ann. Cas. 1913B, 479.

[f] **Four Days.**—*McCaslin v. Camp*, 26 Mich. 390. In Michigan the general established practice recognizes four days as the usual time for all except a few peculiar motions. A longer notice is needed where the service is for a distant point. *McCaslin v. Camp*, 26 Mich. 390.

[g] **Two days** in case of a special motion. *Hoffman v. Lowell*, 58 N. J. L. 553, 34 Atl. 750; *Trenton Mut. Life & Fire Ins. Co. v. Hodges*, 24 N. J. L. 673; *Den ex dem.*, etc. *v. Fen, Matlack*, 17 N. J. L. 354.

[h] **Ignorance of a rule of court** requiring eight days' notice will not excuse a failure to give it. *Anonymous*, 2 Wend. (N. Y.) 288.

31. U. S.—*State of New York v. State of Connecticut*, 4 Dall. 1, 1 L. ed. 715. **Ill.**—*Berry v. Wilkinson*, 2 Ill. 164. **Ind.**—*Latta v. Griffith*, 57 Ind. 329. **Va.**—*Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235. **Wash.**—*Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189.

[a] **What is reasonable notice** (1) in any case must be determined in relation to the object of the motion (*State of New York v. State of Connecticut*, 4 Dall. [U. S.] 1, 1 L. ed. 715), and (2) the circumstances of each particular case. *Lowry v. Jenkins*, 3 Bibb (Ky.) 314; *Sterling Mfg. Co. v. Hough*, 49 Neb. 618, 68 N. W. 1019.

[b] **Ten Days' Notice Is Reasonable.**—*Blake v. Sherman*, 12 Minn. 420.

[c] **Four days' notice**, reasonable, in case of motion to amend judgment. *Latta v. Griffith*, 57 Ind. 329; *Stringer v. Dean*, 61 Mich. 196, 27 N. W. 886.

[d] **One day's notice**, reasonable where the grounds upon which the motion was founded, depended upon matter of record. *Lowry v. Jenkins*, 3 Bibb (Ky.) 314.

32. *Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239, Ann. Cas. 1913B, 479; *Bush v. Geisey*, 16 Ore. 267, 19 Pac. 122. See the note next following.

b. *Order To Show Cause*.—Statutes in many jurisdictions empower the court to shorten the prescribed notice of motion by an order to show cause,³³ and, it seems, the court has inherent power to issue orders fixing the time for hearing motions whether the purpose is to shorten or lengthen the statutory notice.³⁴

3. **Contents of Notice.**³⁵ — **Stating Grounds.** — The grounds on which the party making a motion means to rely must be stated³⁶ in the

33. **Minn.**—*Goodrich v. Hopkins*, 10 Minn. 162; *Marty v. Ahl*, 5 Minn. 27. **N. Y.**—*People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582; *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430; *Rogers v. McElhone*, 12 Abb. Pr. 292, 20 How. Pr. 441; *Merritt v. Slocum*, 6 How. Pr. 350; *People ex rel. Crouse v. Fulton County Supers.*, 70 Hun 560, 24 N. Y. Supp. 397; *Parker v. Linden*, 59 Hun 359, 13 N. Y. Supp. 95, 36 N. Y. St. 564; *Citizens' Sav. Bank v. Bauer*, 49 Hun 233, 1 N. Y. Supp. 450; *Agnew v. Latham*, 54 Misc. 61, 105 N. Y. Supp. 366; *In re Ferris*, 37 Misc. 606, 76 N. Y. Supp. 159. **N. C.**—*Branch v. Walker*, 92 N. C. 87. **S. D.**—*Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1130. **Wis.**—*Foote v. Carpenter*, 7 Wis. 395.

[a] **Not (1) a matter of course** (*Androvette v. Bowne*, 15 How. Pr. [N. Y.] 75, 4 Abb. Pr. 440), nor (2) an absolute right of the party. *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430, 434.

[b] **In exceptional cases only** should the power to shorten notice be exercised, and not indiscriminately on all occasions. *Androvette v. Bowne*, 15 How. Pr. (N. Y.) 75, 4 Abb. Pr. 440.

[c] **Special Proceeding.**—A shorter time may be prescribed on a motion in a special proceeding. *In re Cutting*, 49 App. Div. 388, 63 N. Y. Supp. 246.

[d] **Who May Make Order.**—The statute provides that the "court or judge" may make the order. This does not mean that any judge at chambers has power to shorten the time of notice but only the judge before whom the application to which the order relates is to be made. *Merritt v. Slocum*, 6 How. Pr. (N. Y.) 350.

[e] **Review.**—(1) The action of a judge at chambers in granting an order shortening a notice is subject to review (*People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582; *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430, 434), but (2) an order of

the general term vacating an order requiring a party to show cause upon short notice, is not appealable to the court of appeals. *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430, 434.

[f] **Power to shorten notice not affected by Rule 44** which provides that a case on certiorari may be brought to a hearing upon the usual notice of argument; the rule is binding only so far as it is consistent with the code. *People ex rel. Mayor of New York v. Nichols*, 79 N. Y. 582.

34. *Larson v. Minnesota Northwestern Elec. R. Co.*, 136 Minn. 423, 162 N. W. 523.

35. **Depositions.**—Contents of notice of motion to take depositions, see 7 STANDARD PROC. 231.

Judgment on pleadings, motion for, see 14 STANDARD PROC. 951.

Execution Sale.—Notice of motion to vacate sale, see 16 STANDARD PROC. 209.

36. **U. S.**—*Nevada Co. v. Farnsworth*, 89 Fed. 164. **Cal.**—*Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981; *Freeborn v. Glazer*, 10 Cal. 337. **Mont.**—*Omaha Upholstering Co. v. Chauvin-Fant Furniture Co.*, 18 Mont. 468, 45 Pac. 1087. **N. Y.**—*Van Wickle v. Weaver Coal & Coke Co.*, 88 App. Div. 603, 85 N. Y. Supp. 82; *Rallings v. McDonald*, 76 App. Div. 112, 78 N. Y. Supp. 1040; *In re George Ringler & Co.*, 70 Misc. 576, 127 N. Y. Supp. 934; *Weehawken Wharf Co. v. Knickerbocker Coal Co.*, 24 Misc. 683, 53 N. Y. Supp. 982; *Bowman v. Sheldon*, 5 Sandf. 657; *Ellis v. Jones*, 6 How. Pr. 296; *Hill v. Smith*, 2 How. Pr. 242. **S. D.**—*Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876. **Utah.**—*Cupit v. Park City Bank*, 11 Utah 427, 40 Pac. 707. **Va.**—*Drew v. Anderson*, 1 Call (5 Va.) 44. **Wis.**—*Hungerford v. Cushing*, 8 Wis. 320.

Motion to vacate default, see 6 STANDARD PROC. 835.

notice or order to show cause.³⁷ Defects not specified in the notice cannot be urged in support of the motion,³⁸ and a failure to specify the grounds of the motion is ground for denying the same.³⁹

Time To Be Made.—The notice of motion must state the time when it will be made or brought on for hearing,⁴⁰ being sufficient in this

[a] **Either by the notice or the affidavits** the particular grounds of the motion should appear. *Ellis v. Jones*, 6 How. Pr. (N. Y.) 296.

[b] **Notice of motion to set aside an order** must ordinarily state the irregularities relied upon, but this is not necessary where the objection is jurisdictional and upon the merits. *In re George Ringler & Co.*, 70 Misc. 576, 127 N. Y. Supp. 934.

[c] **Notice of motion for new trial** need not state the grounds. See *Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981, and generally "**New Trial**."

[d] **In a special proceeding** to recover judgment upon facts to be shown, particularly if judgment for a penalty is sought, the notice must be as specific as a petition. *Skaggs v. Hines*, 5 Ky. L. Rep. 106.

[e] **Irregularities complained of** should be specified. *Perkins v. Mead*, 22 How. Pr. (N. Y.) 476; *Selover v. Forbes*, 22 How. Pr. (N. Y.) 477; *Lewis v. Graham*, 16 Abb. Pr. (N. Y.) 126.

[f] **Limits of Rule.**—"It is a salutary rule in all cases, where in answer to a motion, the opposite party would have a right to explain by affidavit the matters which constitute the foundation of the motion, that he should be apprized by the notice of the motion, or by the papers upon which the motion is to be founded of the grounds upon which the moving party relies to sustain his motion." *Brower v. Brooks*, 1 Barb. (N. Y.) 423. See also *Hanna v. Curtis*, 1 Barb. Ch. (N. Y.) 263.

[g] **Shown by Other Papers.**—Notice of motion is not objectionable which does not point out the irregularity complained of, where such irregularity sufficiently appears in the moving papers. *Blake v. Loey*, 6 How. Pr. (N. Y.) 108, 1 Code Rep. (N. S.) 406.

37. See *Agnew v. Latham*, 54 Misc. 61, 105 N. Y. Supp. 366, *affirmed*, 120 App. Div. 877, 105 N. Y. Supp. 1105.

38. *Stevens v. Middleton*, 26 Hun (N. Y.) 470, 14 Wkly. Dig. 126; *Hungerford v. Cushing*, 8 Wis. 320.

[a] **Defects in substance** are not

within the rule. "In other words, it is the omission of some matter of form. Where, however, as here, the defects go to the sufficiency of the affidavit as evidence, they are matters of substance, not mere irregularities, and the rule has no application." *Agnew v. Latham*, 54 Misc. 61, 105 N. Y. Supp. 366.

39. *Lewis v. Graham*, 16 Abb. Pr. (N. Y.) 126.

40. **Ala.**—*Bank of Mobile v. State*, Minor 290. **Cal.**—*Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981. **N. J.**—*White v. Rockafellar*, 45 N. J. L. 299; *Brown v. Williamson*, 8 N. J. L. 363. **N. Y.** *Avery v. Cadugan*, 1 Cow. 230. **S. C.** *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278.

[a] "**Or as soon thereafter**," etc. (1) Following the designation of a specified day in the notice appear such phrases as "or as soon thereafter as the court can attend to the same," or "as soon thereafter as counsel can be heard," etc. *White v. Rockafellar*, 45 N. J. L. 299. (2) Such a notice is good for the day succeeding the designated day. *White v. Rockafellar*, 29 N. J. L. 299.

[b] **A rule of court cannot dispense** with the necessity of such statement. *Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981.

[c] **In motion for new trial** such statement not necessary. See *Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981.

[d] **Stated in Alternative.**—A notice of motion must specify one certain time only when the motion will be brought on, it cannot be made in the alternative. *Crane v. Crofoot*, 1 How. Pr. (N. Y.) 191.

[e] **Uncertainty in designating the time of hearing** of the motion will not invalidate the notice where it appears, the opposite party was not misled thereby. *Blake v. Sherman*, 12 Minn. 420.

[f] **Day Misdated.**—A notice which states that a motion will be made on Friday the seventh is bad when Friday is the eighth. *Brown v. Williamson*, 8 N. J. L. 363.

respect if it designate the particular term at which the hearing will take place.⁴¹

Place of Moving.—The place where court will be held need not be specified in the notice since that is a matter fixed by law of which a party must take notice at his peril.⁴²

Papers Upon Which Based.—The papers upon which the motion is based, if any, must be stated.⁴³

The relief sought should be specified in the notice.⁴⁴ Different kinds of relief may be stated⁴⁵ and set out in the alternative.⁴⁶

D. SERVICE OF NOTICE.⁴⁷—**1. In General.**—Service of the notice of motion must be in accordance with the statutes regulating the same,⁴⁸ and it is not within the province of the court to order a service which the statute does not authorize.⁴⁹

41. **Ky.**—*Dye v. Knox*, 1 Bibb 573. **Minn.**—*Blake v. Sherman*, 12 Minn. 420. **N. Y.**—*Beekman v. Reed*, 5 Cow. 23; *Avery v. Cadugan*, 1 Cow. 230; *Bodwell v. Wilcox*, 2 Caines 104, *Colem. & C. Cas.* 367. **Va.**—*Hanks v. Lyons*, 92 Va. 30, 22 S. E. 813.

[a] **The day of the term** (1) need not be specified. *Dye v. Knox*, 1 Bibb (Ky.) 573; *Avery v. Cadugan*, 1 Cow. (N. Y.) 230. And (2) if after designating the next term, generally, a particular day is added which is several terms forward, the latter may be rejected as surplusage. *Jackson ex dem. Davis v. Brownson*, 4 Cow. (N. Y.) 51.

[b] **Provision for Continuance.**—A notice of motion for a particular term, and that if not then made, it will be continued on the calendar from term to term until it shall be made is insufficient. *Beekman v. Reed*, 5 Cow. (N. Y.) 23.

[c] **Where the term is abolished** for which the notice was given, a new notice is necessary. *Belknap v. Ives*, 1 How. Pr. (N. Y.) 218.

42. *Bodwell v. Wilcox*, 2 Caines (N. Y.) 104, *Colem. & C. Cas.* 367; *William v. Brown*, 5 Cow. (N. Y.) 281; *Brown v. State*, 8 Heisk. (Tenn.) 371.

[a] **The addition of a wrong place** is mere surplusage, and may be rejected. *William v. Brown*, 5 Cow. (N. Y.) 281.

43. See *Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981; *Crowley v. La Brake*, 147 App. Div. 389, 132 N. Y. Supp. 155.

[a] **The stenographer's minutes** should not be considered at the hearing when not served as a part of the

motion papers. *Crowley v. La Brake*, 147 App. Div. 389, 132 N. Y. Supp. 155.

44. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

45. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

46. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625; *Clark v. Clark*, 11 Abb. N. C. 333.

47. See generally "Service of Process and Papers."

Depositions, motion to take, see 7 STANDARD PROC. 231.

[a] **Judgment.**—Notice of motion to vacate judgment, see 15 STANDARD PROC. 226; to vacate default judgment, see 6 STANDARD PROC. 835; notice of motion to amend judgment, see 15 STANDARD PROC. 141.

48. **Ariz.**—*Union Iron Works v. Vekol Min. & Mill Co.*, 11 Ariz. 47, 89 Pac. 539. **Kan.**—*Brian v. Jeffrey*, 5 Kan. App. 98, 48 Pac. 875. **Ky.** *Fleece v. Goodrum*, 1 Duv. 306. **Nev.** *State ex rel. Sparks v. State Bank & Trust Co.*, 37 Nev. 55, 139 Pac. 505, 142 Pac. 627. **Va.**—*Fowler v. Mosher*, 85 Va. 421, 7 S. E. 542.

[a] **The statute is mandatory** and service of the notice can be made in no other manner than therein provided. *Fowler v. Mosher*, 85 Va. 421, 7 S. E. 542.

[b] **As Summons.**—The service is made in the same manner as service of a summons. *Brian v. Jeffrey*, 5 Kan. App. 98, 48 Pac. 875.

49. *State ex rel. Sparks v. State Bank & Trust Co.*, 37 Nev. 55, 139 Pac. 505, 142 Pac. 627.

2. By and Upon Whom.—A person authorized to serve a summons may serve a notice of motion.⁵⁰ Service may be made upon the opposite parties,⁵¹ except that after appearance the statutes sometimes require service to be made on the attorney.⁵²

3. Manner of Service.—Personal service is required,⁵³ unless there are circumstances of necessity which would authorize a substituted service.⁵⁴ To authorize notice by publication there must be a provision therefor in the statute.⁵⁵

Upon Foreign Corporation.—A notice of motion directed to a foreign

50. *Brian v. Jeffrey*, 5 Kan. App. 98, 48 Pac. 875.

[a] A constable may serve a notice of motion under a statute providing notice of motion to be served in the same manner as a summons. Under such a statute "the sheriff, coroner, constable or any other person including the moving party," may serve the notice. *Brian v. Jeffrey*, 5 Kan. App. 98, 48 Pac. 875.

51. *Fleece v. Goodrum*, 1 Duv. (Ky.) 306. See *Branch v. Walker*, 92 N. C. 87; *Fowler v. Mosher*, 85 Va. 421, 7 S. E. 542.

52. *Ariz.*—*Union Iron Works v. Vekol Min. & Mill. Co.*, 11 *Ariz.* 47, 89 Pac. 539. *Mich.*—*People ex rel. Finnegan v. Board of Supervisors*, 19 *Mich.* 9. *N. C.*—*Branch v. Walker*, 92 N. C. 87.

[a] Service upon the party not authorized. *People ex rel. Finnegan v. Board of Supervisors*, 19 *Mich.* 9.

[b] Each of the several adverse attorneys need not be served. Where the motion bears acceptance of service by one of the attorneys representing the opposing party, it is sufficient. *Union Iron Works v. Vekol Min. & Mill. Co.*, 11 *Ariz.* 47, 89 Pac. 539.

[c] Upon death, removal or suspension of the attorney or solicitor, and neglect of the party to appoint an attorney, in such manner as the court shall direct, notices of motions in the case may thereafter be served on such party. *Hoffman v. Rowley*, 13 *Abb. Pr.* 399; *Jewell v. Schouten*, 1 *N. Y.* 241.

[d] A notice of motion to set aside judgment may be properly served on the attorney of record of the opposite party. *Branch v. Walker*, 92 N. C. 87.

53. *McCaslin v. Camp*, 26 *Mich.* 390.

54. See *McCaslin v. Camp*, 26 *Mich.* 390.

[a] Service (1) on attorney. "To make the service of a notice good, it must be shown that everything has been done to bring it home to the party. The service must be on some person in the office and belonging there. If no person is there, it must be on some one in the house where the attorney resides or where his office is kept and if there is no person there, it may be left in the office." *Gelston v. Swartwout*, 1 *Johns. Cas.* (N. Y.) 136. (2) Service on attorney's clerk in his office (*Cooper v. Carr*, 8 *Johns. [N. Y.]* 360; *Jackson ex dem. Payn v. Yale*, 1 *Cow. [N. Y.]* 215), whether (3) the attorney be there or not. *Jackson ex dem. Payn v. Yale*, 1 *Cow. (N. Y.)* 215. (4) Service at attorney's house not sufficient. *Jackson ex dem. Pickart v. Eacker*, 1 *Johns. Cas.* (N. Y.) 331; *Anonymous*, 1 *Caines (N. Y.)* 73.

[b] Leaving a copy (1) with a member of family of the party is sufficient where he cannot be found at his usual place of abode (*Fleece v. Goodrum*, 1 *Duv. [Ky.]* 306; *Fowler v. Mosher*, 85 *Va.* 421, 7 *S. E.* 542), with (2) wife of party (*Fleece v. Goodrum*, 1 *Duv. [Ky.]* 306), but (3) delivery to "a mere boarder, a stranger to his blood," is not sufficient. *Fowler v. Mosher*, 85 *Va.* 421, 7 *S. E.* 542.

55. *State ex rel. Sparks v. State Bank & Trust Co.*, 37 *Nev.* 55, 139 *Pac.* 505, 142 *Pac.* 627, rehearing denied, 37 *Nev.* 55, 139 *Pac.* 505, 514, 142 *Pac.* 627.

[a] Motion To Fix Compensation. A publication for ten days in a newspaper of notice of motion to fix a receiver's compensation is not a service and could not cut off or affect the right of any party in interest unless such publication was authorized by statute. *State ex rel. Sparks v. State Bank & Trust Co.*, 37 *Nev.* 55, 139 *Pac.* 505, 142 *Pac.* 627.

corporation may be served on its agent within the state.⁵⁶

4. Return and Proof.—The return of the officer,⁵⁷ and, in some jurisdictions,⁵⁸ but not all,⁵⁹ the affidavit of a disinterested person is sufficient proof of service.

E. FAILURE TO GIVE NOTICE.—**1. In General.**—Want of notice, where required, although not a jurisdictional defect,⁶⁰ will justify the court in refusing to consider the motion,⁶¹ and renders a decision thereon irregular and erroneous,⁶² unless the want of notice has been cured by the subsequent proceedings,⁶³ or by the appearance, without objection, of the party entitled to such notice.⁶⁴

2. Waiver.—One entitled to notice of motion may expressly waive the same.⁶⁵ If he desires to question the sufficiency of the notice he should appear specially for that purpose,⁶⁶ for by appearing generally and resisting the motion on its merits he waives want of notice⁶⁷

56. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 337.

Service of process on corporations, see the title "**Corporations.**"

[a] **A director of a foreign bank,** living in New York City may be served with notice directed to such bank. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 337.

Judgment.—Notice to amend judgment, see 15 STANDARD PROC. 141.

57. *Nigh v. Stillwell, etc. Co.*, 5 Ohio Cir. Dec. 335. See generally "**Returns.**"

58. *Jackson ex dem. Norton v. Gardner*, 2 Caines (N. Y.) 95.

[a] **Insufficient Affidavit.**—An affidavit of service, stating it to have been made by leaving notice and copy on the table of the opposite attorney, is not good, unless it also set forth that there was no one in the office. *Jackson ex dem. Norton v. Gardner*, 2 Caines (N. Y.) 95.

59. *McCaslin v. Camp*, 26 Mich. 390.

[a] **A copy of the notice sworn to** or officially certified, so that the court may judge for itself of its form and sufficiency is necessary. *McCaslin v. Camp*, 26 Mich. 390.

60. *Goldreyer v. Foley*, 154 App. Div. 584, 139 N. Y. Supp. 190; *Geller v. Hoyt*, 7 How. Pr. (N. Y.) 265; *Blackmar v. Van Inwagen*, 5 How. Pr. (N. Y.) 367, 1 Code Rep. (N. S.) 80.

61. *Dupuis v. Thompson*, 16 Fla. 69. See *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173.

62. *Stringer v. Echols*, 46 Ala. 61; *Goldreyer v. Foley*, 154 App. Div. 584, 139 N. Y. Supp. 190.

[a] **An order discharging judgment debtor** is merely irregular where the required notice of motion was not given the judgment creditor. *Goldreyer v. Foley*, 154 App. Div. 584, 139 N. Y. Supp. 190.

63. *Thomas v. San Diego College Co.*, 111 Cal. 358, 43 Pac. 965; *Rivers v. Olmsted*, 66 Iowa 186, 23 N. W. 392; *Billings v. Kothe*, 49 Iowa 34.

[a] **A motion to set aside an order** when properly disposed of, cures an error in granting the order without notice. *Thomas v. San Diego College Co.*, 111 Cal. 358, 43 Pac. 965. But see *McLean v. Tompkins*, 18 Abb. Pr. (N. Y.) 24.

64. See *infra*, XI, E, 2.

65. *Talman v. Barnes*, 12 Wend. (N. Y.) 227; *Fraser & Co. v. Ryan*, 4 Rich. L. (S. C.) 460.

66. *Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239, Ann. Cas. 1913B, 479; *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876.

67. **Ala.**—*Bondurant v. Woods*, 1 Ala. 543. **Cal.**—*Herman v. Santee*, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Benedict v. Cozzens*, 4 Cal. 381. **Colo.**—*Blyth v. People*, 16 Colo. App. 526, 66 Pac. 680. **Ga.**—*Kimbrough v. Orr Shoe Co.*, 98 Ga. 537, 25 S. E. 576. **Idaho.**—*Curtis v. Walling*, 2 Idaho 416, 18 Pac. 54. **Ind.**—*College Corner & R. G. Road Co. v. Moss*, 77 Ind. 139; *Louisville, N. A. & C. Ry. Co. v. Thompson*, 62 Ind. 87. **Ia.** *Billings v. Kothe*, 49 Iowa 34. **Kan.** *Smith v. State*, 1 Kan. 365. **Ky.**—*Miller v. Cavanaugh*, 99 Ky. 377, 35 S. W. 920, 59 Am. St. Rep. 463; *Smith's Heirs v. Robinson*, 1 Mon. 14; *Mc-*

or defects in the notice,⁶⁸ the service,⁶⁹ or the return or proof thereof.⁷⁰

XII. COUNTER-MOTIONS.—The statute sometimes enables the party against whom the motion is made to demand by motion such relief as on the facts presented he deems himself to be entitled to at the same time.⁷¹

Notice of counter-motion should be served on the adverse party,⁷² and such notice should specify the kind or kinds of relief to which the counter movant claims to be entitled in the action.⁷³

Supporting affidavits and papers may, if the party giving the notice chooses, be served therewith.⁷⁴

XIII. AFFIDAVITS AND PAPERS.—A. NECESSITY FOR.—The necessity for affidavits in support of particular motions is treated

Dowall v. Macker, Sneed 145; *Howard v. Duke*, 19 Ky. L. Rep. 2008, 45 S. W. 69. **Mo.**—*Price v. White*, 27 Mo. 275. **N. Y.**—*Crane v. Stiger*, 58 N. Y. 625. **S. C.**—*Bank of Charleston v. Zorn*, 14 S. C. 444, 37 Am. Rep. 733. **Tenn.** *Brown v. State*, 8 Heisk. 871; *State v. Faust*, 7 Coldw. 109; *Cheatham v. Hodges*, Peck 177. **Wis.**—*Priest v. Varney*, 64 Wis. 500, 25 N. W. 551.

Execution Sale.—Notice of motion to vacate sale, see 16 STANDARD PROC. 209.

Judgment.—Notice of motion to amend judgment, see 15 STANDARD PROC. 140; to vacate judgment, see 15 STANDARD PROC. 227.

[a] **Motion To Vacate.**—Want of notice of motion is not cured by the fact that the aggrieved party subsequently moved to vacate the order made on the motion. *McCaslin v. Camp*, 26 Mich. 390; *McLean v. Tompkins*, 18 Abb. Pr. (N. Y.) 24.

68. **Fla.**—*Silver Springs & W. R. Co. v. Koonce*, 56 Fla. 845, 47 So. 390. **Ind.**—*Lane v. Fox*, 8 Blackf. 58. **Miss.** *Izod v. Addison*, 5 How. 432. **N. Y.** *Main v. Pope*, 16 How. Pr. 271. **Tenn.** *Chaffin v. Crutcher*, 2 Sneed 360. **Utah.** *Salt Lake City v. Utah & Salt Lake Canal Co.*, 43 Utah 591, 137 Pac. 638. **Va.**—*Winston v. Overseers of Poor*, 4 Call (8 Va.) 357. **W. Va.**—*Venable v. Coffman*, 2 W. Va. 310.

[a] **Right to written notice of application for possession by a purchaser of land at sheriff's office, waived by appearance and disclaimer.** *Ferguson v. Blakeney*, 6 Ark. 296.

69. **Ark.**—*Foohs v. Bilby*, 95 Ark. 302, 129 S. W. 1104. **Fla.**—*Pearce v. Thackeray*, 13 Fla. 574. **Mont.**—*Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239,

Ann. Cas. 1913B, 479. **N. Y.**—*Cronin v. O'Reiley*, 7 N. Y. Supp. 337, 26 N. Y. St. 249. **S. C.**—*Ferguson v. Gilbert & Co.*, 17 S. C. 26.

70. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

71. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

[a] **The relief need not be responsive to that asked for by the moving party.** *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

[b] **The purpose is to "minimize practice motions and both save time to the courts and expense to the litigants."** *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

[c] **Rule Illustrated.**—Where notice of motion to vacate an order appointing a receiver is served on a party, he may serve a counter notice that in the event of the vacating of the original order on the hearing of the motion he will make a motion for the appointment of a receiver. *Clark v. Clark*, 11 Abb. N. C. (N. Y.) 333.

72. *Clark v. Clark*, 11 Abb. N. C. (N. Y.) 333. See *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

73. See *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

[a] **Specifying in the alternative the relief sought is proper.** *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

74. See *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625.

elsewhere in this work.⁷⁵ Where the motion is based upon matters appearing on the record, no supporting affidavits are necessary.⁷⁶ It is otherwise where the motion is grounded upon facts that are neither apparent from the face of the record or papers on file in the case,⁷⁷ nor within the judicial knowledge of the court.⁷⁸

B. BY WHOM MADE.⁷⁹ — The moving party may make the necessary affidavit,⁸⁰ as may also his attorney when all the facts are within the latter's knowledge,⁸¹ and the matters pertinent to the motion relate to procedure,⁸² unless the statute either expressly or impliedly otherwise provides.⁸³

C. FORM AND SUFFICIENCY.⁸⁴ — FORM OF AFFIDAVIT. — The affidavit

75. See particular titles.

Affidavits of merits, see the title "Affidavits of Merits and Defense."

Amendments.—Affidavits in support of motions to amend, see 1 STANDARD PROC. 892.

Appeals.—Motions for rehearing on appeal, see 2 STANDARD PROC. 407.

Attachment, motion to vacate, 3 STANDARD PROC. 780.

Continuance, motion for, 5 STANDARD PROC. 473.

Default.—Motion to vacate default, see 6 STANDARD PROC. 835.

Execution Sale.—Motion to vacate sale, see 16 STANDARD PROC. 208.

Misjoinder of Causes of Action.—Affidavits in support of motion to strike out cause of action, see 14 STANDARD PROC. 724.

Judgment.—Motion to open or vacate, see 15 STANDARD PROC. 219.

76. *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277; *Bash v. Christian*, 84 Ind. 180; *Darrow v. Miller*, 5 How. Pr. (N. Y.) 247, 3 Code Rep. 241.

77. *Ind.*—*Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277; *Etter v. Anderson*, 84 Ind. 333; *Toledo, W. & W. Ry. Co. v. Gates*, 32 Ind. 238. *Ia.*—*Shellenberger v. Ward*, 8 Iowa 425. *Mass.*—*Spaulding v. Knight*, 118 Mass. 528. *Mich.*—*Stringer v. Dean*, 61 Mich. 196, 27 N. W. 886; *Haywood v. Johnson*, 41 Mich. 598, 2 N. W. 926; *Storey v. Child*, 2 Mich. 107. *Mo.*—*Adler v. Lang*, 26 Mo. App. 226. *Mont.*—*State v. Second Judicial District Court*, 25 Mont. 202, 64 Pac. 352. *N. H.*—*Goodwin v. Blanchard*, 73 N. H. 550, 64 Atl. 22. *N. J.*—*Trenton Mut. Life & Fire Ins. Co. v. Hodges*, 24 N. J. L. 673. *N. Y.*—*Ellis v. Van Ness*, 14 How. Pr. 313; *Bingham v. Bingham*, 1 Civ. Proc. 166; *Mendello v. Rosati*, 30 Misc.

834, 61 N. Y. Supp. 1102. *Tex.*—*Connor v. Zachry*, 54 Tex. Civ. App. 188, 115 S. W. 867, 117 S. W. 177. *Utah.*—*Salt Lake City v. Utah & Salt Lake Canal Co.*, 43 Utah 591, 137 Pac. 638. *Wis.*—*Amory v. Amory*, 26 Wis. 152; *Hungerford v. Cushing*, 8 Wis. 320.

78. *McDonel v. State*, 90 Ind. 320.

[a] A motion for production of articles used as evidence should be supported by affidavit, since the court may not take judicial notice that the articles referred to are in the possession of the opposite party. *McDonel v. State*, 90 Ind. 320.

79. Affidavit of merits, see 1 STANDARD PROC. 670.

Motion to amend, see 1 STANDARD PROC. 893.

80. *Clark v. Frost*, 3 Caines (N. Y.) 125.

[a] A third party is not entitled to make the affidavit when the facts are within the knowledge of the movant. *Clark v. Frost*, 3 Caines (N. Y.) 125.

81. *Truman v. Lester*, 71 App. Div. 612, 75 N. Y. Supp. 548, 10 N. Y. Ann. Cas. 478; *Chase v. Edwards*, 2 Wend. (N. Y.) 283.

[a] A clerk of the attorney has no authority to make it. *Chase v. Edwards*, 2 Wend. (N. Y.) 283.

82. *Truman v. Lester*, 71 App. Div. 612, 75 N. Y. Supp. 548, 10 N. Y. Ann. Cas. 478.

83. See the statutes.

No general rule can be safely laid down as to the circumstances and conditions under which an attorney may make the affidavit. The rule in particular cases will be found in the title dealing with the subject-matter of the particular motion.

84. Forms of affidavits, see 9 STANDARD PROC. 852.

should be written in a legible manner,⁸⁵ and in the English language.⁸⁶ It must be properly entitled,⁸⁷ except where made before suit is commenced,⁸⁸ and must show affirmatively that it is made in the proper venue.⁸⁹

Sufficiency.—All the necessary facts⁹⁰ upon which the relief is sought should be concisely⁹¹ and positively⁹² stated, together with some reason for invoking the action of the court.⁹³ The affidavit need not contain the party's excuse for not noticing the motion for the first day of the term.⁹⁴

D. SERVICE OF AFFIDAVITS.—1. Necessity for.—Copies of affi-

85. *Henry v. Bow*, 20 How. Pr. (N. Y.) 215.

[a] The affidavit may be so defaced with interlineations and erasures that the court will refuse to receive or act upon it. *Henry v. Bow*, 20 How. Pr. (N. Y.) 215.

86. *Spencer v. Doane*, 23 Cal. 418.

[a] Where affidavit is in foreign language it may be excluded on the trial. *Spencer v. Doane*, 23 Cal. 418.

87. *Sterrick v. Pugsley*, 1 Flip. 350, 22 Fed. Cas. No. 13,379; *Irroy v. Nathan*, 4 E. D. Smith (N. Y.) 68.

[a] The name of the judge of the circuit to which the cause is referred need not be stated. *Boyle v. Boyle*, 2 How. Pr. (N. Y.) 10.

88. *Sterrick v. Pugsley*, 1 Flip. 350, 22 Fed. Cas. No. 13,379.

[a] When entitled before suit brought, the affidavit may be rejected. *Sterrick v. Pugsley*, 1 Flip. 350, 22 Fed. Cas. No. 13,379.

89. *Sterrick v. Pugsley*, 1 Flip. 350, 22 Fed. Cas. No. 13,379; *Schemerhorn v. Develin*, 1 N. Y. Code Rep. 13.

[a] When taken before a United States commissioner the proper venue is: "United States of America, District of ———," naming the district and state for which the commissioner is such. *Sterrick v. Pugsley*, 1 Flip. 350, 22 Fed. Cas. No. 13,379.

90. *Ala.*—*Blair v. Cleveland*, 1 Stew. 421. *Cal.*—*Donnelly v. Strueven*, 63 Cal. 182. *Ga.*—*Butler v. Ambrose*, 51 Ga. 152. *Ill.*—*Harter v. People*, 204 Ill. 158, 68 N. E. 447. *Ia.*—*Crouch v. Crouch*, 9 Iowa 269. *Mich.*—*Osborne v. Robbins*, 10 Mich. 277. *N. M.*—*Deemer v. Falkenburg*, 4 N. M. 149, 12 Pac. 717. *Tex.*—*Rollins v. State*, 32 Tex. Crim. 566, 25 S. W. 125. *Wash.*—*State v. Vance*, 29 Wash. 435, 70 Pac. 34.

Conclusions of law will not suffice. See the cases under this note.

Judgment.—Motion to open or vacate, see 15 STANDARD PROC. 220.

91. *U. S.*—*O'Malley v. Times Pub. Co.*, 135 Fed. 909. *Ind.*—*McDonel v. State*, 90 Ind. 320. *N. Y.*—*Mason v. Moore*, 2 How. Pr. 70.

[a] For Order Shortening Notice.

An affidavit for an order shortening notice of motion should state "the present condition of the action and whether at issue, and if not yet tried, the time appointed for holding the next special or trial term where the action is triable." See *Sweeney v. O'Dwyer*, 45 Misc. 43, 90 N. Y. Supp. 806. But this rule has no application to a motion made for the purpose of securing a judicial determination of the question whether the action is or is not at issue. *Sweeney v. O'Dwyer*, 45 Misc. 43, 90 N. Y. Supp. 806.

92. *U. S.*—*Jenks v. Richardson*, 71 Fed. 365. *Kan.*—*Keith v. Stetter*, 25 Kan. 100. *N. C.*—*Evans v. Andrews*, 52 N. C. 117. *Okla.*—*Dunn v. Claunch*, 13 Okla. 577, 76 Pac. 143. *Ore.*—*Bowman v. Wade*, 54 Ore. 347, 103 Pac. 72; *Watson v. Loewenberg*, 34 Ore. 323, 56 Pac. 289. *S. D.*—*Lindquist v. Johnson*, 12 S. D. 486, 81 N. W. 900. *Wyo.*—*Bank of Commerce v. Latham*, 8 Wyo. 316, 57 Pac. 184.

As to affidavits on information and belief, see the title "Information and Belief."

93. *Ill.*—*Dacey v. People*, 116 Ill. 555, 6 N. E. 165. *Ind.*—*McDonel v. State*, 90 Ind. 320; *North British & Merc. Ins. Co. v. Rudy*, 26 Ind. App. 472, 60 N. E. 9. *Kan.*—*Clark v. Ellithorpe*, 7 Kan. App. 337, 51 Pac. 940. *La.*—*State v. Chitman*, 117 La. 950, 42 So. 437.

94. Anonymous, 5 Cow. (N. Y.) 423.

[a] Such excuses are for the court, not for the party. Anonymous, 5 Cow. (N. Y.) 423.

affidavits or other supporting papers must usually be served on the other party or his attorney,⁹⁵ but in certain cases this is not required.⁹⁶

2. Time of Service.—Service of affidavits is required to be made at the time the notice of motion is served,⁹⁷ or the same day the motion is entered,⁹⁸ or a certain specified time before the hearing,⁹⁹ or at the time of making the motion.¹

3. Manner of Service.²—The manner of service must conform to the statutes or rules of court applicable thereto.³

95. *Mich.*—*Bertram v. McNaughton*, 1 *Mich. N. P.* 200. *Mont.*—*State v. Second Judicial District Court*, 25 *Mont.* 202, 64 *Pac.* 352. *N. Y.*—*Fitzroy v. Card*, 1 *Johns. Cas.* 30, *Colem. Cas.* 63; *Bergen v. Boerum*, 2 *Caines* 256, *Colem. & C. Cas.* 404. *Wis.*—*Smith v. Hoyt*, 14 *Wis.* 252; *Corwith v. State Bank*, 8 *Wis.* 376.

[a] **A second service is unnecessary** of affidavits which have recently been served on the adversary, and which the party desires to use on motion in the same cause. In such case he need only give the opposing party notice of his intention to use such affidavits. *Deutermann v. Pollock*, 36 *App. Div.* 522, 55 *N. Y. Supp.* 829.

[b] **True Copies.**—(1) Copies of affidavits served with notice of motion must be true and complete. *Chesebro v. Chesebro*, 21 *Mich.* 506. (2) The jurat, when an essential part of the affidavit, should appear in the copy served (*Chesebro v. Chesebro*, 21 *Mich.* 506. See also *Chase v. Edwards*, 2 *Wend. [N. Y.]* 283), but (3) its omission may not be fatal (*Livingston v. Cheetham*, 2 *Johns. [N. Y.]* 479), if (4) the facts stated are intelligible without it. *Union Furnace Co. v. Shepherd*, 2 *Hill (N. Y.)* 413.

96. *Palmer v. Bosher*, 72 *N. C.* 371.

[a] **Rule Not Applicable to Motion for Judgment.**—Affidavits showing service of summons and failure to answer and the filing of notice of lis pendens, which are to be used in support of a motion for judgment, need not be served with the notice of motion. *Smith v. Hoyt*, 14 *Wis.* 252.

97. *Mont.*—*State v. Second Judicial District Court*, 25 *Mont.* 202, 64 *Pac.* 352. *N. Y.*—*Northrup v. Village of Sidney*, 97 *App. Div.* 271, 90 *N. Y. Supp.* 23; *Brown v. Ricketts*, 2 *Johns. Ch.* 425. *Wis.*—*Smith v. Hoyt*, 14 *Wis.* 252; *Corwith v. State Bank*, 8 *Wis.* 376.

[a] **Only such affidavits can be read**

in support of the motion as are served with the notice of motion. *Northrup v. Village of Sidney*, 97 *App. Div.* 271, 90 *N. Y. Supp.* 23.

[b] **Served After Notice.**—The court may refuse to consider an affidavit served two days after service of notice of motion. *State v. Second Judicial District Court*, 25 *Mont.* 202, 64 *Pac.* 352.

[c] **Additional Affidavits.**—The court may, in its discretion, allow service of other affidavits than those served with the notice of motion, when new facts have been discovered since the motion was made. *Nothrup v. Village of Sidney*, 97 *App. Div.* 271, 90 *N. Y. Supp.* 23.

98. *Chesebro v. Chesebro*, 21 *Mich.* 506; *Bertram v. McNaughton*, 1 *Mich. N. P.* 200.

99. *Turner v. Hahn*, 1 *Colo.* 23.

[a] **Twenty-four hours before the hearing.** But the rule of court requiring such service applies only to affidavits in support of the motion, and not to those in resistance thereof. *Turner v. Hahn*, 1 *Colo.* 23.

1. *Hatch, Kimball & Co. v. Clark, Rice (S. C.)* 268.

[a] **Motion To Set Aside Judgment.** Affidavits, in support of a motion for leave to file a suggestion to set aside a judgment need not be served on the opposite party at the time notice of motion is served, nor at any time previously to making the motion. *Hatch, Kimball & Co. v. Clark, Rice (S. C.)* 268.

2. See generally "Service of Process and Papers."

3. *Anonymous*, 18 *Wend. (N. Y.)* 578.

[a] **Leaving in Conspicuous Place.** (1) The affidavit may be left in some suitable and conspicuous place in the attorney's office where the same is open (*Anonymous*, 18 *Wend. [N. Y.]* 578), but (2) service cannot be made by putting the papers under the door

4. Proof of Service.—Proof of service is, as a rule, made by affidavit, which must be of the required form,⁴ and state facts showing a sufficient service under the statute.⁵

E. FILING.⁶—It is necessary to file the affidavits and papers upon which the motion is based,⁷ and such filing must be done at the proper time,⁸ and in the proper manner and place.⁹

and pushing them into the office of the attorney to whom they are directed. Anonymous, 18 Wend. (N. Y.) 578.

[b] **Service by Mail.**—Birdsall v. Taylor, 1 How. Pr. (N. Y.) 89.

[c] **Failure to serve the affidavits** as required will result in denial of the motion. Corwith v. State Bank, 8 Wis. 376.

4. Anonymous, 4 Hill (N. Y.) 597.

[a] **Entitling by relation** to the principal papers is possible. Thus where the papers for a motion are properly entitled, an affidavit immediately following, or endorsed upon them, though not itself entitled, is sufficient. Anonymous, 4 Hill (N. Y.) 597.

5. Brewer v. Ragan, 128 Ga. 441, 57 S. E. 701; Anonymous, 4 Hill (N. Y.) 597.

[a] **Where service is by mail** the affidavit of proof must state that the papers were enclosed in a wrapper. Anonymous, 25 Wend. (N. Y.) 677.

[b] **Affidavit of Counsel.**—Where the only evidence of service was an affidavit of counsel that "he has in his mind" that service was made by mailing a copy of the motion to one of adversary's counsel, who resided in another county, but it was not stated positively that such was the fact, and such nonresident counsel, made affidavit that he did not receive a copy of the motion, the motion was properly dismissed. Brewer v. Ragan, 128 Ga. 441, 57 S. E. 701.

[c] **That there was no person in the office** at the time, must be stated in an affidavit of service made by leaving the papers in a conspicuous place in the office. Campbell v. Spencer, 1 How. Pr. (N. Y.) 97.

[d] **The place of residence** of an attorney upon whom papers are served must be stated in the affidavit. Brown v. Cook, 2 How. Pr. (N. Y.) 40.

6. See the title "Filing."

7. Ind.—Hubble v. Osborn, 31 Ind. 249. Mont.—State v. Second Judicial District Court, 25 Mont. 202, 64 Pac. 352. N. J.—Cooper v. Galbraith, 24 N. J. L. 219. Pa.—Clemens v. Horton, 13

Wkly. N. Cas. 504. Wis.—Corwith v. State Bank, 8 Wis. 376.

[a] **Affidavits in support of all motions** whether enumerated or non-enumerated must be filed. Anonymous, 5 Cow. (N. Y.) 13.

[b] **An affidavit** not filed, as required (1) may be disregarded (Cooper v. Galbraith, 24 N. J. L. 219), unless (2) it appear that the neglect was occasioned by some casualty which no ordinary precaution could guard against. See Cooper v. Galbraith, 24 N. J. L. 219.

[c] **That the filing might incriminate** the party making the affidavits does not excuse him from filing them. Anonymous, 5 Cow. (N. Y.) 13.

8. Ind.—Hubble v. Osborn, 31 Ind. 249. Mont.—State v. Second Judicial District Court, 25 Mont. 202, 64 Pac. 352. Neb.—Jacoby v. Mitchell, 19 Neb. 537, 26 N. W. 255.

[a] **With the Motion.**—State v. Second Judicial District Court, 25 Mont. 202, 64 Pac. 352; Corwith v. State Bank, 8 Wis. 376.

[b] **Before Argument of Motion.** The court may refuse to allow affidavits to be read when the moving party refused upon request of opposing counsel to file them before argument of the motion. Hubble v. Osborn, 31 Ind. 249.

[c] **Before Submission of Motion.** Of affidavits filed after the submission of the motion and without leave of court, the court is not bound to take notice, nor can such affidavits be considered in reviewing the decision. Jacoby v. Mitchell, 19 Neb. 537, 26 N. W. 255.

[d] **An affidavit supporting a rule** to show cause should be filed upon entering the rule. Cooper v. Galbraith, 24 N. J. L. 219.

[e] **At time of making the motion,** or opposing it. Anonymous, 5 Cow. (N. Y.) 13.

[f] **When Read.**—Affidavits should be filed when read. Clemens v. Horton, 13 W. N. C. (Pa.) 504.

9. Bertram v. McNaughton, 1 Mich.

F. AMENDMENTS. — The court may allow affidavits in support of a motion to be amended so long as the motion is pending and undetermined.¹⁰

G. OBJECTIONS TO AFFIDAVITS. — Objections based on defects in affidavits in support of a motion are waived unless duly made.¹¹

H. ADDITIONAL AFFIDAVITS. — The court, in its discretion, may sometimes permit supplemental affidavits in support of a motion,¹² but the right may be confined to cases where the supplemental affidavits are in answer to new matter introduced by the opponent.¹³

I. COUNTER-AFFIDAVITS. — The adverse party may file opposition affidavits and papers unless the subject is one upon which no denial or issue is permissible.¹⁴ Service of such affidavits is not always required,¹⁵ but where necessary, it must be made within the time prescribed by statute or rule of court.¹⁶

J. REBUTTING AFFIDAVITS. — The moving party has the right to file rebutting affidavits to meet new matter set up in the counter-affidavits of his adversary.¹⁷

N. P. 200.

[a] In the Motion Docket.—*Bertram v. McNaughton*, 1 Mich. N. P. 200.

[b] In What County. — Affidavits used on motions made to a justice out of term, upon notice, must be filed with the clerk of the county where the venue is laid; or in case the place of trial has been changed, in the county to which the other papers in the case are transferred. *Savage v. Relyea*, 3 How. Pr. (N. Y.) 276, 1 Code Rep. 42.

10. *Goings v. Chapman*, 18 Ind. 194. See 1 STANDARD PROC. 705.

11. *Wooster v. Bateman*, 4 Misc. 431, 24 N. Y. Supp. 112, 53 N. Y. St. 562.

[a] At Special Term.—Any objection to the affidavit upon which an order to show cause is granted must be addressed to the special term granting the order, and cannot be made on appeal from the final order granting the relief sought. *Wooster v. Bateman*, 4 Misc. 431, 24 N. Y. Supp. 112, 53 N. Y. St. 562.

12. *Schlesinger v. Modern Samaritans*, 121 Minn. 145, 140 N. W. 1027.

[a] Copies of supplemental affidavits must be served the same length of time before the day for which the motion is noticed, as is necessary for the service of copies of the principal affidavit. *Wilcox v. Howland*, 6 Cow. (N. Y.) 576.

13. See *infra*, XIII, J.

14. Cal.—*Bredfield v. Hannon*, 151

Cal. 497, 91 Pac. 334. Mich.—*Lathrop v. Hicks*, 2 Doug. 223. Minn.—*Richards v. White*, 7 Minn. 345. N. Y. *Quin v. Riley*, 3 Johns. 249. N. C. *Young v. Rollins*, 85 N. C. 485.

Motion to vacate default, see 6 STANDARD PROC. 835.

Judgment.—Motion to vacate judgment, see 15 STANDARD PROC. 227.

[a] Where a right to relief in moving party is shown by the counter-affidavits he may take advantage thereof. *Richards v. White*, 7 Minn. 345.

15. *Bredfield v. Hannon*, 151 Cal. 497, 91 Pac. 334; *Campbell v. Grove*, 2 Johns. Cas. (N. Y.) 105, *Colem. Cas.* 113, *Colem. & C. Cas.* 115.

16. *Chapman v. George R. Read & Co.*, 149 App. Div. 52, 133 N. Y. Supp. 625; *Joyce v. Eastman Kodak Co.*, 163 N. Y. Supp. 623.

[a] The rule in New York is that when at least eight days' notice of motion has been given, affidavits in answer to the motion shall be served at least one day prior to the time at which the motion is noticed to be heard. And under Code Civ. Proc., §768, and Gen. Rul. Pr. 37, where a notice of motion of ten days has been given and answering affidavits have been requested, additional answering affidavits may be filed, in the discretion of the court, if not as a matter of right, one day prior to the time at which the motion is noticed to be heard. *Joyce v. Eastman Kodak Co.*, 163 N. Y. Supp. 623.

17. Cal.—*Bredfield v. Hannon*, 151

XIV. APPEARANCE.¹⁸—By appearing and resisting a motion on the merits a party waives all objections he might have to the courts hearing the motion.¹⁹ If, on the other hand, the movant fails to appear in support of his motion, the court may properly dismiss²⁰ or deny²¹ it. But the opposing party has the right to have the motion heard,²² and in some jurisdictions he is entitled to an order for costs against the defaulting movant.²³

Default.—Upon failure of the party moved against to appear and oppose the motion, an order of default may be made against him granting such relief as is asked for in the moving papers.²⁴

XV. WITHDRAWAL AND ABANDONMENT.—The movant may abandon his motion by failure to enter²⁵ or prosecute the same,²⁶ or by filing a second motion inconsistent therewith.²⁷ He is entitled also upon payment of costs²⁸ to withdraw his motion,²⁹ but leave of

Cal. 497, 91 Pac. 334. **N. Y.**—Campbell v. Grove, 2 Johns. Cas. 105, **Colem.** Cas. 113, **Colem. & C. Cas.** 115; Deas v. Smith, 1 Caines 171; Callen v. Kearney, 2 Cow. 529; Jacobs v. Miller, 10 Hun 230. **N. C.**—Young v. Rollins, 85 N. C. 485.

[a] **Time To File.**—Where counter-affidavits are filed at the time of the hearing without previous notice or service upon the mover the latter's remedy is an affidavit in rebuttal and the court in its discretion will grant further time to file such affidavit. Bredfield v. Hannon, 151 Cal. 497, 91 Pac. 334.

18. See generally "Appearances."

Appearance as waiver of notice, see *supra*, XI, E, 2.

Motion as appearance, see 2 **STANDARD PROC.** 493.

19. Rush v. Johnson, 75 Ill. App. 234; State v. Estes, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

[a] **Objections to the Term.**—By appearing and arguing a motion the party waives objections to the hearing of the motion at that term, notwithstanding an order has been previously entered continuing the motion to the next term. Rush v. Johnson, 75 Ill. App. 234.

20. Clowser v. Noland, 72 Mo. App. 217.

21. Jefferson v. Brundage, 108 Minn. 7, 120 N. W. 1092.

22. Bosworth v. Hightower, 73 Ga. 46; Roosevelt v. Fulton, 5 Cow. (N. Y.) 438; Bolles v. Duff, 7 Abb. Pr. N. S. (N. Y.) 385, 55 Barb. 313, 38 How. Pr. 492.

23. Thompson v. Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 233.

24. **Ind.**—Scott v. Indianapolis Waggon Works, 48 Ind. 75. **La.**—Haggerty's Succession, 28 La. Ann. 87. **Mich.** Parsons v. Copland, 5 Mich. 143. **Minn.** Barker v. Walbridge, 14 Minn. 469. **Mo.**—Robinson v. Rice, 20 Mo. 229. **N. Y.**—Thompson v. Erie R. Co., 9 Abb. Pr. (N. S.) 233, 238; Jackson *ex dem.* Counter v. Giles, 3 Caines 88; Bowman v. Sheldon, 5 Sandf. 657.

25. Stille v. Wood, 1 N. J. L. 162.

[a] **Notice** must be given to the opposite party. Stille v. Wood, 1 N. J. L. 162.

26. Hoops v. Culbertson, 17 Iowa 305; Foster v. Wade, 4 Mete. (Ky.) 252.

27. Kentucky Central R. R. Co. v. McGinty, 9 Ky. L. Rep. 356.

[a] **Rule Illustrated.**—A motion for judgment on a special verdict will be deemed abandoned where, during its pendency, a second motion is filed, asking for a new trial on the ground that the special verdict is contrary to the evidence. Kentucky Central R. R. Co. v. McGinty, 9 Ky. L. Rep. 356.

28. Walkenshaw v. Perzel, 5 Robt. (N. Y.) 648; Bates v. James, 1 Duer (N. Y.) 668.

[a] **But a distinct part of a motion** may be withdrawn without payment of costs. Thus where a motion as originally noticed is, 1st, for leave to add parties defendant; and 2d, for an injunction and a receiver; the first part of the motion may be withdrawn without paying costs. Walkenshaw v. Perzel, 5 Robt. (N. Y.) 648.

29. Louisville, N. A. & C. Ry. Co. v. Renicker, 17 Ind. App. 619, 47 N. E. 239; Kjellander v. Kjellander, 92 Kan. 42, 139 Pac. 1013.

court should first be obtained if he wishes to file a second motion.³⁰

Successive Motions.—A second motion for the same purpose may be filed,³¹ providing the first motion has been withdrawn by leave of the court,³² and the costs thereof paid.³³ In the absence of such leave the court may disregard the second motion.³⁴

XVI. DISMISSAL.—It is proper practice to dismiss the motion where the moving party fails to appear and prosecute it.³⁵ After his appearance, dismissal may be ordered in a proper case,³⁶ but, where the motion shows on its face a prima facie case for the relief asked, it cannot be rejected on the application of the opposite party.³⁷

XVII. HEARING.—A. JURISDICTION TO HEAR.—The motion must be heard by a court having jurisdiction to entertain it.³⁸

[a] **Refiling Implied.**—Where the court disposes of a motion, filed before a former motion inconsistent therewith, was withdrawn, the second motion will be considered as having been refiled after the withdrawal of the other. *Louisville, N. A. & C. Ry. Co. v. Renicker*, 17 Ind. App. 619, 47 N. E. 239.

30. See *infra*, this section.

31. *Kjellander v. Kjellander*, 92 Kan. 42, 139 Pac. 1013.

[a] **It is discretionary with the court to permit successive motions.** *Reeves & Co. v. Best*, 13 Colo. App. 225, 56 Pac. 985.

32. *Kjellander v. Kjellander*, 92 Kan. 42, 139 Pac. 1013; *Hoover v. Rochester Printing Co.*, 2 App. Div. 11, 37 N. Y. Supp. 419, 72 N. Y. St. 717.

[a] **A statement that the first motion is withdrawn** contained in the notice of the second motion does not alter the rule. *Hoover v. Rochester Printing Co.*, 2 App. Div. 11, 37 N. Y. Supp. 419, 72 N. Y. St. 717.

33. *Hoover v. Rochester Printing Co.*, 2 App. Div. 11, 37 N. Y. Supp. 419, 72 N. Y. St. 717.

34. *Kjellander v. Kjellander*, 92 Kan. 42, 139 Pac. 1013.

[a] **It is unfair to the court and to the opposite party in any action to file successive pleadings or motions for the same purpose and without leave of court.** If one may file two motions for the same purpose he may file three or more. *Kjellander v. Kjellander*, 92 Kan. 42, 139 Pac. 1013.

35. See *supra*, XIV.

36. *Hewitt v. Dean* (Cal.), 26 Pac. 1101.

[a] **After a judgment is set aside, a motion resting upon such judgment**

will be dismissed. *Hewitt v. Dean* (Cal.), 26 Pac. 1101.

37. *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56; *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277; *Johnson v. Moore*, 112 Ind. 91, 13 N. E. 106.

[a] **Notice of Motion.**—Whether by order to show cause or by notice signed by attorney, is not a writ or process which can be vacated or quashed upon an independent motion therefor. *Matter of Van Ness*, 21 Misc. 249, 47 N. Y. Supp. 702.

[b] **A motion (1) to strike out another motion is not proper.** Ind.—*Long v. Ruch*, 148 Ind. 74, 47 N. E. 156; *Clause Printing Press Co. v. The Chicago Trust & Sav. Bank*, 148 Ind. 680, 48 N. E. 245; *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277. Ia.—*German Sav. Bank v. Cady*, 114 Iowa 228, 86 N. W. 277. N. Y.—*Matter of Van Ness*, 21 Misc. 249, 47 N. Y. Supp. 702. Pa.—*Newlin v. Armstrong*, 8 W. N. C. 255. Wash.—*Mann v. Young*, 1 Wash. Ter. 454. Wyo.—*Reid v. Fillmore*, 12 Wyo. 72, 73 Pac. 849. (2) The proper practice of disposing of a motion, unless for scandal or impertinence, is to consider it and either sustain or deny it. *Reid v. Fillmore*, 12 Wyo. 72, 73 Pac. 849. (3) But if entertained and sustained by the court it is equivalent to overruling the first motion. *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156; *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56; *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277; *Reid v. Fillmore*, 12 Wyo. 72, 73 Pac. 849. (4) And if overruled it does not necessarily pass on the question whether the first motion was a proper one. *German Sav. Bank v. Cady*, 114 Iowa 228, 86 N. W. 277.

38. *Lowry v. Atlantic Coast Line R.*

Place of. — The motion is generally heard in the place where the application is made.³⁹ If made in the principal cause the motion must be heard in the county where the action is pending,⁴⁰ unless the parties consent to its being heard and decided outside the county.⁴¹

Outside the Court. — Where the court has jurisdiction to entertain a motion in chambers, he may do so at any place in his district.⁴²

B. NOTICE OF HEARING. — The party making the motion is not entitled to notice of the hearing,⁴³ but the opposite party must be notified where the statute or practice requires notice.⁴⁴

C. TIME FOR HEARING. — 1. In General. — Courts have a large discretion in fixing the time for hearing pending motions.⁴⁵ If noticed for a certain day the motion should be heard on that day,⁴⁶ unless postponed or continued by order of the court.⁴⁷ Certain motions, however, stand over as a matter of course, as for example, a motion noticed⁴⁸ to be

Co., 92 S. C. 33, 75 S. E. 278; *China v. Courtney*, 85 S. C. 245, 67 S. E. 234; *Kirtley v. Cabell County Court*, 69 W. Va. 327, 71 S. E. 401.

Motion to amend judgment, see 15 STANDARD PROC. 138.

Judgment non obstante veredicto, motion for, see 14 STANDARD PROC. 968.

Hearing in vacation, see 6 STANDARD PROC. 46; 16 STANDARD PROC. 613. Motions to dissolve injunction, see 13 STANDARD PROC. 251.

[a] **At Special Session.**—A county court cannot hear a motion and make an order thereon at a special session unless the record shows the special session to have been held upon the required statutory notice. *Kirtley v. Cabell County Court*, 69 W. Va. 327, 71 S. E. 401.

39. See *supra*, IV.

40. *Atlantic Nat. Bank v. Peregoy-Jenkins Co.*, 147 N. C. 293, 61 S. E. 68.

41. *Atlantic Nat. Bank v. Peregoy-Jenkins Co.*, 147 N. C. 293, 61 S. E. 68.

[a] **The record must show such consent.** *Atlantic Nat. Bank v. Peregoy-Jenkins Co.*, 147 N. C. 293, 61 S. E. 68.

[b] **Rule Illustrated.**—A judge of one county sitting in another county has jurisdiction to hear a motion filed in a third county when the judge of the latter county requested him to act in the matter and the papers were sent to him upon stipulation of the attorneys. *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005.

42. *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495.

[a] **In court house corridor** as judge was leaving. *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495.

43. *Cohen v. Superior Court (R. I.)*, 97 Atl. 794.

[a] **The duty is imposed upon the moving party** after he has filed his motion of following in the clerk's office the travel of the cause. He is entitled to notice neither of the hearing of the motion nor of decision thereon. *Cohen v. Superior Court (R. I.)*, 97 Atl. 794.

44. *Hennen v. The New Orleans & C. Ry. Co.*, 20 La. Ann. 544.

45. *Barnes v. State*, 68 Fla. 291, 67 So. 131; *Gurney v. Steffens*, 56 Kan. 295, 43 Pac. 241.

46. *Ky.*—*Foster v. Wade*, 4 Metc. 252; *McDowall v. Macher*, Sneed 145. *Mich.*—*Ireland v. Spalding*, 11 Mich. 455. *N. Y.*—*Vernovy v. Tanney*, 3 How. Pr. 359. *Wis.*—*Allen v. Beekman*, 42 Wis. 185. *Vt.*—*Partridge & Co. v. Stocker*, 36 Vt. 108, 84 Am. Dec. 664.

[a] **“Or as Soon Thereafter as Counsel Can Be Heard.”**—A motion noticed for a certain day “or as soon thereafter as counsel can be heard,” should be heard on the day designated or within a reasonable time thereafter. *Stephens v. Kaga*, 142 Ind. 523, 41 N. E. 930.

47. See *infra*, XVII, C, 4.

48. *Mathis v. Vail*, 10 How. Pr. (N. Y.) 458; *Bronner v. Loomis*, 17 Hun (N. Y.) 439.

heard at chambers, or one noticed to be heard at a designated day in term.⁴⁹

Special motions are not considered by the court until the day following that upon which they are entered.⁵⁰

2. Respecting the Term.—It is sometimes required that motions not involving the merits be determined at a special term.⁵¹ A motion cannot be heard at a term prior to that to which the opposite party was cited to appear,⁵² but a motion pending and undetermined at the end of a term will stand over to the subsequent term,⁵³ and the court has power to order pending motions carried over to a subsequent term.⁵⁴

3. Time of Hearing at Trial.—Motions constituting dilatory objections must be disposed of before the trial upon the merits is entered upon by the parties.⁵⁵ Two motions may be of such a character as to be triable together,⁵⁶ but if the court proceeds to try them singly, the logical order of precedence should be followed.⁵⁷

[a] **If noticed to be heard on the first day** of the term and a sufficient number of judges are not present on that day to hear court, the motion may be taken up on the first day on which a court is formed. *Com. v. McClelland, Hardin (Ky.)* 28.

49. *Anonymous*, 1 Johns. (N. Y.) 143. See *Ex parte Brown*, 5 Cow. (N. Y.) 31; *Anonymous*, 2 Wend. (N. Y.) 241.

[a] **The notice need not contain the words** "or as soon thereafter as counsel can be heard," to authorize the making of the motion as stated in the text. *Anonymous*, 1 Johns. (N. Y.) 143.

50. *United States Exp. Co. v. Bedbury*, 40 Ill. 122.

[a] **The reason they are allowed to lie over** is to give the opposite party an opportunity to file counter suggestions. *United States Express Co. v. Bedbury*, 40 Ill. 122.

51. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

[a] **No motion made at a special term** can be heard at the general term unless such motion involve the merits of the proceeding or suit in which it is made. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

52. *Lane v. Peters*, 1 White & W. Civ. Cas., §1030.

53. *Hartman v. Viera*, 113 Ill. App. 216; *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278.

[a] **The continuance is by operation of the statute** which provides that "all causes and proceedings pending and

undisposed of in any of said courts at the end of a term shall stand continued till the next term of the court." *Hartman v. Viera*, 113 Ill. App. 216.

[b] **A notice fixing July 3d** "or as soon thereafter as counsel can be heard" as the time for hearing a motion, did not lose its vitality by the court's failure to dispose of the motion at that term. Such notice gave the court power to hear the motion on Nov. 6 thereafter. *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278.

54. *Calaf v. Fernandez*, 239 Fed. 795, 152 C. C. A. 581.

55. *Erwin v. Austin*, 1 White & W. Civ. Cas., §1037.

Motion to quash indictment or information, see 12 STANDARD PROC. 637.

56. *Chopin v. Freeman*, 138 La. 423, 70 So. 421.

[a] **Rule Illustrated.**—A motion by plaintiff to strike out an exception to citations and service thereof, and a motion to dissolve the injunction, filed by the defendants, on the ground among others that the matters in dispute had been amicably settled by prior agreement between the parties may be tried together. *Chopin v. Freeman*, 138 La. 423, 70 So. 421.

57. *Chopin v. Freeman*, 138 La. 423, 70 So. 421; *Anonymous*, 2 Caines (N. Y.) 377.

[a] **A motion to strike out defendant's motion to dissolve an injunction** should be heard in the order stated for where the court hears and decides the defendant's motion first it operates

4. Continuances and Adjournments.—By operation of the statute, motions may stand over, even to a subsequent term, without any formal order of court.⁵⁸ The court, however, may, in its discretion postpone the hearing on a motion,⁵⁹ especially if good cause is shown why a continuance should be granted.⁶⁰

D. CONDUCT OF HEARING.—**1. Discretion of Court.**—The conduct of the hearing on motion is largely within the discretion of the trial judge.⁶¹

2. Consolidation of Motions.—The court may in a proper case consolidate several motions.⁶²

3. Reference.—The court on hearing of a motion may order a reference to take further testimony,⁶³ but it is in nowise concluded by

as a refusal to hear plaintiff's motion to strike out. *Chopin v. Freeman*, 138 La. 423, 70 So. 421.

[b] **A motion to overrule a frivolous plea** has the same preference as motions on frivolous demurrers. *Anonymous*, 2 Caines (N. Y.) 377.

58. See *supra*, XVII, C, 1.

Continuances in general, see the title "Continuances."

59. **Ga.**—*Snelling v. Bryce & Co.*, 41 Ga. 513. **Ill.**—*Hartman v. Viera*, 113 Ill. App. 216. **Kan.**—*Gurney v. Steffens*, 56 Kan. 295, 43 Pac. 241; *Hanna v. Barrett*, 39 Kan. 446, 18 Pac. 497. **N. Y.**—*Northrup v. Village of Sidney*, 97 App. Div. 271, 90 N. Y. Supp. 23.

[a] **Order Continuing All Causes.** A general order continuing all pending causes to the next term would continue a pending motion. *Hartman v. Viera*, 113 Ill. App. 216.

[b] **Motion Not Filed.**—A general order continuing all pending motions, operates to continue a motion for rehearing which has been delivered to the clerk for filing, but is not filed or docketed. *Houston & T. C. R. Co. v. Davis* (Tex. Civ. App.), 32 S. W. 163.

60. *Dieter v. Title Guarantee & Trust Co.*, 96 App. Div. 168, 89 N. Y. Supp. 110; *Jackson ex dem Fisher v. Ferguson*, 3 Caines (N. Y.) 127.

[a] **Necessity for Request.**—A party who is in court when a motion is made cannot complain that the court proceeds to hear and determine the same forthwith, when he has not asked for further time to produce counter evidence, nor has even advised the court he intended to resist the motion. *Petrie v. People*, 40 Ill. 334.

[b] **That counsel is engaged in another case** is good cause for postponement of the motion. *Dieter v. Title*

Guarantee & Trust Co., 96 App. Div. 168, 89 N. Y. Supp. 110.

[c] **To Prepare Affidavits.**—A party must show some good reason why he is not prepared to entitle him to a postponement to the next non-enumerated day, to prepare affidavits in opposition. *Jackson ex dem. Fisher v. Ferguson*, 3 Caines (N. Y.) 127.

[d] **To Enable Movant To Reply.**—Where a conclusive answer is given to a special motion, the motion will be denied, and will not be continued over to a subsequent term to give the moving party an opportunity of replying. *Standard v. Williams*, 10 Wend. (N. Y.) 599.

[e] **Necessary absence of a party** is ground for a reasonable continuance. *Ohly v. Ohly*, 11 N. Y. Wkly. Dig. 129.

61. *Goodwin v. Blanchard*, 73 N. H. 550, 64 Atl. 22.

62. *State v. Moore*, 57 Tex. 307; *Marks v. Auerbach*, 94 Wis. 668, 69 N. W. 1001.

[a] **Motions by a judgment creditor** to have proceeds of executions issued by another judgment creditor applied first in payment of movant's judgment may be consolidated. *Marks v. Auerbach*, 94 Wis. 668, 69 N. W. 1001.

63. *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Davies v. Davies*, 20 Abb. N. C. 170; *Jones v. Haile Gold Mining Co.*, 79 S. C. 47, 60 S. E. 35.

[a] **In order to speed the cause** on its merits the court, where it is not satisfied with the facts furnished by the affidavit and desires further testimony, may order a reference for that purpose. *Jones v. Haile Gold Mining Co.*, 79 S. C. 47, 60 S. E. 35.

the findings of the referee.⁶⁴

4. Arguments.⁶⁵ — The matter of arguing motions is controlled by rules of court or statutes. Certain motions may be submitted on briefs,⁶⁶ or written argument,⁶⁷ and in respect to other motions oral argument may be required.⁶⁸ The court may, in the exercise of its general control over the conduct of the proceedings limit the argument of counsel upon the motion,⁶⁹ or the number of counsel to be heard on each side.⁷⁰

Right To Open and Close. — The moving party has the right to open and close.⁷¹

E. SCOPE OF HEARING. — Though the hearing is sometimes confined to the grounds assigned by the mover,⁷² grounds appearing upon the face of the record but not set out in the motion, may also it seems, be considered.⁷³

F. PROVINCE OF JUDGE AND JURY. — What state of facts the minutes and records of the court represent is for the judge.⁷⁴

64. *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572.

65. See generally "Arguments."

As to affidavits in support of motion. See *supra*, XIII.

66. *Ind.*—*Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567. *La.*—*Breaux v. Negrotto*, 43 La. Ann. 426, 9 So. 502. *Neb.* *Spencer v. Thistle*, 14 Neb. 21, 14 N. W. 550. *Wis.*—*Collart v. Fisk*, 38 Wis. 238.

67. *Dierloff v. Winterfield*, 26 Wis. 175.

68. Anonymous, 5 Wend. (N. Y.) 138.

[a] **Special motions** should be argued; to submit them on briefs is erroneous. Anonymous, 5 Wend. (N. Y.) 138.

69. *Mick v. Corporation of Royal Exch. Assur.*, 87 N. J. L. 628, 94 Atl. 808. See generally the title "Arguments."

70. *Mick v. Corporation of Royal Exch. Assur.*, 87 N. J. L. 628, 94 Atl. 808.

[a] **Where several cases are being tried together** the court in its discretion may refuse to hear more than one counsel on a side upon the same motion. *Mick v. Corporation of Royal Exch. Assur.*, 87 N. J. L. 628, 94 Atl. 808.

71. *Del.*—*First Nat. Bank v. Lieberman*, 1 Marv. 367, 41 Atl. 90. *Ga.* *Boyce v. Burchard*, 21 Ga. 74. *N. Y.* *The New York & H. R. Co. v. The Mayor etc.* of New York, 1 Hilt. 562.

Vt.—*Tarbel v. White River Bank*, 24 Vt. 655.

See generally "Opening and Closing."

Motion to vacate attachment, see 3 15 STANDARD PROC. 217, et seq.

[a] **An order to show cause** is regarded as a notice of motion and the party obtaining it is entitled to open and close. *The New York & H. R. Co. v. The Mayor etc.* of New York, 1 Hilt. (N. Y.) 562.

72. *Nevada Co. v. Farnsworth*, 89 Fed. 164; *Challiss v. Headley*, 9 Kan. 684.

Motion to dissolve injunction, see 13 STANDARD PROC. 245.

Judgment on pleadings, motion for, see 14 STANDARD PROC. 951.

Motion to amend judgment, see 15 STANDARD PROC. 142.

Motion to vacate judgment, see 15 STANDARD PROC. 217, et seq.

73. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118; *Hancock v. Youree*, 25 Okla. 460, 106 Pac. 841.

[a] **The reason is that** "it would be circuitous, dilatory and serve no useful or just purpose to deny the motion upon the particular grounds assigned by the mover, and leave him to make another motion for the same purpose, simply assigning in its support a ground not specified, but which plainly appeared in the record at the hearing of the first motion." *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

74. *Lewis v. Armstrong*, 64 Ga. 645.

G. FINDINGS AND CONCLUSIONS. — The necessity for findings as the basis of an order disposing of a motion is treated elsewhere in this work.⁷⁵

XVIII. DECISION UPON THE MOTION.⁷⁶ — A. NATURE OF. The decision upon a motion, though a judicial act,⁷⁷ is not a judgment but an order merely,⁷⁸ and is not appealable unless made so by statute.⁷⁹

B. RULES OF DECISION. — Where the motion is too broad in its scope it will be denied in the form in which it is presented unless the moving party is entitled as a matter of right to the relief demanded.⁸⁰

C. NOTICE OF DECISION. — Notice of decision on hearing of motion need not be given the moving party.⁸¹

D. DECISION OR ORDER. — Matters pertaining to the form and requisites of orders and the remedies to review them will be found in another part of this work.⁸²

E. REARGUMENT AND REHEARING. — The court has the power upon proper application to grant a rehearing or reargument of a motion,⁸³ but after the time for appealing from the order has expired this power will not be exercised.⁸⁴

How Obtained. — The rehearing or reargument is obtained by motion,⁸⁵ addressed to the discretion of the court,⁸⁶ and showing a sufficient reason for the same.⁸⁷

See generally "Province of Judge and Jury."

[a] **Whether Suit Dismissed.**—An issue of fact as to the passage of an order dismissing a case, involved in a motion to enter it *nunc pro tunc*, is for the court. *Lewis v. Armstrong*, 64 Ga. 645.

75. See 8 STANDARD PROC. 1001.

Judgment on pleadings, motion for, see 14 STANDARD PROC. 955.

76. Upon default of moving party, see *supra*, XIV.

Upon default of party moved against, see *supra*, XIV.

77. *State v. Wolever*, 127 Ind. 306, 26 N. E. 762.

78. See *supra*, I.

79. *State ex rel. Shackelford v. McElhinney*, 241 Mo. 592, 145 S. W. 1139. See generally, "Appeals," "Orders."

80. *Padgett v. State*, 64 Fla. 389, 59 So. 946, Ann. Cas. 1914 B, 897.

81. *Cohn v. Superior Court (R. I.)*, 97 Atl. 794.

82. See the title "Orders."

83. *Ia.*—*Theis v. Chicago & N. W. Ry. Co.*, 107 Iowa 522, 78 N. W. 199. *Mont. State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614. *N. Y. Keller v. Friedman*, 138 N. Y. Supp. 671.

84. *Megary v. Shipley*, 72 Md. 33,

19 Atl. 151; *A. Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317, 13 N. Y. Ann. Cas. 15; *Matter of Sillman's Est.*, 38 Misc. 226, 77 N. Y. Supp. 267.

[a] **Change in Decision.**—An error of law disclosed for the first time by a subsequent decision of a higher court, will not justify a reargument of the decision where the time for appealing therefrom has expired. *A. Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317, 13 N. Y. Ann. Cas. 15.

85. *Hauser v. Herzog*, 141 App. Div. 522, 126 N. Y. Supp. 337.

[a] Based on the original papers. *Hauser v. Herzog*, 141 App. Div. 522, 126 N. Y. Supp. 337.

86. *A. Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317, 13 N. Y. Ann. Cas. 15.

[a] **Discretion Not Arbitrary.**—The power to grant a rehearing or reargument of a motion cannot be arbitrarily exercised and if the judge grants it upon insufficient grounds it is an error which the appellate court will correct. *Matter of Livingston*, 74 Misc. 494, 134 N. Y. Supp. 148; *A. Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317, 13 N. Y. Ann. Cas. 15.

87. See the discussion immediately following.

Grounds. — To entitle the party to a rehearing it must appear that the order is palpably erroneous⁸⁸ in that the court overlooked some decision or some principle of law which would have a controlling effect,⁸⁹ or was under some misapprehension of fact.⁹⁰

F. CONCLUSIVENESS OF DECISION.⁹¹ — A decision upon a motion, so long as it stands, is conclusive in subsequent controversies when it has adjudicated some substantial right especially if it is made upon a full hearing of controverted facts,⁹² but it has not the force of a former adjudication in the same sense as a judgment finally settling the controversy,⁹³ consequently in a proper case a renewal of the motion may be granted.⁹⁴

XIX. RENEWAL OF MOTION. — A. RIGHT TO RENEW. — 1.

In General. — A party whose motion has been denied has no absolute right to renew the same.⁹⁵ The court, however, having power to review its own decisions may permit a party to renew his motion,⁹⁶ its power

88. *In re Adams*, 24 Misc. 293, 53 N.Y. Supp. 666.

89. *Hauser v. Herzog*, 141 App. Div. 522, 126 N. Y. Supp. 337; *A. Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317, 13 N. Y. Ann. Cas. 15.

[a] **Where an inapplicable case controlled the decision of the motion, a rehearing should be granted.** *Hauser v. Herzog*, 141 App. Div. 522, 126 N. Y. Supp. 337.

[b] **Improper Affidavits.**—It is good ground for granting a reargument that in deciding the motion the justice took into consideration affidavits not properly admissible. *Stromberg v. Di Salvo*, 38 Misc. 139, 77 N. Y. Supp. 102.

90. See *A. Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317, 13 N. Y. Ann. Cas. 15.

91. See generally “**Orders**”; see also “**Judgments**”; “**Res Judicata**.”

92. *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614; *Riggs v. Pursell*, 74 N. Y. 370.

[a] **A denial of a motion by one justice of the supreme court will prevent another justice of the same court from granting it.** *Heischouer v. Polishook*, 152 App. Div. 193, 136 N. Y. Supp. 567.

93. **U.S.**—*Mitchell v. Porter*, 194 Fed. 49, 114 C. C. A. 69. **Cal.**—*Johnston v. Brown*, 115 Cal. 694, 47 Pac. 686; *Ford v. Doyle*, 44 Cal. 635; *Lawson v. Lawson*, 15 Cal. App. 496, 115 Pac. 461, 464; *In re Riviere's Estate*, 8 Cal. App. 773, 98 Pac. 46. **La.**—*Succession of Edward C. Mielke*, 8 La. Ann. 11. **Minn.**—*McLaughlin v. City of Breckenridge*,

122 Minn. 154, 141 N. W. 1134, 142 N. W. 134. **Mont.**—*State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614; *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592. **N. Y.**—*Haskell v. Moran*, 117 App. Div. 251, 102 N. Y. Supp. 388; *Cruikshank v. Cruikshank*, 30 App. Div. 381, 51 N. Y. Supp. 926; *Belmont v. Erie R. Co.*, 52 Barb. 637. **S. D.**—*Fisk v. Hicks*, 29 S. D. 399, 137 N. W. 424, Ann. Cas. 1914 D, 971. **Tex.**—*Holmes v. Coalson* (Tex. Civ. App.), 178 S. W. 628.

See generally “**Judgments**”; “**Res Judicata**.”

94. See *infra*, XIX.

95. *Johnson v. Success Brick Machinery Co.*, 104 Miss. 217, 61 So. 178, 62 So. 4.

96. **Cal.**—*Hitchcock v. McElrath*, 69 Cal. 634, 11 Pac. 487; *Kenney v. Kelleher*, 63 Cal. 442; *Lawson v. Lawson*, 15 Cal. App. 496, 115 Pac. 461, 464; *In re Riviere's Estate*, 8 Cal. App. 773, 98 Pac. 46. **Kan.**—*Adams v. Lockwood, Englehardt & Co.*, 30 Kan. 373, 2 Pac. 626. **Minn.**—*McLaughlin v. City of Breckenridge*, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134; *Stacy v. Stephen*, 78 Minn. 480, 81 N. W. 391; *Carlson v. Carlson*, 49 Minn. 555, 52 N. W. 214. **Miss.**—*Johnson v. Success Brick Machinery Co.*, 104 Miss. 217, 61 So. 178, 62 So. 4. **Neb.**—*Stutzner v. Printz*, 43 Neb. 306, 61 N. W. 620. **N. Y.**—*Riggs v. Pursell*, 74 N. Y. 370. **S. D.**—*Fisk v. Hicks*, 29 S. D. 399, 137 N. W. 424, Ann. Cas. 1914 D, 971. **Tex.**—*Holmes v. Coalson* (Tex. Civ. App.) 178 S. W. 628. **Wash.**—*Clein v. Wand-schneider*, 14 Wash. 257, 44 Pac. 272.

in this respect, being most frequently exercised where additional facts are presented.⁹⁷ But in order to justify a renewal, good cause must be shown,⁹⁸ and an application to renew a motion for the same purpose and upon the same state of facts is usually denied,⁹⁹ though even in such cases the court may in its discretion grant a renewal where the facts are more fully stated.¹

2. Terms.—Where an order denying a motion grants privilege to renew it upon certain terms, a compliance with such terms is essential to the right to renew.²

3. Leave of Court.—*a. Necessity for.*—A motion once denied on the merits cannot, as a general rule, be renewed on the same state of facts,³ or upon facts previously existing,⁴ unless leave of court is first obtained. But no leave of court is necessary where the second motion is made upon a new state of facts arising since the making of the first motion,⁵ or upon new grounds not known until after the hearing on the first motion,⁶ or where the former order was obtained by

97. *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614; *People ex rel. Barry v. Mercein*, 3 Hill (N. Y.) 399, 416, 38 Am. Dec. 644.

98. *Holmes v. Cosalon* (Tex. Civ. App.), 178 S. W. 628.

[a] **Surprise** as ground for renewal, see *Mitchell v. Allen*, 12 Wend. (N. Y.) 290.

[b] **Ignorance of the practice** as justifying a renewal, see *Dollfus v. Froesch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368.

99. *Cal.*—*Kenney v. Kelleher*, 63 Cal. 442; *Ford v. Doyle*, 44 Cal. 635; *Beaumont v. Midway Provident Oil Co.*, 21 Cal. App. 128, 131 Pac. 106. *Ia.* *Barkdull v. Callaman*, 33 Iowa 391. *Kan.*—*Adams v. Lockwood, Englehart & Co.*, 30 Kan. 373, 2 Pac. 626; *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594. *Minn.*—*Griffin v. Jorgenson*, 22 Minn. 92. *N. Y.*—*Schlemmer v. Myerstein*, 19 How. Pr. 412; *Allen v. Gibbs*, 12 Wend. 202. *Wis.*—*Mills v. Morris*, 150 Wis. 277, 136 N. W. 556.

1. *Cal.*—*Kenney v. Kelleher*, 63 Cal. 442. *Minn.*—*McLaughlin v. City of Breckenridge*, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134. *N. Y.*—*Riggs v. Pursell*, 74 N. Y. 370.

2. *Wetmore v. Wetmore*, 29 App. Div. 512, 51 N. Y. Supp. 800.

[a] **Payment of costs** being the terms, renewal is automatically stayed until costs paid. *Porboner v. Miller*, 97 Misc. 376, 161 N. Y. Supp. 306.

3. *U. S.*—*A. B. Dick Co. v. Wichelman*, 109 Fed. 81; *In re Brockway*, 21

Blatchf. 136, 23 Fed. 583. *Cal.*—*Tyrell v. Baldwin*, 78 Cal. 470, 21 Pac. 116; *Hitchcock v. McElrath*, 69 Cal. 634; *Bowers v. Cherokee Bob*, 46 Cal. 279. *Kan.*—*Adams v. Lockwood, Englehart Co.*, 30 Kan. 373, 2 Pac. 626. *Me.* *Cilley v. Limerock Railroad Company*, 115 Me. 382, 99 Atl. 17. *Mich.*—*Johnson v. Johnson, Walker* 309. *Minn.* *Stacy v. Stephens*, 78 Minn. 480, 81 N. W. 391; *Irvine v. Myers & Co.*, 6 Minn. 558. *N. Y.*—*Riggs v. Pursell*, 74 N. Y. 370; *Hayward v. Wemple*, 152 App. Div. 201, 136 N. Y. Supp. 629; *Childs v. Childs*, 144 App. Div. 168, 128 N. Y. Supp. 782; *Gall v. Gall*, 58 App. Div. 97, 68 N. Y. Supp. 649; *Belmont v. Erie R. Co.*, 52 Barb. 637; *Marry v. James*, 34 How. Pr. 238. *N. C.*—*Jones v. Thorne*, 80 N. C. 72. *S. D.*—*Jeansch v. Lewis*, 1 S. D. 609, 48 N. W. 128. *Wis.*—*Pierce v. Kneeland*, 9 Wis. 23, 34.

4. *Vickery v. Mountelair Jam Kitchens*, 161 N. Y. Supp. 409.

5. *Cal.*—*Ford v. Doyle*, 44 Cal. 635. *Kan.*—*Wilson County Comrs. v. McIntosh*, 30 Kan. 238, 1 Pac. 572. *La.* *Harlan v. White*, 18 La. Ann. 399. *N. Y.*—*DeLacy v. Kelly*, 147 App. Div. 37, 131 N. Y. Supp. 702; *Haskell v. Moran*, 117 App. Div. 251, 102 N. Y. Supp. 388; *White v. Munroe*, 33 Barb. 650.

6. *Elston v. Schilling*, 7 Robt. (N. Y.) 74; *Havana Bank v. Moore*, 5 Hun (N. Y.) 624; *Pierce v. Kneeland*, 9 Wis. 23, 34.

fraud or collusion,⁷ or the denial of the motion was for a technical cause and not on the merits.⁸

b. *Leave Given by Another Judge.* — A motion which has been denied by one judge without leave to renew, cannot be renewed by another judge,⁹ unless the motion is to challenge the court's jurisdiction.¹⁰

c. *How Leave Obtained.* — (I.) *Provision As To Renewal in the Order.* It is the better practice to have the order denying a motion recite that it is made without prejudice, or that privilege is granted to renew the motion,¹¹ but this is not always done,¹² nor unless the statute so provides,¹³ is it necessary to the granting of a renewal.¹⁴

(II.) *Application for Leave.* — Where leave to renew is not contained in the order denying the former motion,¹⁵ an independent application for permission to renew must be made to the court.¹⁶

Sufficiency of Application. — The application to renew the motion must show some good reason for such renewal,¹⁷ as for example that the

7. *Haskell v. Moran*, 117 App. Div. 251, 102 N. Y. Supp. 388.

8. *Porboner v. Miller*, 97 Misc. 376, 161 N. Y. Supp. 306; *Corwith v. State Bank*, 15 Wis. 289. See also *Marvin v. Lewis*, 12 Abb. Pr. (N. Y.) 482. To the contrary see *Dollfus v. Frosch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368.

9. *Sloan v. Beard*, 125 App. Div. 625, 110 N. Y. Supp. 1; *American Hosiery Co. v. Himler*, 78 Misc. 32, 137 N. Y. Supp. 702; *Lee v. Bowling Green Sav. Bank*, 55 Misc. 369, 106 N. Y. Supp. 568; *Garner v. Hellman*, 47 Misc. 336, 93 N. Y. Supp. 431.

[a] When one special term of the supreme court determines a motion another special term cannot entertain a similar motion for the same relief. *Sloan v. Beard*, 125 App. Div. 625, 110 N. Y. Supp. 1.

10. *Gaugler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79.

[a] Leave to renew a motion to remand a cause to a state court may be granted by the successor to the judge who had refused the motion. *Gaugler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79.

11. *Cal.*—*In re Riviere's Estate*, 8 Cal. App. 773, 98 Pac. 46. *Mont.*—*State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614. *N. Y.*—*Dana v. Thaw*, 109 N. Y. Supp. 826.

[a] The appellate court upon reversing an order because of an absence of a showing on the merits may grant leave to renew the motion upon proper papers. *Dana v. Thaw*, 109 N. Y. Supp. 826.

12. *Mugler v. Castleton Hotel &*

Realty Co., 168 App. Div. 492, 153 N. Y. Supp. 1025; *Haskell v. Moran*, 117 App. Div. 251, 102 N. Y. Supp. 388.

[a] Right to renew is not shown where the court declined to refer the issues "and will leave the parties where they were and they can thus try their case whenever the condition of the equity calendar in Richmond county permits." *Mugler v. Castleton Hotel & Realty Co.*, 168 App. Div. 492, 153 N. Y. Supp. 1025.

13. *In re Riviere's Estate*, 8 Cal. App. 773, 98 Pac. 46.

[a] In California such a provision is indispensable to the right to have the motion renewed unless such motion was denied for mere informalities. See Cal. Code Civ. Proc., §182, and *In re Riviere's Estate*, 8 Cal. App. 773, 98 Pac. 46.

14. *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614.

15. See *supra*, XIX, A, 3, c, (I).

16. *Cal.*—*Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721; *Kenney v. Kelleher*, 63 Cal. 442; *Beaumont v. Midway Provident Oil Co.*, 21 Cal. App. 128, 131 Pac. 106. *Minn.*—*Carlson v. Carlson*, 49 Minn. 555, 52 N. W. 214; *Irvine v. Myers & Co.*, 6 Minn. 558. *Mont.* *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614. *N. Y.* *Havana Bank v. Moore*, 5 Hun 624. *S. D.*—*Fisk v. Hicks*, 29 S. D. 399, 137 N. W. 424, Ann. Cas. 1914 D, 971. *Wis.*—*Webster v. Oconto County*, 47 Wis. 225, 2 N. W. 335.

17. *Beaumont v. Midway Provident Oil Co.*, 21 Cal. App. 128, 131 Pac. 106.

same proofs then offered could not have been offered at the hearing of the first motion.¹⁸

d. *Manner of Granting Leave*.¹⁹ — An express order granting leave to renew is usually made,²⁰ but it is sufficient if the giving of the order can be implied from some action or ruling of the court,²¹ and even though formal leave to renew has not been granted, nevertheless if the renewed motion has been heard and disposed of upon its merits, the presumption attaches that leave was previously granted.²²

e. *Effect of Leave To Renew*. — The order granting leave to renew the motion, reinstates the motion for hearing on the merits just as if the order denying it had never been made.²³

B. HEARING ON RENEWAL. — NOTICE OF. — It is necessary to give the opposite party notice of the hearing on renewal,²⁴ but the court may by order shorten the time for the giving of such notice.²⁵

Supporting Papers. — If the order denying a motion requires the second motion to be on proper papers a failure to observe the condition will result in the court's dismissing the motion,²⁶ and a consequent loss of power in the court to grant leave to make a third motion for the same relief.²⁷ The renewed motion is generally heard on new papers,²⁸ although it is discretionary with the court to hear it on the same papers.²⁹

18. *Beaumont v. Midway Provident Oil Co.*, 21 Cal. App. 128, 131 Pac. 106.

19. Leave to renew in the order denying the motion, see *supra*, XIX, A, 3, c, (I).

20. *State ex rel Working v. District Court*, 50 Mont. 435, 147 Pac. 614.

21. *McLaughlin v. Breckenridge*, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

[a] A denial of an application to dismiss the renewed motion is equivalent to an order granting leave to present such motion. *McLaughlin v. Breckenridge*, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

22. Cal.—*Kennedy v. Kelleher*, 63 Cal. 442; *Bowers v. Cherokee Bob*, 46 Cal. 279, 286. Mont.—*State ex rel. Working* District Court, 50 Mont. 435, 147 Pac. 614. N. Y.—*Rutherford Realty Co. v. Cook*, 198 N. Y. 29, 90 N. E. 1112; *Harris v. Brown*, 93 N. Y. 390; *Riggs v. Pursell*, 74 N. Y. 370, 381; *Thayer v. Parr*, 13 Wkly. Dig. 137.

23. *State ex rel. Working v. District*

Court, 50 Mont. 435, 147 Pac. 614.

[a] It annuls the former order and leaves the cause open for hearing as if it had never been heard, unless the order limits the scope of the argument or designates the particular point or points upon which further argument is desired. *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614.

24. *Piles v. Charles*, 3 G. Gr. (Iowa) 109; *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614; *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592.

25. *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614.

26. *Dana v. Thaw*, 109 N. Y. Supp. 826.

27. *Dana v. Thaw*, 109 N. Y. Supp. 826.

28. *White v. Munroe*, 33 Barb. (N. Y.) 650; *Fenton v. Lumberman's Bank*, 1 Clark Ch. (N. Y.) 360.

29. See *White v. Munroe*, 33 Barb. (N. Y.) 650.

MOTOR VEHICLES

By the Editorial Staff.

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CROSS-REFERENCES:

Highways, Streets and Bridges; Parties;
Injuries to Persons and Property; Province of Court and Jury;
Instructions; Railroads;
Negligence; Street Railroads;
 Trial.

Exemption of motor vehicle from execution, see 16 STANDARD PROC.
78.

For further references and cross-references, see the index to this
work and the cross-references throughout this article.

I. REMEDIES OF VENDOR OR PURCHASER.—A vendor or a purchaser of a motor vehicle has the same remedies in regard to the contract of purchase as have vendors and purchasers generally.¹ Thus, upon breach of a warranty in the sale of a motor vehicle, the purchaser, within a reasonable time, may rescind the contract and sue for the recovery of the purchase price,² or he may affirm the contract and sue for the damages sustained.³ One induced by the fraud of a vendor to enter into a contract for the purchase of a motor vehicle may either rescind,⁴ or he may affirm the contract and maintain an action to recover damages for the tort committed by the vendor in so inducing the sale.⁵ The remedies of the seller of a motor vehicle under a conditional contract of sale which retains title in him until the purchase price is fully paid are the same as those of any other seller under such a contract.⁶

II. ACTIONS FOR INJURIES.—A. PARTIES.—The parties to an action for injuries caused by a motor vehicle are determined by the general rules elsewhere treated.⁷ Thus if two defendants each operating a motor vehicle contribute to an injury to plaintiff, he may sue them either jointly or severally.⁸

B. COMPLAINT OR DECLARATION.—1. In General.—The complaint or declaration in an action for injuries to person or property caused by a motor vehicle must conform to the general requirements of such pleadings elsewhere discussed.⁹ An allegation under a *videlicet* as to the speed per hour a motor vehicle was being driven is not suffi-

1. See generally the title "Sales."

2. **Ky.**—International Harvester Co. v. Bean, 159 Ky. 842, 169 S. W. 549. **Md.**—White Automobile Co. v. Dorsey, 119 Md. 251, 86 Atl. 617. **Miss.** Mobile Auto Co. v. Sturges & Co., 107 Miss. 848, 66 So. 205. **Mo.**—Walker v. Grout Bros. Auto Co., 124 Mo. App. 628, 102 S. W. 25. **N. Y.**—Miller v. Zander, 85 Misc. 499, 147 N. Y. Supp. 479; Beecroft v. Van Schaick, 104 N. Y. Supp. 458. **Pa.**—Cunningham v. Wanamaker, 217 Pa. 497, 66 Atl. 748.

[a] The mere breach of the warranty as to the automobile would not have authorized a rescission by the buyer alone. *Rimmele v. Huebner*, 190 Mich. 247, 157 N. W. 10.

[b] But see *Wirth v. Fawkes*, 109 Minn. 254, 123 N. W. 661, 134 Am. St. Rep. 778, distinguishing between executed and executory contracts of sale, and holding there is no right to rescind an executed contract for breach of warranty, in the absence of fraud.

3. **Ky.**—Johnson v. Studebaker Corp. of America, 160 Ky. 567, 169 S. W. 992. **Md.**—White Automobile Co. v. Dorsey, 119 Md. 251, 86 Atl. 617. **Miss.** Mobile Auto Co. v. Sturges & Co., 107

Miss. 848, 66 So. 205. **N. Y.**—Miller v. Zander, 85 Misc. 499, 147 N. Y. Supp. 479. **Wash.**—Klock v. Newbury, 63 Wash. 153, 114 Pac. 1032.

[a] After waiver of right of rescission the buyer's sole remedy is for damages for breach of warranty. *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

4. *Morbrose Inv. Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189; *Smith v. Columbus Buggy Co.*, 40 Utah 580, 123 Pac. 580.

5. *Morbrose Inv. Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189.

6. See generally the title "Sales," and the following cases: *Chase & Co. v. Kelly*, 125 Minn. 317, 146 N. W. 1113, L. R. A. 1916 A, 912; *Winton Motor Carriage Co. v. Blomberg*, 84 Wash. 451, 147 Pac. 21, *replevin*.

7. See generally the titles "Injuries to Persons and Property," "Negligence," "Parties."

8. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69.

9. See generally the titles "Declaration and Complaint;" and "Injuries to Persons and Property."

cient to charge that the vehicle was being driven at any particular number of miles per hour.¹⁰

The constitutionality of a statute regulating the speed and use of automobiles may be raised by demurrer to a declaration for damages for injuries received through defendant's negligence in operating his automobile in violation of such statute.¹¹

2. Particular Averments. — Negligence. — Where an injury is suffered by reason of the negligence of the operator of a motor vehicle, the negligence must be pleaded as in other similar cases.¹²

Master and Servant. — Where another than the defendant is driving at the time of the negligent act, the plaintiff must allege that he is under the control of the defendant,¹³ or that the relationship of master and servant existed between the defendant and the driver.¹⁴ Where at the time of the injury another person was driving, it is insufficient to allege that the defendant was in control of the automobile, without showing in what the control consisted.¹⁵

Scope of Employment. — If the driver was agent or servant of defendant it must appear from the complaint that he was acting within the scope of his employment.¹⁶

10. *Fippinger v. Glos*, 190 Ill. App. 238.

11. *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215. And see generally the title "Statutes."

12. See generally the title "Negligence," and *infra*, this note.

[a] **Allegations Held Sufficient.** — Ala. — *Yarbrough v. Carter*, 179 Ala. 356, 60 So. 833; *Taxicab & Touring Car Co. v. Cabaniss*, 9 Ala. App. 549, 63 So. 774; *Overton v. Bush*, 2 Ala. App. 623, 56 So. 852. Del. — *Hughes v. Connable*, 5 Penne. 523, 64 Atl. 72. Fla. — *McNeil v. Webeking*, 66 Fla. 407, 63 So. 728. Ind. — *Carter v. Caldwell*, 183 Ind. 434, 109 N. E. 355; *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718; *Haynes Auto Co. v. Sinnett*, 46 Ind App. 110, 91 N. E. 171. Kan. — *Ellsworth v. Jarvis*, 92 Kan. 895, 141 Pac. 1135. N. Y. — *Peterson v. Eighmie*, 175 App. Div. 113, 161 N. Y. Supp. 1065, reversing judgment 94 Misc. 706, 158 N. Y. Supp. 202.

[b] **Pleading negligence eo nomine** is not necessary in an action for damages for injuries received in an automobile accident where the complaint does allege the substance of an ordinance, the fact that it was in force and effect, and that defendant's agent failed to comply with its mandate, and that plaintiff was injured in consequence. Such failure to comply with

the duty imposed by the mandatory ordinance was negligence per se. *Hood & Wheeler Furn. Co. v. Royal* (Ala.), 76 So. 965.

[c] An averment "that defendant ran into plaintiff" is sufficient as clearly meaning that defendant ran into plaintiff with his automobile and not in person. *Wellington v. Reynolds*, 177 Ind 49, 97 N. E. 155.

13. *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897. See generally the title "Principal and Agent."

[a] **Agency May Be Alleged in General Terms.** — *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Pangburn v. Buick Motor Co.*, 151 App. Div. 756, 137 N. Y. Supp. 37.

14. *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897. See generally the title "Master and Servant."

15. *Rodriguez v. Nicole*, 7 Porto Rico Fed. 418.

[a] **Allegation of Ownership Not Sufficient.** — A complaint which alleges that the plaintiff was injured by the careless operation of an automobile owned by the defendant and driven at the time by a named chauffeur does not state a good cause of action in the absence of an allegation that the chauffeur was the defendant's servant. *Rubin v. Bierman*, 87 Misc. 174, 149 N. Y. Supp. 483.

16. *Lewis v. Amorous*, 3 Ga. App.

C. ISSUES, PROOF AND VARIANCE. — Matters admitted by failure to properly deny them are not in issue.¹⁷ Under the general issue, the defendant may show that he was driving on the wrong side of the street because of an excavation and a desire to make a delivery on such side.¹⁸

The general rule that the proof must conform to the pleadings,¹⁹ is applicable in this class of cases.²⁰

D. PROVINCE OF COURT AND JURY. — The general rule that where the evidence is conflicting or more than one inference may be drawn therefrom, the question raised thereby becomes one of fact for the jury or for the court sitting without a jury,²¹ applies in this class of cases. Thus, under such circumstances, it is a question for the jury to determine which one of the two was negligent, the defendant²² or his

50, 59 S. E. 338; *Cullen v. Thomas*, 153 App. Div. 797, 138 N. Y. Supp. 600; s. c. 150 App. Div. 475, 135 N. Y. Supp. 22.

17. See *infra*, this note.

[a] **Driver's agency admitted** (1) by a plea of not guilty (*Rasmussen v. Drake*, 185 Ill. App. 526), or (2) by unverified denial, under the code (§5703). *Johnson v. Kansas City Home Tel. Co.*, 87 Kan. 441, 124 Pac. 528.

[b] **Defendant's ownership** of the machine is admitted by general issue. *Kirchler v. Stafford*, 185 Ill. App. 199.

18. *White v. Shipley*, 48 Utah 496, 160 Pac. 441.

19. See generally the title "**Variance and Failure of Proof**," and the index to this work.

20. *Trout Brook Ice & Feed Co. v. Hartford Elec. Light Co.*, 77 Conn. 338, 59 Atl. 405; *Merklinger v. Lambert*, 76 N. J. L. 806, 72 Atl. 119.

[a] **Act of Servant as Act of Master**. — A declaration alleging that the defendant ran into plaintiff with his automobile is supported by proof that the defendant's servant did the act. *Shepard v. Wood*, 116 App. Div. 861, 102 N. Y. Supp. 306.

[b] **A cause of action for wilful injury** to plaintiff is not supported by evidence of mere negligence. *Tognazzini v. Freeman*, 18 Cal. App. 468, 123 Pac. 540.

21. See generally the title "**Province of Judge and Jury**."

22. *Ala.*—*Karpeles v. City Ice Delivery Co.*, 73 So. 642; *Yarbrough v. Carter*, 179 Ala. 356, 60 So. 833. *Cal.* *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460. *Colo.*—*Kent v. Treworgy*, 22 Colo. App. 441, 127 Pac. 128. *Ill.* *Berg v. Michell*, 196 Ill. App. 509;

Forsythe v. Killam, 193 Ill. App. 534; *Rasmussen v. Drake*, 185 Ill. App. 526; *Trzietiatowski v. Evening American Pub. Co.*, 185 Ill. App. 451. *Ind.*—*McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. (N. S.) 1130. *Ia.*—*Crawford v. McElhinney*, 171 Iowa 606, 154 N. W. 310, Ann. Cas. 1917 E, 221; *Delfs v. Dunshee*, 143 Iowa 381, 122 N. W. 236; *Raber v. Hinds*, 133 Iowa 312, 110 N. W. 597. *Kan.*—*McComas v. Strasburger Dry Goods Co.*, 96 Kan. 467, 152 Pac. 615; *Ellsworth v. Jarvis*, 92 Kan. 895, 141 Pac. 1135. *Ky.*—*Weidner v. Atter*, 171 Ky. 167, 188 S. W. 335; *Melville v. Rollwage*, 171 Ky. 607, 188 S. W. 638, L. R. A. 1917B, 133; *Webb v. Moore*, 136 Ky. 708, 125 S. W. 152; *Weiskopf v. Ritter*, 29 Ky. L. Rep. 1268, 97 S. W. 1120. *Md.*—*Epstein v. Ruppert*, 129 Md. 432, 99 Atl. 685. *Mass.*—*Tripp v. Taft*, 219 Mass. 81, 106 N. E. 578; *Clark v. Blair*, 217 Mass. 179, 104 N. E. 435; *Shipelis v. Cody*, 214 Mass. 452, 101 N. E. 1071; *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345; *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336. *Mich.*—*Tuttle v. Briscoe Mfg. Co.*, 190 Mich. 22, 155 N. W. 724; *Cusick v. Kinney*, 164 Mich. 25, 128 N. W. 1089; *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71. *Minn.*—*Benson v. Larson*, 133 Minn. 346, 158 N. W. 426; *Daly v. Curry*, 128 Minn. 449, 151 N. W. 274; *Fischer v. McGrath*, 112 Minn. 456, 128 N. W. 579; *Liebrecht v. Crandall*, 110 Minn. 454, 126 N. W. 69. *N. J.*—*Pyers v. Tiers*, 89 N. J. L. 520, 99 Atl. 130; *Bennett v. Busch*, 75 N. J. L. 240, 67 Atl. 188. *N. Y.*—*Bohringer v. Campbell*, 153 App. Div. 905, 137 N. Y. Supp. 241; *Cowell v. Saperston*, 149

servant,²³ and whether the injuries in the operation of the motor vehicle were proximately caused by the negligence.²⁴ Whether the signal given by the operator of the automobile was sufficient to warn the plaintiff of danger is a question of fact for the jury to decide.²⁵ Where several defendants are sued as contributing to an injury caused by an automobile accident, it is a question for the jury to determine whether each contributed.²⁶

Employment.—Ordinarily, subject to the court's instructions, it is for the jury to determine whether, at the time of the commission of the negligent acts complained of, the relationship of master and servant or principal and agent existed between the defendant and the driver,²⁷ and whether the driver was acting within the scope of his employment.²⁸

App. Div. 373, 134 N. Y. Supp. 284; *Yanz v. Grad*, 84 Misc. 110, 146 N. Y. Supp. 338; *Union Transfer & Storage Co. v. Westcott Exp. Co.*, 79 Misc. 408, 140 N. Y. Supp. 98. **N. C.**—*Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626. **N. D.** *Messer v. Bruening*, 32 N. D. 515, 156 N. W. 241; *Armann v. Caswell*, 30 N. D. 406, 152 N. W. 813. **Pa.**—*Miller v. Tiedmann*, 249 Pa. 234, 94 Atl. 835. **Utah.**—*Boeddcher v. Frank*, 48 Utah 363, 159 Pac. 634. **Wash.**—*Tooker v. Perkins*, 86 Wash. 567, 150 Pac. 1138; *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892. **Wis.**—*Riggles v. Priest*, 163 Wis. 199, 157 N. W. 755. **Can.**—*McIntyre v. Coote*, 19 Ont. L. R. 9, 13 Ont. W. R. 1098.

[a] Under statutes requiring the driver of an automobile to stop when requested by signal or otherwise by the driver of domestic animals, in the absence of any accompanying signals or attending circumstances which might affect the meaning of the words used, it is a question for the court to determine the meaning of the words used by the plaintiff. *Stern v. Issitt*, 89 Kan. 357, 131 Pac. 551.

23. **Ala.**—*Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863. **Mass.**—*Winslow v. New England Co-op. Soc.*, 225 Mass. 576, 114 N. E. 748. **Neb.**—*Rule v. Claar Transfer & Storage Co.*, 165 N. W. 883. **S. C.**—*Rochester v. Bull*, 78 S. C. 249, 58 S. E. 766. **Tex.**—*Sulzberger & Sons Co. v. Page* (Tex. Civ. App.), 195 S. W. 928.

24. **Ala.**—*Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815, Ann. Cas. 1915 C, 888; *Adler v. Martin*, 179 Ala. 97, 59 So. 597. **Cal.**—*Stohlman v. Martin*, 28

Cal. App. 338, 152 Pac. 319. **Ind.** *Mayer v. Mellette* (Ind. App.), 114 N. E. 241. **Mich.**—*Reed v. Martin*, 160 Mich. 253, 128 N. W. 61. **N. C.**—*Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134. **Tex.**—*Sulzberger & Sons Co. v. Page* (Tex. Civ. App.), 195 S. W. 928.

25. *Coppock v. Schlatter*, 193 Ill. App. 255.

26. *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69.

[a] The fact that separate suits are brought against the tortfeasors makes no difference. *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69.

27. *Levine v. Ferlisi*, 192 Ala. 362, 68 So. 269; *Stovall v. Corey Highlands Land Co.*, 189 Ala. 576, 66 So. 577; *Crawford v. McElhinney*, 171 Iowa 606, 154 N. W. 310, Ann. Cas. 1917 F, 221.

[a] **Loan of Chauffeur and Machine.** Where the services of a chauffeur and automobile are, at the time of an injury, temporarily loaned to another by the owner of the car, it is a question for the jury to determine from the evidence whether he was at such time an employee of the borrower or of the regular employer. *Cowell v. Saperston*, 149 App. Div. 373, 134 N. Y. Supp. 284.

28. **Ala.**—*Levine v. Ferlisi*, 192 Ala. 362, 68 So. 269. **Ill.**—*Swancutt v. Trout Auto Livery Co.*, 176 Ill. App. 606. **Mass.**—*Reynolds v. Denholm*, 213 Mass. 576, 100 N. E. 1006. **Mich.**—*Cady v. Doxtator*, 193 Mich. 170, 159 N. W. 151. **N. Y.**—*Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057. **Pa.**—*O'Malley v. Public Ledger Co.*, 101 Atl. 94; *Graham v. Henderson*, 254 Pa. 137, 98 Atl. 870. **Can.**—*Bernstein v. Lynch*, 28 Ont. L. Rep. 435.

Contributory Negligence.—The determination of the question whether the plaintiff was guilty of contributory negligence is one for the jury as in other negligence cases.²⁹

License.—Under a statute allowing an unlicensed person to drive a motor vehicle if accompanied by a licensed operator, it is a question for the jury to determine whether the presence of the licensed operator in the rear seat was a sufficient compliance with the statute to permit the plaintiff driver to maintain an action for injuries received.³⁰

E. INSTRUCTIONS.—The general rules regulating the giving of instructions are applicable in cases of this kind,³¹ and an instruction

29. See generally the title "**Negligence**," and the following cases: **U. S.** Garside v. New York Transp. Co., 146 Fed. 588. **Cal.**—Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760; Bellingier v. Hughes, 31 Cal. App. 464, 160 Pac. 838; Baillargeon v. Myers, 27 Cal. App. 187, 149 Pac. 378. **Conn.**—Garfield v. Hartford & S. St. R. Co., 79 Conn. 453, 65 Atl. 598. **Ill.**—Berg v. Michell, 196 Ill. App. 509; Forsythe v. Killam, 193 Ill. App. 534; Rasmussen v. Drake, 185 Ill. App. 526. **Ia.**—Switzer v. Baker, 160 N. W. 372; Neidy v. Littlejohn, 146 Iowa 355, 125 N. W. 198; Strand v. Grinnell Auto. Garage Co., 136 Iowa 68, 113 N. W. 488. **Kan.**—Routh v. Weakley, 97 Kan. 74, 154 Pac. 218; Johnson v. Kansas City Home Tel. Co., 87 Kan. 441, 124 Pac. 528. **Me.**—Meserve v. Libby, 115 Me. 282, 98 Atl. 754, whether or not child of tender years capable of exercising care in crossing street is question for the jury. **Md.**—Epstein v. Rupert, 129 Md. 432, 99 Atl. 685. **Mass.**—Clark v. Blair, 217 Mass. 179, 104 N. E. 435; Shipelis v. Cody, 214 Mass. 452, 101 N. E. 1071; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345. **Mich.**—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 155 N. W. 724; Cusick v. Kinney, 164 Mich. 25, 128 N. W. 1089; Ketchum v. Fillingham, 162 Mich. 704, 127 N. W. 702; Reed v. Martin, 160 Mich. 253, 128 N. W. 61. **Minn.**—Wentworth v. Butler, 135 Minn. 382, 159 N. W. 828; Daly v. Curry, 128 Minn. 449, 151 N. W. 274; Thomas v. Armitage, 111 Minn. 238, 126 N. W. 738; Liebrecht v. Crandall, 110 Minn. 454, 126 N. W. 69. **Mo.** Carradine v. Ford, 195 Mo. App. 684, 187 S. W. 285; Ginter v. O'Donoghue (Mo. App.), 179 S. W. 732; McFern

v. Gardner, 121 Mo. App. 1, 97 S. W. 972. **N. J.**—Pyers v. Tiers, 89 N. J. L. 520, 99 Atl. 130; Turner v. Hall, 74 N. J. L. 214, 64 Atl. 1060. **N. Y.** Bohringer v. Campbell, 153 App. Div. 905, 137 N. Y. Supp. 241; Cowell v. Saperston, 149 App. Div. 373, 134 N. Y. Supp. 284; Kalb v. Redwood, 147 App. Div. 77, 131 N. Y. Supp. 789; Noakes v. New York Cent. & H. R. R. Co., 121 App. Div. 716, 106 N. Y. Supp. 522; Hall v. Dilworth, 94 Misc. 240, 157 N. Y. Supp. 1091; Yanz v. Grad, 84 Misc. 110, 146 N. Y. Supp. 338. **N. D.**—Messer v. Bruening, 32 N. D. 515, 156 N. W. 241. **Pa.**—Miller v. Tiedemann, 249 Pa. 234, 94 Atl. 835; Shaffer v. Coleman, 35 Pa. Super. 386; Fricker v. Philadelphia Rapid Transit Co., 63 Pa. Super. 381. **Wash.**—Franey v. Seattle Taxicab Co., 80 Wash. 396, 141 Pac. 890; Coughlin v. Weeks, 75 Wash. 568, 135 Pac. 649; Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892; Domke v. Gunning, 62 Wash. 629, 114 Pac. 436. **Wis.**—Friedrich v. Boulton, 164 Wis. 526, 159 N. W. 803; Quinn v. Ross Motor Car Co., 157 Wis. 543, 147 N. W. 1000.

30. Hughes v. New Haven Taxicab Co., 87 Conn. 416, 87 Atl. 721.

31. See generally the title "**Instructions**," and *infra*, this note.

[a] **Must Be Justified by the Pleadings and Issues.**—Fippinger v. Glos, 190 Ill. App. 238; Merklinger v. Lambert, 76 N. J. L. 806, 72 Atl. 119.

[b] **Must Not Invade Province of Jury.**—McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. (N. S.) 1130; Merklinger v. Lambert, 76 N. J. L. 806, 72 Atl. 119.

[c] **Must Not Be Misleading.**—Sullivan v. Smith, 123 Md. 546, 91 Atl. 456.

following a rule of law that in an action brought to recover damages for injuries caused by defendant's negligence in running an automobile at a greater speed than permitted by law, the plaintiff makes out a prima facie case if he proves the injury and the fact that the automobile was driven at a greater speed than allowed, is sufficient and proper.³²

F. VERDICT AND JUDGMENT.—Under a complaint against two defendants, as master and servant, charging them with negligence in the operation of a motor vehicle, the jury may, where the law and the facts justify it, find for the plaintiff as against one defendant, and for the other.³³ Where separate actions are brought against two joint tort-feasors, the plaintiff is entitled to judgments against each for the full amount of the recovery.³⁴

G. APPEAL AND REVIEW.—The rules regulating the appeal and review of questions arising in this class of cases are the same as in appeals generally.³⁵

III. CRIMINAL PROSECUTIONS FOR VIOLATIONS OF STATUTES REGULATING USE.—**A. JURISDICTION.**³⁶—Jurisdiction to hear and determine prosecutions for the violation of the provisions of an act regulating the use of motor vehicles has been conferred upon justices of the peace by some statutes.³⁷

B. INFORMATION OR COMPLAINT.—Proceedings for the violations of statutes regulating the use of motor vehicles upon the highway are

[d] **Must Not Ignore Material Issues.**—Mich.—Levyn v. Koppin, 183 Mich. 232, 149 N. W. 993. Mo.—Young v. Dunlap, 195 Mo. App. 119, 190 S. W. 1041. N. Y.—Marius v. Motor Del. Co., 146 App. Div. 608, 131 N. Y. Supp. 357, negligence. N. D.—Messer v. Brueening, 25 N. D. 599, 142 N. W. 158, 48 L. R. A. (N. S.) 945, negligence.

[e] **Master and Servant.**—Where the motor vehicle is being driven by the defendant's servant at the time of the injury, the court should instruct the jury as to the master's liability, if the servant was guilty of negligence. Thomas v. Armitage, 111 Minn. 238, 126 N. W. 735, 738.

[f] **Law of the Road.**—The court may properly instruct the jury as to the "law of the road." Cal.—Sheldon v. James, 166 Pac. 8. Mass.—Baker v. Fall River, 187 Mass. 53, 72 N. E. 336. Mich.—Ketchum v. Fillingham, 162 Mich. 704, 127 N. W. 702, duties of the driver of a motor vehicle. N. Y. Peters v. Cuneo, 123 App. Div. 740, 108 N. Y. Supp. 264.

32. Ward v. Meredith, 220 Ill. 66, 77 N. E. 118 (affirming 122 Ill. App. 159); Christy v. Elliott, 216 Ill. 31, 74

N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215.

33. Weil v. Hagan, 166 Ky. 750, 179 S. W. 835. Compare Antrim v. Noonan, 186 Ill. App. 360, holding that a direction to find a verdict for one defendant is erroneous where it appears from the evidence that the other defendant, who was driving the automobile at the time of the injury, was the servant of such defendant.

34. Brown v. Thayer, 212 Mass. 392, 99 N. E. 237; Corey v. Havener, 182 Mass. 250, 65 N. E. 69, there can be but one satisfaction.

35. See the title "Appeals," and other titles dealing with appellate procedure.

[a] **Award of damages for injuries received in an automobile accident** will not be disturbed on appeal when neither excessive nor greatly inadequate. Shields v. Fairchild, 130 La. 648, 58 So. 497; Navailles v. Dielmann, 124 La. 421, 50 So. 449, 134 Am. St. Rep. 508. See 2 STANDARD PROC. 442.

36. See generally the title "Jurisdiction."

37. Crichton v. State, 115 Md. 423, 81 Atl. 36.

properly brought in the name of the people or commonwealth,³⁸ but where the penalty for a violation of such a statute is made payable to a certain official, the suit should be brought in the name or for the use of such official.³⁹ An information or complaint charging the violation of the provisions of a motor vehicle act is subject to the same rules as to its form and sufficiency as apply to informations or complaints generally.⁴⁰

Highway. — The information or complaint should designate the particular highway upon which the offense is committed.⁴¹

Speed. — An information for speeding on the highway should show that the speed attained was greater than the law allowed,⁴² but if the statute provides that the motor vehicle shall not be operated at a speed so as to endanger the life or limb of any person, or the safety of any property, an allegation merely that it was driven at a certain rate of speed is insufficient.⁴³

C. INSTRUCTIONS. — The rules regulating the giving and refusing instructions in criminal prosecutions generally apply in this class of cases.⁴⁴

38. *Com. v. Quander*, 18 Pa. Dist. 973.

39. *Com. v. Pfeiffer*, 35 Pa. Co. Ct. 476; *Caufman's Case*, 35 Pa. Co. Ct. 417.

40. See the title "Indictment and Information."

[a] **Information in language of the statute is sufficient.** Ill.—*People v. Levin*, 181 Ill. App. 429. Md.—*Crichton v. State*, 115 Md. 423, 81 Atl. 36. Mo.—*State v. Cobb*, 113 Mo. App. 156, 87 S. W. 551.

[b] **Complaint not vitiated by allegations in the disjunctive**, of violations of the act. *People v. Hood*, 191 Ill. App. 33. Compare *Rex v. Wells*, 20 Cox C. C. 671, 91 L. T. N. S. 98, 20 T. L. R. 549, and 12 STANDARD PROC. 335, et seq.

[c] **Exception in statute negated in the information.** *McCummins v. State*, 132 Wis. 236, 112 N. W. 25.

[d] **Informations Held Sufficient.** *People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007, wrong chapter of vehicle act referred to.

[e] **Informations Held Insufficient To State an Offense.**—*State v. Pfeiffer*, 96 Kan. 791, 153 Pac. 552 (an information charging that defendant drove past a buggy at a speed greater than eight miles an hour does not, in the absence of allegations that he drove at a dangerous or unreasonable speed, or with due regard to the safety of

others, or otherwise fails in his duty to observe the rules of the road, is insufficient); *People v. Ellis*, 88 App. Div. 471, 85 N. Y. Supp. 120; *People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007.

41. See 11 STANDARD PROC. 258.

[a] But see *People v. Curtis*, 217 N. Y. 304, 112 N. E. 54, wherein it was held that an omission to state in the indictment that the accident occurred on a public highway was not serious enough to warrant a reversal of a conviction for the violation of the statute in failing to report the accident to the police station.

42. See 11 STANDARD PROC. 259.

43. *People v. Payne*, 71 Misc. 72, 129 N. Y. Supp. 1007; *Com. v. Moller*, 50 Pa. Super. 366.

44. See generally the title "Instructions."

[a] **Heedless Driving.**—An instruction is proper which charges that the jury in determining whether the defendant was guilty of heedless driving, as charged, should take into consideration the time and place of the offense charged as to light or darkness; the presence or absence of other vehicles on the highway at the time; the width of the highway; the condition of the vehicle driven as to equipment; the defendant's manner of driving, and all other surrounding circumstances as shown by the evidence. *Territory v. McGregor*, 22 Hawaii 786.

MULTIFARIOUSNESS

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CROSS-REFERENCES:

Indictment and Information; Joinder of Actions;
Several Counts.

Alternative relief, prayer for as multifariousness, see 4 STANDARD PROC. 144.

Codes and practice acts, joinder of causes under, see 14 STANDARD PROC. 668.

Creditors' bills, multifariousness in, see 6 STANDARD PROC. 217.

Discovery, in bill of, see 7 STANDARD PROC. 535.

Fraudulent conveyances, multifariousness in bill to set aside, see 10 STANDARD PROC. 174.

Injunction, multifariousness in bill for, see 13 STANDARD PROC. 97 et. seq.

Legal and equitable causes, joinder of, see 14 STANDARD PROC. 710 et seq.

Stockholder's suit, multifariousness in bill, see 5 STANDARD PROC. 715.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND FORMS OF.—Multifariousness has been defined as "improperly joining in one bill distinct and independent matters, and thereby confounding them."¹

Forms of.—Multifariousness may be said to be of two kinds or classes, the joining in one suit of several parties as complainants or defendants, and unconnected with each other,² or where separate and distinct causes of action are joined which ought not to be joined.³

1. U. S.—Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. ed. 478; Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; Shields v. Thomas, 18 How. 253, 15 L. ed. 368. **Ala.**—Ford v. Borders, 75 So. 398. **Conn.**—Wells v. Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250. **Ga.**—Nail v. Mobley, 9 Ga. 278. **Ill.**—Sherlock v. Winnetka, 59 Ill. 389. **Miss.**—Darcey v. Lake, 46 Miss. 109. **Va.**—Porter v. Robinson, 22 S. E. 843.

[a] This is Justice Story's definition (1) and the example by which he illustrates the definition is "the uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Shields v. Thomas, 18 How. (U. S.) 253, 260, 15 L. ed. 368; Story Eq. Pl., §271. (2) In Daniell's Chancery Practice 335, it is said in explanation of this that

"it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records." Walker v. Powers, 104 U. S. 245, 26 L. ed. 729.

2. Ala.—Bean v. Bean's Admr., 37 Ala. 17; McIntosh v. Alexander, 16 Ala. 87. **Ill.**—Crawford-Adsit Co. v. Fordyce, 100 Ill. App. 362. **Mich.** Taylor v. King, 32 Mich. 42; Hunton v. Platt, 11 Mich. 264. **N. J.**—Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593; Ferry v. Laible, 27 N. J. Eq. 146. **Ohio.**—State v. Ellis, 10 Ohio 456. **Ore.** White v. Delschneider, 1 Ore. 254. **Tenn.**—Allison v. Davidson, 39 S. W. 905.

See also cases cited *infra*, II, H.

3. Ala.—Ford v. Borders, 75 So. 398. **Mich.**—Wales v. Newbould, 9 Mich. 45, "it sometimes, therefore,

Multifariousness in the latter respect is to be distinguished from misjoinder of causes of action.⁴

II. RULES FOR DETERMINING. — A. GENERAL STATEMENT.

No absolute rule can be laid down as to what constitutes multifariousness,⁵ it is a matter in which the court must exercise to a considerable

means misjoinder of causes of action, and sometimes misjoinder of parties." **Eng.**—*Campbell v. Mackay*, 1 Myl. & C. 603, 618, 40 Eng. Reprint 507.

[a] "The only way of reconciling the authorities upon the subject is by adverting to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two kinds: 1. Frequently the objection raised to the bill, though termed multifariousness, is, in fact, properly speaking, a misjoinder; that is to say, the cases or claims asserted in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and the defendants are parties to the whole transactions which form the subject of the suit, but nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. 2. But what is more familiarly understood by multifariousness, as applied to a bill, is where a party is brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no connection whatever. In such a case he has a right to demur (and so the old form of demurrer was) and to state the evil of thus uniting distinct matters in one record to be that it put the parties to great and useless expense. Such an objection could have no application to the case of a mere misjoinder of different causes of action between the same parties, plaintiffs and defendants, and none others. See Story's Eq. Pl. pp. 406, 407." *Gartland v. Dunn*, 11 Ark. 720.

Principles determining whether one or more causes of action are stated. 14 STANDARD PROC. 630, et seq.

Requirements as to causes joined under codes, see 14 STANDARD PROC. 671.

Legal and equitable causes, joinder of, see 14 STANDARD PROC. 710, et seq.

Rules for determining, see *infra*, II.

4. **U. S.**—*Shields v. Thomas*, 18 How. 253, 15 L. ed. 368, frequently, the objection raised, though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. **N. J.**—*Green v. Richards*, 23 N. J. Eq. 32. **Eng.**—*Campbell v. Mackay*, 1 Myl. & C. 603, 618, 40 Eng. Reprint 507.

See 14 STANDARD PROC. 629.

5. **U. S.**—*Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. ed. 478; *Barney v. Latham*, 103 U. S. 205, 26 L. ed. 514; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Metropolitan Trust Co. v. Columbus, S. & H. R. Co.*, 93 Fed. 689. **Ala.**—*Planters' & Merchants' Bank v. Walker*, 7 Ala. 926, "We have repeatedly had occasion to remark upon the doctrine of multifariousness, as applicable to bills in chancery, and have heretofore shown the utter impracticability of laying down any general rules by which, with unerring certainty, it may, in all cases, be determined whether the objection is well taken." **Cal.**—*People v. Morrill*, 26 Cal. 336. **Conn.**—*De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282. **Ga.**—*Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444. **Ill.**—*Sherlock v. Village of Winnetka*, 59 Ill. 389. **Me.**—*Warren v. Warren*, 56 Me. 360. **Md.**—*Whitaker v. Coudon*, 130 Md. 234, 100 Atl. 279; *Dunn v. Cooper*, 3 Md. Ch. Dec. 46, "The difficulty, indeed the impossibility of laying down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally applicable, is conceded on all hands." **Mass.**—*Bliss v. Parks*, 175 Mass. 539, 56 N. E. 566; *Robinson v. Guild*, 12 Metc. 323. **Miss.**—*Hardie v. Bulger*, 66 Miss. 577, 6 So. 186, "When a bill is or is not multifarious is difficult of determination. Indeed the decisions upon the subject are so inharmonious that no rule upon the subject can be said to be clearly announced." **N. H.**—*Abbot v. Johnson*, 32 N. H. 9. **N. J.**—*Lehigh Valley*

extent a sound discretion,⁶ and generally whether a bill is multifarious must depend on the circumstances of the particular case.⁷ But despite this absence of fixed rules there are certain tests and principles which the courts generally follow.⁸

R. Co. v. McFarlan, 31 N. J. Eq. 706, 758; *Stevens v. Bosch*, 54 N. J. Eq. 59, 33 Atl. 293. **N. Y.**—*Carroll v. Roosevelt*, 4 Edw. Ch. 211. **S. C.**—*Barkley v. Barkley*, 14 Rich. Eq. 12. **Tenn.** *Johnson v. Brown*, 2 Humph. 327, 37 Am. Dec. 556; *Bartee v. Tompkins*, 4 Sneed 623. **Tex.**—*Clegg v. Varnell*, 18 Tex. 294, 302. **Vt.**—*Wade v. Pulsifer*, 54 Vt. 45, 70. **Va.**—*Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. 193. **W. Va.**—*Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710. **Eng.**—*Campbell v. Mackay*, 1 Myl. & C. 603, 40 Eng. Reprint 507.

[a] **No General Rule.**—"Lord Cottonham, in *Campbell v. Mackay*, 7 Simon, 564, and in *Mylne v. Craig*, 603, says, to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts." *Fitch v. Creighton*, 24 How. (U. S.) 159, 16 L. ed. 596.

6. **U. S.**—*Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622; *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 651; *Metropolitan Trust Co. v. Columbus, S. & H. R. Co.*, 93 Fed. 689; *California Fig-Syrup Co. v. Clinton E. Worden & Co.*, 86 Fed. 212; *Singer Mfg. Co. v. Springfield Foundry Co.*, 34 Fed. 393; *McLean v. Lafayette Bank*, 3 McLean 415, 16 Fed. Cas. No. 8,886. **Conn.** *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282. **Fla.**—*Farrell v. Forest Inv. Co.*, 74 So. 216. **Ga.**—*Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444. **Ind.** *Carter v. Kerr*, 8 Blackf. 373. **Mo.**

Warren v. Warren, 56 Me. 360. **Md.** *Whitaker v. Coudon*, 130 Md. 234, 100 Atl. 279; *Chew v. Glenn*, 82 Md. 370, 33 Atl. 722. **Mich.**—*Torrent v. Hamilton*, 95 Mich. 159, 54 N. W. 634. **Pa.** *Quin v. Power*, 18 Wkly. N. Cas. 285. **Tex.**—*Clegg v. Varnell*, 18 Tex. 294. **Va.**—*Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. 193.

7. **U. S.**—*Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Sheldon v. Keokuk Northern Line Packet Co.*, 10 Biss. 470, 8 Fed. 769. **Md.**—*Whitaker v. Coudon*, 130 Md. 234, 100 Atl. 279. **Mass.** *Bliss v. Parks*, 175 Mass. 539, 56 N. E. 566. **Mich.**—*Torrent v. Hamilton*, 95 Mich. 159, 54 N. W. 634. **N. H.**—*Eastman v. Savings Bank*, 58 N. H. 421. **S. C.**—*Edwards v. Sartor*, 1 S. C. 266. **Tenn.**—*Johnson v. Brown*, 2 Humph. 327, 37 Am. Dec. 556.

[a] **Each Case Determined on Its Own Facts.**—"There is, perhaps, no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application, than has attended this relating to multifariousness. This effect, flowing, perhaps, inevitably, from the variety of modes and decrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features." *Shields v. Thomas*, 18 How. (U. S.) 253, 259, 15 L. ed. 368.

8. See *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125, where the court says: "Yet it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case, if we will only bear in mind these cardinal rules upon the subject, namely, that a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be com-

B. DISTINCT AND UNCONNECTED CAUSES. — A bill is bad for multifariousness which includes several distinct and unconnected matters, each constituting a cause of action, in regard to each of which relief is sought.⁹

pelled to unite, in his answer and defense, different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing; or again, where there is a demand of several matters of a distinct and independent nature, in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection."

9. **U. S.**—Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; West v. Randall, 2 Mason 181, 29 Fed. Cas. No. 17,424; Copen v. Flesher, 1 Bond 440, 6 Fed. Cas. No. 3,211. **Ala.**—Ford v. Borders, 75 So. 398; American Refrig. & Const. Co. v. Linn, 93 Ala. 610, 7 So. 191 (a bill filed by a stockholder in a domestic corporation against a foreign corporation which owns a majority of the stock, to prevent the latter corporation from voting its stock at an election for directors, and seeking also to enjoin a former officer from voting stock issued to him in trust, on the ground that the indebtedness intended to be secured by it has been paid, and the stock really belongs to it, is multifarious); McEvoy v. Leonard, 89 Ala. 455, 8 So. 40; Stone v. Knickerbocker L. Ins. Co., 52 Ala. 589. **Cal.**—Wilson v. Castro, 31 Cal. 420. **Colo.**—City of Denver v. Kent, 1 Colo. 336. **Conn.**—Robinson v. Cross, 22 Conn. 171. **Fla.**—Mountain v. King, 77 So. 630; Robinson v. Springfield Co., 21 Fla. 203. **Ga.**—Richter v. Macon Gas Co., 95 S. E. 10; Marshall v. Means, 12 Ga. 61, 56 Am. Dec. 444. **Ill.**—Burnett v. Lester, 53 Ill. 325; Ryan v. Town of Shawneetown, 14 Ill. 20. **Ind.**—Chamberlin v. Jones, 114 Ind. 458, 16 N. E. 178. **Me.**—Kennebec & P. R. Co. v. Portland & K. R. Co., 54 Me. 173. **Mass.**—Keith v. Keith, 143 Mass. 262, 9 N. E. 560.

Mich.—Woodruff v. Young, 43 Mich. 548, 6 N. W. 85; Taylor v. King, 32 Mich. 42. **Miss.**—Carmichael v. Browder, 3 How. 252. **Mo.**—Clark v. Covenant Mut. Life Ins. Co., 52 Mo. 272; McGlothlin v. Hemery, 44 Mo. 350; Temple v. Price, 24 Mo. 288. **N. H.**—Winsor v. Bailey, 55 N. H. 218. **N. J.**—Cocks v. Varney, 42 N. J. Eq. 514, 8 Atl. 722; Emans v. Emans, 13 N. J. Eq. 205; Swayze v. Swayze, 9 N. J. Eq. 273. **N. C.**—Bedsole v. Monroe, 40 N. C. 313. **Pa.**—Appeal of Cumberland Valley Ry. Co., 62 Pa. 218; Whetnam v. Pennsylvania, etc. Canal Co., 8 Phila. 92; Wray v. Hazlett, 6 Phila. 155; Baldes v. Henniges, 7 Kulp 143. **Tenn.**—Stuart v. Bair, 8 Baxt. 141; Tilman v. Searey, 5 Humph. 487; Johnson v. Brown, 2 Humph. 327, 37 Am. Dec. 556. **Va.**—Porter v. Robinson, 22 S. E. 843; Universal Life Ins. Co. v. Devore, 83 Va. 267, 2 S. E. 433; Washington City Sav. Bank v. Thornton, 83 Va. 157, 2 S. E. 193; Sadler v. Whitehurst, 83 Va. 46, 1 S. E. 410. **W. Va.**—Bennett v. Clay County Bank, 93 S. E. 353; Day v. National Mut. B. & L. Assn., 53 W. Va. 550, 44 S. E. 779; Bailey v. Calfee, 49 W. Va. 630, 39 S. E. 642. **Wis.**—Hungerford v. Cushing, 8 Wis. 332.

[a] "Two persons cannot unite two distinct titles in an original bill, although against the same person. Such a proceeding, if allowed, might be extended indefinitely and might give such a complexity to chancery proceedings, as would render them almost interminable." Stephens v. McCargo, 9 Wheat. (U. S.) 502, 6 L. ed. 145.

[b] Matters requiring different decrees renders bill multifarious. Hart v. McKee, Walk. (Mich.) 417; Washington City Sav. Bank v. Thornton, 83 Va. 157, 2 S. E. 193. See, however, Neal v. Rathell, 70 Md. 592, 17 Atl. 566; Densmore v. Savage, 110 Mich. 27, 67 N. W. 1103, a bill is not rendered multifarious by the fact that different kinds of specific relief are asked in relation to the same subject-matter, against the same parties, and in favor of the same persons.

[c] Amendment asserting a new

C. SINGLENESSE OF OBJECT OR RIGHT.—The objection of multifariousness is not good where one general right is sought to be enforced or a single object obtained although the defendants may have separate and distinct rights affected by the relief sought and the relief may consist of several elements;¹⁰ thus where a judgment debtor fraud-

and distinct right renders the bill multifarious. *Mobile Sav. Bank v. Burke*, 94 Ala. 125, 10 So. 328.

10. **U. S.**—*Brown v. Guarantee Trust & S. D. Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. ed. 468; *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Williams v. Crabb*, 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425; *United States v. Flournoy Live-Stock, etc. Co.*, 69 Fed. 886; *Gaines v. Mausseaux*, 1 Woods 118, 9 Fed. Cas. No. 5,176. **Ala.** *Gill v. More*, 76 So. 453; *Christian-Craft Groc. Co. v. Kling*, 121 Ala. 292, 25 So. 629; *Collins v. Stix*, 96 Ala. 338, 11 So. 380; *Randle v. Boyd*, 73 Ala. 282; *Bridges & Co. v. Phillips*, 25 Ala. 136, 60 Am. Dec. 495; *Larkins v. Bidle*, 21 Ala. 252; *Planters' & Merchants' Bank v. Walker*, 7 Ala. 926. See also *Hardin v. Swoope*, 47 Ala. 273. **Ark.**—*Winter v. Smith*, 45 Ark. 549. **Cal.**—*Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376; *Wilson v. Castro*, 31 Cal. 420. **Conn.**—*Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, 79 Am. Dec. 250; *Mix v. Hotchkiss*, 14 Conn. 32. **Fla.**—*Deans v. Wilcoxon*, 25 Fla. 980, 7 So. 163; *Robinson v. Springfield Co.*, 21 Fla. 203; *Hayden v. Thrasher*, 18 Fla. 795; *Sanderson v. Sanderson's Admr.*, 17 Fla. 820, a bill by distributees against administrators for mismanagement against one, and a general accounting against both, embracing in the demand a debt alleged to be due the estate by one of the administrators, arising from partnership relations existing between him and the intestate, is not multifarious. **Ga.**—*Allred v. Tate*, 113 Ga. 441, 39 S. E. 101; *Clary v. Haines*, 61 Ga. 520; *Nail v. Mobley*, 9 Ga. 278. **Ill.**—*Rose v. Swann*, 56 Ill. 37; *Merchants' Nat. Bank v. Hogle*, 25 Ill. App. 543. **Ia.**—*Bowers v. Keesecher*, 9 Iowa 422. **Ky.**—*Rodgers v. Rodgers' Admr.*, 17 Ky. L. Rep. 358, 31 S. W. 139. **Me.**—*Bugbee v. Sargent*, 23 Me. 269; *Brown v. Haven*, 12 Me. 164. **Md.**—*Gardner v. Baltimore*, 96 Md. 361, 45 Atl. 85; *Kunkel v. Markell*, 26 Md. 390; *Wilson v. Wilson*, 23 Md. 162; *Young v. Lyons*, 8 Gill 162; *Doub v. Barnes*, 1 Md.

Ch. 127. **Mass.**—*Price v. Minot*, 107 Mass. 49; *Dimmock v. Bixby*, 20 Pick. 368, 377. **Mich.**—*Proctor v. Plumer*, 112 Mich. 393, 70 N. W. 1028. See *Wales v. Newbould*, 9 Mich. 45; *Wheeler v. Clinton Canal Bank*, Harr. 449. **Minn.**—*Palmer v. Tyler*, 15 Minn. 106. **Miss.**—*Henry v. Henderson*, 79 Miss. 452, 30 So. 754; *McGowan v. McGowan*, 48 Miss. 553; *Porniquet v. Forstall*, 34 Miss. 87; *Butler v. Spann*, 27 Miss. 234; *Garrett v. Mississippi & A. R. R. Co.*, *Freem. Ch.* 70. **Mo.**—*Bogges v. Bogges*, 127 Mo. 305, 29 S. W. 1018; *Bobb v. Bobb*, 76 Mo. 419 (*reversing* 8 Mo. App. 257); *Donovan v. Dunning*, 69 Mo. 436; *Goodwin v. Goodwin*, 69 Mo. 617; *Martin v. Martin*, 13 Mo. 36; *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112. **N. H.**—*Chase v. Searles*, 45 N. H. 511. See also *Whitten v. Whitten*, 36 N. H. 326. **N. J.**—*Rowland v. New York State Manure Co. (N. J. Eq.)*, 101 Atl. 521; *Woodridge v. Carlstadt*, 60 N. J. Eq. 1, 46 Atl. 540; *Hicks v. Campbell*, 19 N. J. Eq. 183; *Randolph v. Daly*, 16 N. J. Eq. 313. **N. Y.**—*New York & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592, 7 Abb. Pr. 41; *Reed v. Stryker*, 12 Abb. Pr. 47; *Morton v. Weil*, 11 Abb. Pr. 421, 33 Barb. 30; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412; *Wade v. Rusher*, 4 Bosw. 537; *Bank of America v. Pollock*, 4 Edw. Ch. 215; *Boyd v. Hoyt*, 5 Paige 65; *Hammond v. Hudson River, etc. Co.*, 20 Barb. 378; *Wood v. Sidney Sash, etc. Co.*, 92 Hun 22, 37 N. Y. Supp. 885, 72 N. Y. St. 830. **N. C.**—*Watson v. Cox*, 36 N. C. 389; *Vann v. Hargett*, 22 N. C. 31, 32 Am. Dec. 689; *McCaskill v. McBryde*, 17 N. C. 265. **Pa.**—*Blankenburg v. Black*, 200 Pa. 629, 50 Atl. 198. **R. I.**—*Brown v. Tilley*, 25 R. I. 579, 57 Atl. 380; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234. **S. C.**—*Williams v. Neel*, 10 Rich. Eq. 338, 73 Am. Dec. 94; *Barkley v. Barkley*, 14 Rich. Eq. 12. **Tenn.**—*Bartee v. Tompkins*, 4 Sneed 623; *Hinton v. Cole*, 3 Humph. 656. See also *Johnson v. Brown*, 2 Humph. 327, 37 Am. Dec. 556. **Tex.** *Clegg v. Varnell*, 18 Tex. 294; *Dobbin*

ulently transfers his property in distinct parcels by separate conveyances to different persons a bill to set aside such transfers may join the debtor and his several assignees.¹¹ Nor can a bill be considered multifarious by reason of asking for some additional or ancillary relief such as discovery,¹² accounting,¹³ or a commission for the examination of witnesses.¹⁴ A bill by a creditor seeking several kinds of relief for the one general purpose of obtaining satisfaction of his debt is not necessarily multifarious.¹⁵

D. MUST BE TWO GOOD CAUSES FOR RELIEF.—To render a bill multifarious it must contain two or more sufficient causes or grounds for relief,¹⁶ each being sufficient of itself to authorize a court of equity

v. Bryan, 5 Tex. 276. **Utah.**—*Stevens v. South Ogden, etc. Co.*, 14 Utah 232, 47 Pac. 81. **Vt.**—*Miner v. Pike's Est.*, 71 Vt. 240, 44 Atl. 345; *Smith v. Scribner*, 59 Vt. 96, 7 Atl. 711; *Lewis v. St. Albans Iron & Steel Works*, 50 Vt. 477. **Va.**—*Matney v. Yates*, 93 S. E. 694; *Haskin Wood-Vulcanizing Co. v. Cleveland Ship-Building Co.*, 94 Va. 439, 26 S. E. 878; *Thomas v. Sellman*, 87 Va. 683, 13 S. E. 146; *Hill's Admr. v. Hill*, 79 Va. 592. **W. Va.** *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710; *Arnold v. Arnold*, 11 W. Va. 449. **Wis.**—*Draper v. Brown*, 115 Wis. 361, 91 N. W. 1001; *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 105 Wis. 443, 81 N. W. 675; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; *Moon v. McKnight*, 54 Wis. 551, 11 N. W. 800; *Douglas v. Walbridge*, 38 Wis. 179. **Eng.**—*Mayor of York v. Pilkington*, 1 Atk. 282, 26 Eng. Reprint 180, bill to quiet the plaintiff in a right of fishery might be brought against several defendants, although there was no privity between them and the plaintiff and they claimed distinct rights.

[a] **Defendants claiming under separate conveyances** may be joined in such case. **U. S.**—*Kilgore v. Norman*, 119 Fed. 1006; *United States v. Curtner*, 26 Fed. 296. **Ala.**—*Burke v. Morris*, 121 Ala. 126, 25 So. 759; *Hinds v. Hinds*, 80 Ala. 225; *Halstead v. Shepard*, 23 Ala. 558. **Mich.**—*Alterauge v. Christiansen*, 48 Mich. 60, 11 N. W. 806; *Hammontree v. Lott*, 40 Mich. 190. **Miss.**—*McGowan v. McGowan*, 48 Miss. 553.

[b] **Amendment asking additional relief for enforcement of same right** asserted in the original bill does not render it multifarious. *Eberle v.*

Heaton, 124 Mich. 205, 82 N. W. 820.

[c] **Facts constituting conspiracy** may be alleged and various devices and details of the scheme set forth without rendering bill multifarious. *Bates v. Plonsky*, 62 How. Pr. (N. Y.) 429. See also 5 STANDARD PROC. 331.

[d] **Suit To Cancel Stock.**—Holders of spurious stock certificates in a railroad corporation, fraudulently issued, may be joined in a suit by the corporation, in the interest of the genuine stockholders, to cancel the certificates. *New York & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592, 7 Abb. Pr. 41.

11. 10 STANDARD PROC. 175, et seq.

12. *Chappell v. Funk*, 57 Md. 465; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

13. *Macke v. Macke* (Ala.), 76 So. 26; *Mountain v. King* (Fla.), 77 So. 630.

14. *Commercial Mut. Ins. Co. v. McLoon*, 14 Allen (Mass.) 351.

15. See 6 STANDARD PROC. 217, and the following: **Ala.**—*Guyton v. Terrell*, 132 Ala. 66, 31 So. 83, to set aside fraudulent deed and subject land to payment of debt. **N. J.**—*Randolph v. Daly*, 16 N. J. Eq. 313, to set aside fraudulent conveyance and reach equitable assets. **Va.**—*Thomas v. Sellman*, 87 Va. 683, 13 S. E. 146. **W. Va.** *Stewart v. Stewart*, 27 W. Va. 167, to subject land attached and remove lien of judgment fraudulent against attachment.

16. **U. S.**—*Brown v. Guarantee Trust & S. D. Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. ed. 468. **Ala.**—*McGriff v. Alford*, 111 Ala. 634, 20 So. 497; *Burford v. Steele*, 80 Ala. 147; *Ware v. Curry*, 67 Ala. 274. **Fla.** *Mountain v. King*, 77 So. 630; *Bitch v. Eichelberger*, 13 Fla. 169. See also

to grant relief. Irrelevant or redundant matter,¹⁷ or surplusage,¹⁸ will not be considered on the question of multifariousness. A prayer for relief not warranted by the bill will not render it multifarious.¹⁹

E. SEVERAL GROUNDS FOR SAME RELIEF.—Stating more than one ground to show plaintiff's right to the relief sought²⁰ does not render

Wright *v.* Wright, 77 So. 616. **Ga.** Boney *v.* Cheshire, 92 S. E. 636; Burchard *v.* Boyce, 21 Ga. 6. **Me.**—Kennebec & P. R. R. Co. *v.* Portland & K. R. R. Co., 54 Me. 173. **Mass.**—McCabe *v.* Bellows, 1 Allen 269. **Miss.** Pleasants & Co. *v.* Glasscock, Smed. & M. Ch. 17. **Mo.**—McGlothlin *v.* Hemery, 44 Mo. 350. **N. Y.**—Brady *v.* McCosker, 3 Denio 610, 1 N. Y. 214, 4 How. Pr. 291; Many *v.* Beekman Iron Co., 9 Paige 188; Varick *v.* Smith, 5 Paige 137, 28 Am. Dec. 417. **N. C.**—Bedsole *v.* Monroe, 40 N. C. 313. **Va.**—Town of Appalachia *v.* Mainous, 93 S. E. 566; Matney *v.* Yates, 93 S. E. 694; Huff *v.* Thrash, 75 Va. 546; Snavelly *v.* Harkrader, 29 Gratt. (70 Va.) 112. **W. Va.**—Pyles *v.* Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909; Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455; Smith *v.* McLain, 11 W. Va. 654. **Wis.**—Patten Paper Co. *v.* Kaukauna Water-Power Co., 70 Wis. 659, 35 N. W. 737; Truesdell *v.* Rhodes, 26 Wis. 215; Willard *v.* Reas, 26 Wis. 540; Bassett *v.* Warner, 23 Wis. 673.

[a] **Averments of matter as to which no relief demanded** does not make bill multifarious. **Ala.**—Burford *v.* Steele, 80 Ala. 147; Carpenter *v.* Hall, 18 Ala. 439; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448. **Miss.** Pleasants & Co. *v.* Glasscock, Smed. & M. Ch. 17, as to which no relief can be had. **N. J.**—Wells *v.* Partridge, 31 N. J. Eq. 362. **Pa.**—Blankenburg *v.* Black, 200 Pa. 629, 50 Atl. 198. **R. I.** Arnold *v.* Arnold, 9 R. I. 397; Sayles *v.* Tibbitts, 5 R. I. 79.

[b] **Insufficient Allegations as to One Cause.**—If allegations of one of two causes for relief are insufficient or defective so that no decree could be rendered thereon, the bill is not multifarious. **Ala.**—Boutwell *v.* Vandiver, 123 Ala. 634, 26 So. 222, 82 Am. St. Rep. 149. **Miss.**—Pleasants & Co. *v.* Glasscock, Smed. & M. Ch. 17. **N. Y.** Brady *v.* McCosker, 3 Denio 610, 1 N. Y. 214, 4 How. Pr. 291. **N. C.** Bedsole *v.* Monroe, 40 N. C. 313. **Wis.** Patten Paper Co. *v.* Kaukauna Water-

Power Co., 70 Wis. 659, 35 N. W. 737; Truesdell *v.* Rhodes, 26 Wis. 215; Bassett *v.* Warner, 23 Wis. 673.

[c] **Cause for relief of which a court of equity has no jurisdiction** will not render bill multifarious. **Ala.**—Letchatchie Baptist Church *v.* Bullock, 133 Ala. 548, 32 So. 58; McGriff *v.* Alford, 111 Ala. 634, 20 So. 497; Yarbrough's Admr. *v.* Avant, 66 Ala. 526; Baines *v.* Barnes, 64 Ala. 375. **Ga.**—See Boney *v.* Cheshire, 92 S. E. 636. **Ill.**—Hickey *v.* Chicago, etc. R. Co., 6 Ill. App. 172. **Mass.**—McCabe *v.* Bellows, 1 Allen 269. **Miss.**—Neylans *v.* Burge, 14 Smed. & M. 201. **Va.** Snavelly *v.* Harkrader, 29 Gratt. (70 Va.) 112. **W. Va.**—Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455; Smith *v.* McLain, 11 W. Va. 654.

17. **Ala.**—Morris *v.* Morris, 58 Ala. 443. **Fla.**—Ritch *v.* Eichelberger, 13 Fla. 169. **Mo.**—McGlothlin *v.* Hemery, 44 Mo. 350.

18. **Fla.**—Mountein *v.* King, 77 So. 630. **Ill.**—Sturgeon *v.* Burrall, 1 Ill. App. 537. **Va.**—Town of Appalachia *v.* Mainous, 93 S. E. 566.

19. **U. S.**—De Neufville *v.* New York & N. R. Co., 81 Fed. 10, 26 C. C. A. 306. **Ala.**—McCarthy *v.* McCarthy, 74 Ala. 546. **Mich.**—Hammond *v.* Michigan State Bank, Walk. Ch. 214. **N. J.**—Miller *v.* Jamison, 24 N. J. Eq. 41; Durling *v.* Hammar, 20 N. J. Eq. 220. **N. Y.**—Mayne *v.* Griswold, 3 Sandf. 463. See also McCosker *v.* Brady, 1 Barb. Ch. 329.

20. **U. S.**—Stephens *v.* McCargo, 9 Wheat. 502, 6 L. ed. 145 (the court saying: "We know of no principle, which shall prevent a person claiming the same property, by different titles, from asserting all his titles in the same bill"); Davis *v.* Berry, 106 Fed. 761; Cutter *v.* Iowa Water Co., 96 Fed. 777; Halsey *v.* Goddard, 86 Fed. 25. **Ala.**—Kelly *v.* Browning, 113 Ala. 420, 21 So. 928; Dickerson *v.* Winslow, 97 Ala. 491, 11 So. 918. **Ga.**—Allred *v.* Tate, 113 Ga. 441, 39 S. E. 101. **Mass.** Pope *v.* Leonard, 115 Mass. 286. **N. Y.** Young *v.* Edwards, 11 How. Pr. 201.

the bill multifarious. However, inconsistent and repugnant claims cannot be set up.²¹

F. PREVENTING MULTIPLICITY OF SUITS.²²—A bill is not bad for multifariousness where the joinder prevents a multiplicity of suits and the matters set forth can be conveniently disposed of in the one suit.²³

G. MATTERS ARISING FROM SAME TRANSACTION OR AFFECTING SAME SUBJECT MATTER.—If the matters upon which relief is sought arise out of one and the same transaction,²⁴ or a series of transactions form-

N. C.—Cauley v. Lawson, 58 N. C. 132; Barnett v. Woods, 55 N. C. 198. Pa. Appeal of Cumberland Valley Ry. Co., 62 Pa. 218.

21. U. S.—Cutter v. Iowa Water Co., 96 Fed. 777; Wilkinson v. Dobbie, 12 Blatchf. 298, 29 Fed. Cas. No. 17,670. Ala.—Williams v. Cooper, 107 Ala. 246, 18 So. 170. Mass.—Davis v. Peabody, 170 Mass. 397, 49 N. E. 750. Miss. Thoms v. Thoms, 45 Miss. 263. Mo. Jones v. Paul, 9 Mo. 293; Wilkson v. Blackwell, 4 Mo. 428, bill for specific performance stating one contract charging the land was paid for in money, and again that it was paid for in hogs, is multifarious and bad on demurrer. N. J.—Emans v. Emans, 14 N. J. Eq. 114. N. Y.—Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Swift v. Eckford, 6 Paige 22. Va. Universal Life Ins. Co. v. Devore, 83 Va. 267, 2 S. E. 433.

Distinct and unconnected causes generally, see *supra*, II, B.

22. See generally the title "Multiplicity of Suits."

23. U. S.—Stafford Nat. Bank v. Sprague, 8 Fed. 377, if inconvenience or additional expense not caused defendants. See also Western Land & Emigration Co. v. Guinault, 37 Fed. 523. Cal.—People v. Morrill, 26 Cal. 336. Ia.—Bowers v. Keesecher, 9 Iowa 422. N. C.—Ayers v. Wright, 43 N. C. 229. Pa.—Appeal of Hayes, 123 Pa. 110, 16 Atl. 600, 23 Wkly. N. Cas. 161.

Contra, Haines v. Carpenter, 1 Woods 262, 11 Fed. Cas. No. 5,905.

[a] Parties Must All Be Interested in Main Issue.—People v. Morrill, 26 Cal. 336. See also New York & N. H. R. Co. v. Schuyler, 1 Abb. Pr. (N. Y.) 417.

24. U. S.—Pullman v. Stebbins, 51 Fed. 10; United States v. Pratt Coal & Coke Co., 18 Fed. 708. Ala.—Fies v. Rosser, 162 Ala. 504, 50 So. 287, 136 Am. St. Rep. 57; Hall v. Henderson,

134 Ala. 455, 32 So. 840, 63 L. R. A. 673; Henderson v. Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Cox v. Johnson, 80 Ala. 22. Fla.—Farrell v. Forest Inv. Co., 74 So. 216; Szabo v. Speckman, 74 So. 411, L. R. A. 1917D, 357. Ga.—Maddox v. Rowe, 28 Ga. 61. Ia.—Walkup v. Zehring, 13 Iowa 306. Ky.—Hutchcraft v. Shrout's Heirs, 1 T. B. Mon. 206, 15 Am. Dec. 100. Me.—Kennebec & P. R. Co. v. Portland & K. R. Co., 54 Me. 173; Foss v. Haynes, 31 Me. 81. Md.—Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Doub v. Barnes, 1 Md. Ch. 127. Mass.—Digney v. Blanchard, 226 Mass. 335, 115 N. E. 424. Miss.—Comstock v. Rayford, 1 Smed. & M. 423, 40 Am. Dec. 102. Mo.—Bobb v. Bobb, 76 Mo. 419 (*reversing* 8 Mo. App. 257); Goodwin v. Goodwin, 69 Mo. 617; Tucker v. Tucker, 29 Mo. 350; Rubey v. Barnett, 12 Mo. 3, 49 Am. Dec. 112. N. Y. Varick v. Smith, 5 Paige 137, 28 Am. Dec. 417. N. C.—Ayers v. Wright, 43 N. C. 229 ("But where all the matters charged constitute but one whole transaction, then the bill is not multifarious; and all the parties mixed up in the transaction, and having an interest in the subject-matters, must be made parties, to avoid multiplicity of suits"); Bedsole v. Monroe, 40 N. C. 313; Vann v. Hargett, 22 N. C. 31, 32 Am. Dec. 689. Pa.—Appeal of Cumberland Val. Ry. Co., 62 Pa. 218; Brady v. Shissler, 8 Phila. 333. Tex.—Teas v. McDonald, 13 Tex. 349, 65 Am. Dec. 65. Va.—Johnson v. Black, 103 Va. 477, 49 S. E. 633, 106 Am. St. Rep. 890, 68 L. R. A. 264; Withers' Admr. v. Sims, 80 Va. 651. W. Va.—Arnold v. Arnold, 11 W. Va. 449. Wis.—Douglas v. Walbridge, 38 Wis. 179.

"Transaction" defined, see 14 STANDARD PROC. 702, et seq.

[a] Matters from same fraudulent

ing one course of dealing and tending towards the same end,²⁵ the bill is not multifarious, all of the parties being interested in the right and the relief sought. Nor will the joining of several distinct matters or demands relating to the same subject matter render the bill multifarious.²⁶

H. AS TO PARTIES.—1. Complainants.—a. General Statement. Several complainants having distinct and unconnected claims against a defendant cannot enforce them by one suit in equity; the bill is bad for multifariousness,²⁷ and this is true of a bill setting up dis-

scheme is example of rule. **U. S.** *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337; *Pullman v. Stebbins*, 51 Fed. 10. **Ala.**—*Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107, 31 So. 524. **Conn.**—*Ashmead v. Colby*, 26 Conn. 287. **Ga.**—*Burns v. Beck*, 83 Ga. 471, 10 S. E. 121. **Mass.**—*Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401. **Wis.**—*McLachlan v. Staples*, 13 Wis. 448.

[b] **Matters Arising From Same Contract.**—*Maddox v. Rowe*, 28 Ga. 61; *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60.

[c] **Joining of several parties having distinct or separate interests arising from the same transactions does not render bill multifarious.** *Martin v. Martin*, 13 Mo. 36.

25. **Me.**—*Kennebec, etc. R. Co. v. Portland, etc. R. Co.*, 54 Me. 173. **N. C.** *Bedsole v. Monroe*, 40 N. C. 313. **Ore.** *Baillie v. Columbia Gold Min. Co.*, 86 Ore. 1, 166 Pac. 965, 167 Pac. 1167. **Wis.**—*Douglas v. Walbridge*, 38 Wis. 179.

26. **U. S.**—*Patton v. Glatz*, 56 Fed. 367; *Norris v. Haggin*, 28 Fed. 275; *Bunell v. Stoddard*, 2 Am. L. Rec. 145, 4 Fed. Cas. No. 2,135. **Ala.**—*Bamberger v. Voorhees*, 99 Ala. 292, 13 So. 305; *Seals v. Pfeiffer*, 81 Ala. 518, 1 So. 267; *Johnston v. Smith's Admr.*, 70 Ala. 108; *Whitman v. Abernathy*, 33 Ala. 154, bill filed by a married woman, seeking to recover property belonging to her separate estate, which her husband had sold without authority, and to remove him from the trusteeship of her estate, is not multifarious. **Ark.**—*Gartland v. Nunn*, 11 Ark. 720, where the claim asserted in the bill consisted of an equitable estate in a town lot and the object was to disencumber it by setting aside two separate and distinct sales, one of the entire, the other of a portion of the property in dispute. Held not multi-

furious as relating to the same subject matter and charging defendant with being purchaser at both sales. **Fla.**—*Mountain v. King*, 77 So. 630. **Ga.**—*Williams v. Wheaton*, 86 Ga. 223, 12 S. E. 634; *Blaisdell v. Bohr*, 68 Ga. 56; *Lavender v. Thomas*, 18 Ga. 668. See also *Clary v. Haines*, 61 Ga. 520. **Ill.**—*Sapp v. Phelps*, 92 Ill. 588. **Ky.**—*Lynch v. Johnson*, 2 Litt. 98. **Md.**—*Chew v. Glenn*, 82 Md. 370, 33 Atl. 722. **Mass.**—*Bliss v. Parks*, 175 Mass. 539, 56 N. E. 566. **Mich.**—*Johnson v. Harrison*, 165 N. W. 773; *Densmore v. Savage*, 110 Mich. 27, 67 N. W. 1103. **Miss.**—*Barry v. Barry*, 64 Miss. 709, 3 So. 532; *Comstock v. Rayford*, 1 Smed. & M. 423, 40 Am. Dec. 102. See also *Hardie v. Bulger*, 66 Miss. 577, 6 So. 186; *Richardson v. Brooks*, 52 Miss. 118. **Mo.**—*Perkins v. Baer*, 95 Mo. App. 70, 68 S. W. 939. **N. J.**—*Hicks v. Campbell*, 19 N. J. Eq. 183. **N. Y.**—*Cahoon v. Utica Bank*, 7 N. Y. 486, 7 How. Pr. 401. **N. C.** *Ely v. Early*, 94 N. C. 1. **Ohio.**—*Bank of Muskingum v. Carpenter's Admr.*, *Wright* 729. **Pa.**—*Persch v. Quiggle*, 57 Pa. 247. **W. Va.**—*Lynch v. Armstrong*, 94 S. E. 24. See also *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. **Wis.**—*Hungerford v. Cushing*, 8 Wis. 332.

See also 14 STANDARD PROC. 700, et seq.

[a] **Several parties having different interests in same subject matter may be joined without rendering bill bad for multifariousness.** *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449; *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147.

[b] **Complete identity of subject matter not necessary.** **Conn.**—*Waters v. Hubbard*, 44 Conn. 340. **N. H.**—*Bell v. Woodward*, 42 N. H. 181. **N. J.** *Chapman v. Hunt*, 14 N. J. Eq. 149.

27. **U. S.**—*Stebbins v. Town of St. Anne*, 116 U. S. 386, 6 Sup. Ct. 418,

tinet demands by several complainants against several defendants.²⁸ So too a bill is held multifarious if one of two complainants has no standing in court.²⁹ But a bill is not objectionable on this ground where the several complainants seek identical relief from the same cause,³⁰ or where the complainants are all interested in the subject matter of the bill and the relief sought, though their interests may be distinct,³¹ and if the parties plaintiff have a common interest in the

29 L. ed. 667; *Yeaton v. Lenox*, 8 Pet. 123, 8 L. ed. 889; *Church v. Citizens' St. Ry. Co.*, 78 Fed. 526; *Baker v. Portland*, 5 Sawy. 566, 2 Fed. Cas. No. 777. **Ala.**—*Bean v. Bean's Admr.*, 37 Ala. 17. **Conn.**—*Mix v. Hotchkiss*, 14 Conn. 32. **Del.**—*Reybold v. Herdman*, 2 Del. Ch. 34. **Ill.**—*Whiteside v. Burchell*, 31 Ill. 68. **Ky.**—*Richardson v. McKinson*, Litt. Sel. Cas. 320, 12 Am. Dec. 308. **Md.**—*Fiery v. Emmert*, 36 Md. 464. **Mich.**—*Jenness v. Smith*, 64 Mich. 91, 30 N. W. 909; *Winslow v. Smith*, 64 Mich. 84, 30 N. W. 905. **Miss.**—*Louisville v. Armstrong*, 113 Miss. 385, 74 So. 285. **N. J.**—*Marselis v. Morris Canal & Bkg. Co.*, 1 N. J. Eq. 31. **N. C.**—*Ayers v. Wright*, 43 N. C. 229. **Ohio.**—*Dawson v. Lawrence*, 13 Ohio 543, 42 Am. Dec. 210. **R. I.**—*Peabody v. Western Waterworks*, 20 R. I. 176, 37 Atl. 807. **S. C.**—*Murray v. Stevens*, 1 Rich. Eq. Cas. 205. **Tenn.**—*Tilman v. Searcy*, 5 Humph. 487. **W. Va.**—*Harrison County Court v. Hope Natural Gas Co.*, 92 S. E. 726; *Bailey v. Calfee*, 49 W. Va. 630, 39 S. E. 642. **Wis.**—*Barnes v. City of Beloit*, 19 Wis. 93.

28. *Marsh's Admr. v. Richardson's Admr.*, 49 Ala. 430.

29. **U. S.**—*Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729. **Conn.**—*Jones v. Quinnipiac Bank*, 29 Conn. 25. **Ind.**—*Grimes v. Wilson*, 4 Blackf. 331.

30. **U. S.**—*Kilgore v. Norman*, 119 Fed. 1006; *Home Ins. Co. v. Virginia-Carolina Chemical Co.*, 109 Fed. 681; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160 (claims arising from same cause, involve similar facts, and governed by same legal rules); *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623. See also *Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209. **Ala.**—*Adams v. Jones*, 68 Ala. 117; *Owens v. Grimsley*, 44 Ala. 359. **Ill.**—*Mt. Carbon Coal & R. Co. v. Blanchard*, 54 Ill. 240. **Md.**—*Charles Simons Sons Co. v. Maryland Tel. & Tel. Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727; *Reese v. Wright*,

98 Md. 272, 56 Atl. 976; *Young v. Lyons*, 8 Gill 162; *Peters v. Van Lear*, 4 Gill 249. **Mass.**—See *Coleman v. Barnes*, 5 Allen 374. **Mich.**—*Cornwell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001; *Scotfield v. Lansing*, 17 Mich. 437; *Kerr v. Lansing*, 17 Mich. 34. **N. C.**—*Davis v. Miller*, 57 N. C. 447; *Wood v. Barringer*, 16 N. C. 67. **Ohio.**—*Griffith v. Crawford County Comrs.*, 1 Ohio Dec. 457. **Pa.**—*Rafferty v. Central Traction Co.*, 147 Pa. 579, 23 Atl. 884, 29 Wkly. N. Cas. 542, 30 Am. St. Rep. 763. **R. I.**—*Whipple v. Guile*, 22 R. I. 576, 48 Atl. 935, 84 Am. St. Rep. 855. **Tenn.**—*Madison v. Ducktown, etc. Co.*, 113 Tenn. 331, 83 S. W. 658; *Long v. Fisher Type-writer Co.*, 1 Tenn. Ch. App. 668. **Wis.**—*Catlin v. Wheeler*, 49 Wis. 507, 5 N. W. 935.

See also *supra*, II, C.

[a] *Contra.*—There are decisions which hold that several complainants cannot join in a bill, though the same relief be sought against the same defendant. *Marselis v. Morris Canal & Bkg. Co.*, 1 N. J. Eq. 31.

[b] Several sureties may compel contribution from co-surety in one bill. *Young v. Lyons*, 8 Gill (Md.) 162.

[c] To prevent collection of tax several property owners may join in bill. **Ill.**—*Mt. Carbon Coal & R. Co. v. Blanchard*, 54 Ill. 240. **Mich.**—*Scotfield v. Lansing*, 17 Mich. 437. **Ohio.**—*Griffith v. Crawford County Comrs.*, 1 Ohio Dec. 457. **Tenn.**—*Ignaz v. City of Knoxville*, 1 Tenn. Ch. App. 1. See the title "Taxation."

[d] Fact that same kind of injury sustained by complainants not sufficient to warrant their joining in a bill where cause of complaint is separate and distinct. *Appeal of Young*, 3 Penny. (Pa.) 463.

Nuisance, multifariousness in bill to restrain, see the title "Nuisance."

31. **U. S.**—*Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Virginia-Carolina Chemical Co. v. New York*

subject matter, it is not necessary that they should all be interested to the same extent.³²

b. *One Complainant in Several Capacities.*—One complainant cannot seek different relief in different capacities by one bill.³³ So one cannot unite in a single bill his individual claims with claims in his representative capacity,³⁴ or in two representative capacities.³⁵ However, one complainant may seek the same relief in two capacities.³⁶

2. *Defendants.*—A bill is multifarious which contains distinct and separate demands against several defendants,³⁷ where parties are

Home Ins. Co., 113 Fed. 1, 51 C. C. A. 21; South Penn Oil Co. v. Calf, Creek Oil, etc. Co., 140 Fed. 507. **Ala.** Mobile & C. P. R. Co. v. Talman, 15 Ala. 472; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448. **Conn.**—Cornwell v. Lee, 14 Conn. 524. **Ill.**—Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912. **Md.**—Murphy v. Wheatley, 100 Md. 353, 59 Atl. 704; Kunkell v. Markell, 26 Md. 390. **N. H.**—See Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082. **N. J.**—Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593, having been injured by the same act. **Pa.**—Brady v. Shissler, 8 Phila. 333.

[a] *Claimants under same source of title* may join to protect their rights under that title. Dart v. Orme, 41 Ga. 376.

32. **U. S.**—Shields v. Thomas, 18 How. 253, 15 L. ed. 368; Langdon v. Branch, 37 Fed. 449, 2 L. R. A. 120. **Me.**—Brown v. Haven, 12 Me. 164, relief may be had distributively as the equity of the case may require. **Md.** Charles Simons Sons Co. v. Maryland Tel. & Tel. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727; Fiery v. Emmert, 36 Md. 464. **Miss.**—McGowan v. McGowan, 48 Miss. 553. **N. J.**—Hicks v. Campbell, 19 N. J. Eq. 183. **S. C.** Ragsdale v. Holmes, 1 S. C. 91. **Va.** Boshier v. Richmond & H. L. Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

33. **U. S.**—Metropolitan Trust Co. v. Columbus, S. & H. R. Co., 93 Fed. 689. **Ark.**—Ft. Smith v. Brogan, 49 Ark. 306, 5 S. W. 337, as taxpayer and individual to redress private grievance. **N. J.**—Van Mater v. Sickler, 9 N. J. Eq. 483, as heir at law and as next of kin. **N. C.**—Allen v. Miller, 57 N. C. 146.

See also Church v. Citizens' St. R. Co., 78 Fed. 526.

34. **U. S.**—Cassels v. Vernon, 5 Mason 332, 5 Fed. Cas. No. 2,503; Carter

v. Treadwell, 3 Story 25, 5 Fed. Cas. No. 2,480. **Mass.**—See White v. Bigelow, 154 Mass. 593, 28 N. E. 904. **N. C.**—May v. Smith, 45 N. C. 196, 59 Am. Dec. 594. **Tenn.**—See Gilliam v. Spence, 6 Humph. 163; Moody v. Fry, 3 Humph. 567; Bosley v. Phillips, 3 Tenn. Ch. 649.

35. Jones v. Foster, 50 Miss. 47, as guardian and as administrator.

36. **Ala.**—Ford v. Borders, 75 So. 398. **Fla.**—See Keyser v. Simmons, 16 Fla. 263. **Mass.**—Phillips v. Allen, 5 Allen 85 (the administrator of a cestui que trust, in a bill in equity seeking for an account and payment of moneys received by the trustee for timber cut from the land held in trust and sold by him, may properly aver, in addition to setting forth his office of administrator, that he is now the sole owner of the whole equitable interest in the land); Robinson v. Guild, 12 Metc. 323.

See also Metropolitan Trust Co. v. Columbus, S. & H. R. Co., 93 Fed. 689.

37. **U. S.**—Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644. **Ala.**—Bullock v. Knox, 96 Ala. 195, 11 So. 339; Sumter County v. Mitchell, 85 Ala. 313, 4 So. 705; Bayzor v. Adams, 80 Ala. 239; Johnson v. Parkinson, 62 Ala. 456; Clay v. Gurley, 62 Ala. 14; Harden v. Swoope, 47 Ala. 273; Kennedy v. Kennedy's Heirs, 2 Ala. 571. **Conn.**—Coe v. Turner, 5 Conn. 86. **Ga.**—Richter v. Macon Gas Co., 95 S. E. 10; George W. Muller Bank Fixture Co. v. Southern Seating, etc. Co., 92 S. E. 884; Griffin v. Henderson, 116 Ga. 310, 42 S. E. 482; Stephens v. Whitehead, 75 Ga. 294; Dewberry v. Shannon, 59 Ga. 311. **Ky.**—Richardson v. McKinson, Litt. Sel. Cas. 320, 12 Am. Dec. 308. **Me.**—Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523; Cheney v. Goodwin, 88 Me. 563, 34 Atl. 420; Robinson v. Robinson, 73 Me. 170. **Md.** Beachey v. Heiple, 101 Atl. 553; Emer-

joined as defendants between whom there is no community or connection in interest;³⁸ when no relief is asked against a defendant who is joined;³⁹ where one having no connection with or interest in the subject matter is joined as defendant;⁴⁰ or where any defendant is unconnected with any of the distinct claims set forth in the bill.⁴¹ It is not sufficient that the claims against the several defendants be sim-

son *v.* Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738; Fiery *v.* Emmert, 36 Md. 464. **Mass.**—Sylvester *v.* Boyd, 166 Mass. 445, 44 N. E. 343; Sanborn *v.* Dwinell, 135 Mass. 236; Dimmock *v.* Bixby, 20 Pick. 368. **Mich.** Ingersoll *v.* Kirby, Walk. 65. See also Woodruff *v.* Young, 43 Mich. 548, 6 N. W. 85. **Miss.**—Roberts *v.* Starke, 47 Miss. 257; Boyd *v.* Swing, 38 Miss. 182. **N. J.**—Evans *v.* Evans (N. J. Eq.), 58 Atl. 904; Emans *v.* Emans, 13 N. J. Eq. 205. **N. Y.**—Childs *v.* Clark, 3 Barb. Ch. 52, 49 Am. Dec. 164; Banks *v.* Walker, 2 Sandf. Ch. 344. **N. C.** Simpson *v.* Wallace, 83 N. C. 477; Drew *v.* Clemmons, 55 N. C. 312; Ayers *v.* Wright, 43 N. C. 229. **Ore.** See Benson *v.* Keller, 37 Ore. 120, 60 Pac. 918. **Pa.**—Bovaird *v.* Seyfang, 200 Pa. 261, 49 Atl. 958; Young *v.* Forest Oil Co., 194 Pa. 243, 45 Atl. 121; Sheriff *v.* Globe Oil Co., 1 Brewst. 489, 7 Phila. 4. **R. I.**—Aylesworth *v.* Crocker, 21 R. I. 436, 44 Atl. 308. **Tenn.** Allison *v.* Davidson, 39 S. W. 905; Hickman *v.* Cooke, 3 Humph. 640, bill to compel conveyance by one joining owner of adjoining property to settle boundary dispute. **Tex.**—See Yellow Pine Lumber Co. *v.* Carroll, 76 Tex. 135, 13 S. W. 261. **Va.**—Almond *v.* Wilson, 75 Va. 613; Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238. See also Porter *v.* Young, 85 Va. 49, 6 S. E. 803. **W. Va.**—Petty *v.* Fogle, 16 W. Va. 497. **Wis.**—Hungerford *v.* Cushing, 8 Wis. 332.

[a] Amendment to bill introducing other defendants and a cause for relief wholly distinct from first, renders bill multifarious. Dewberry *v.* Shannon, 59 Ga. 311.

[b] Fact that each case involves some common elements of fact does not warrant joining claims against several defendants arising from different transactions. Boonville Nat. Bank *v.* Blakey, 166 Ind. 427, 76 N. E. 529.

[c] Largely in Discretion of Court. Benson *v.* Keller, 37 Ore. 120, 60 Pac. 918, and cases cited *supra*, II, A.

38. **U. S.**—United States *v.* Alexander, 4 Cranch C. C. 311, 24 Fed. Cas. No. 14,428. **Conn.**—Mix *v.* Hotchkiss, 14 Conn. 32. **Ga.**—Farmer *v.* Rogers, 88 Ga. 162, 14 S. E. 188. **Kan.**—Fry *v.* Rush, 63 Kan. 429, 65 Pac. 701. **Md.**—Wilson *v.* Wilson, 23 Md. 162. **Mass.**—Sanborn *v.* Dwinell, 135 Mass. 236; Cambridge Water Works *v.* Somerville, etc. Co., 14 Gray 193. **Mich.** Hutton *v.* Platt, 11 Mich. 264. **Miss.** McNiell *v.* Burton, 1 How. 510. **Mo.** Clamorgan's Exrs. *v.* Guisse, 1 Mo. 141. **N. J.**—Miller *v.* Willett, 70 N. J. Eq. 396, 62 Atl. 178. **Va.**—Wells *v.* Sewell's Point Guano Co., 89 Va. 708, 17 S. E. 2. **Wis.**—Seaman *v.* Goodnow, 20 Wis. 27.

39. Cowgill & Hill Milling Co. *v.* L. M. Nicholson Co. (Miss.), 24 So. 880.

40. Carmichael *v.* Texarkana, 94 Fed. 561; Morris *v.* Dillard, 4 Smed. & M. (Miss.) 636.

41. **Ala.**—Waller *v.* Taylor, 42 Ala. 297. **D. C.**—Fields *v.* Gwynn, 19 App. Cas. 99. **Ga.**—Stuck *v.* Southern Steel, etc. Co., 96 Ga. 95, 22 S. E. 592. **Md.** Reckefus *v.* Lyon, 69 Md. 589, 16 Atl. 233. **Mass.**—Sylvester *v.* Boyd, 166 Mass. 445, 44 N. E. 343. **Mo.**—Montserratt Coal Co. *v.* Johnson County Coal Min. Co., 141 Mo. 149, 42 S. W. 822. **N. H.**—Whitten *v.* Whitten, 36 N. H. 326. **N. J.**—Van Houten *v.* Van Winkle, 46 N. J. Eq. 380, 20 Atl. 34; Kirkpatrick *v.* Corning, 37 N. J. Eq. 54. See also Burne *v.* O'Shaughnessy (N. J. Eq.), 38 Atl. 963. **N. Y.**—Viall *v.* Mott, 37 Barb. 208. **Pa.**—Sheriff *v.* Globe Oil Co., 1 Brewst. 489, 7 Phila. 4. **W. Va.**—Petty *v.* Fogle, 16 W. Va. 497.

[a] Joint claim against all joined with distinct claim against one defendant renders the bill multifarious. Ala. McIntosh *v.* Alexander, 16 Ala. 87. Me.—Robinson *v.* Robinson, 73 Me. 170. N. J.—Emans *v.* Emans, 13 N. J. Eq. 205. N. Y.—Boyd *v.* Hoyt, 5 Paige 65.

ilar in nature.⁴² But where there is a common liability on the part of the defendants,⁴³ or when the defendants are all connected with or have a common interest in the subject matter of the action or the wrong complained of,⁴⁴ or the relief which complainant asks against the several defendants affects the same property,⁴⁵ or the object of

42. *Cheney v. Goodwin*, 88 Me. 563, 34 Atl. 420, to enforce several separate though similar contracts.

43. **Ala.**—See *Lee v. Lee*, 55 Ala. 590, joinder of guardians and sureties on their bonds in suit to compel accounting and payment of money into court, does not render bill multifarious. **Md.**—Fiery *v. Emmert*, 36 Md. 464. **Mich.**—*Merritt Tp. v. Harp*, 131 Mich. 174, 91 N. W. 156.

44. **U. S.**—*Union Pac. R. Co. v. McShane*, 3 Dill. 303, 24 Fed. Cas. No. 14,382; *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14; *New England Phonograph Co. v. Edison*, 110 Fed. 26; *United States v. Guglard*, 79 Fed. 21; *Northern Pac. R. Co. v. Walker*, 47 Fed. 681; *Duff v. First Nat. Bank*, 13 Fed. 65. **Ala.**—*Bellview Cemetery Co. v. Faulks*, 73 So. 927; *Adams v. Wilson*, 137 Ala. 632, 34 So. 831; *Schussler v. Dudley*, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124; *Lott v. Mobile County*, 79 Ala. 69; *Larkin v. Mead*, 77 Ala. 485; *Dallas v. Timberlake*, 54 Ala. 403; *Horton v. Sledge*, 29 Ala. 478; *Donelson's Admrs. v. Posey*, 13 Ala. 752; *McCartney v. Calhoun*, 11 Ala. 110. **Ark.**—*State v. Churchill*, 48 Ark. 426, 3 S. W. 352. **Cal.**—See *Wilson v. Castro*, 31 Cal. 420. **Conn.**—*Bissell v. Beckwith*, 33 Conn. 357; *Cornwell v. Lee*, 14 Conn. 524. **D. C.**—*Kann v. King*, 25 App. Cas. 182. **Fla.**—*Deans v. Wilcoxon*, 25 Fla. 980, 7 So. 163; *Sanderson's Admrs. v. Sanderson*, 17 Fla. 820. **Ga.**—*Brown v. Wilcox*, 94 S. E. 993; *Wynne v. Lumpkin*, 35 Ga. 208 (though different relief be asked against the different defendants); *McDougald v. Maddox*, 17 Ga. 52. **Ia.**—*Greither v. Alexander*, 15 Iowa 470. **Me.**—*Brown v. Haven*, 12 Me. 164. **Md.**—*Beachey v. Heiple* (Md.), 101 Atl. 553; *Brian v. Thomas*, 63 Md. 476. **Mass.**—*Bliss v. Parks*, 175 Mass. 539, 56 N. E. 566. **Miss.**—*Delafield v. Anderson*, 7 Smed. & M. 630. **N. J.**—*Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449; *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147. **N. Y.**—*Kent v. Lee*, 2 Sandf. Ch. 105. **S. C.**—*Barkley v. Barkley*, 14 Rich. Eq. 12. **Tenn.**

Madison v. Ducktown Sulphur, Copper, etc. Co., 113 Tenn. 331, 83 S. W. 658 (acts of several defendants constituting a nuisance); *Woodward v. Hall*, 2 Tenn. Ch. 164. **Va.**—*Johnson v. Black*, 103 Va. 477, 49 S. E. 633, 106 Am. St. Rep. 890, 68 L. R. A. 264; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; *Almond v. Wilson*, 75 Va. 613. See also *Albemarle School Board v. Farish's Admr.*, 92 Va. 156, 23 S. E. 221. **W. Va.**—*Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298. See also *Smith v. McLain*, 11 W. Va. 654. **Wis.**—*Blake v. Van Tilborg*, 21 Wis. 672.

[a] **Defendants having common interest in defeating complainant's claim** may be joined. **U. S.**—*Virginia-Carolina Chem. Co. v. New York Home Ins. Co.*, 113 Fed. 1, 51 C. C. A. 21; *Central Pac. R. Co. v. Dyer*, 1 Sawy. 641, 5 Fed. Cas. No. 2,552. **Ala.**—*Howard v. Corey*, 126 Ala. 283, 28 So. 682; *Donelson's Admrs. v. Posey*, 13 Ala. 752. **Ga.**—*Austin v. Raiford*, 61 Ga. 125. **Miss.**—*Delafield v. Anderson*, 7 Smed. & M. 630.

[b] **Where defendants employed a common agent who procured the execution of a deed which it is the main purpose of the suit to have set aside, they may be joined without rendering the bill multifarious.** *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14.

45. **U. S.**—*United States v. Curtner*, 26 Fed. 296. **Ala.**—*Donelson's Admrs. v. Posey*, 13 Ala. 752. **Ark.**—*Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058. **Fla.**—*Hayden v. Thrasher*, 18 Fla. 795. **Me.**—*Richards v. Pierce*, 52 Me. 560. **Md.**—See *Beachey v. Heiple*, 101 Atl. 553. **Mo.**—*Waddell v. Waddell*, 99 Mo. 338, 12 S. W. 349, 17 Am. St. Rep. 575. **Tenn.**—*Walker v. Day*, 8 Baxt. 77. **Tex.**—*Clegg v. Varnell*, 18 Tex. 294; *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942.

[a] **Bill to quiet title not multifarious because defendants claim through different sources.** *Alterauge v. Christiansen*, 48 Mich. 60, 11 N. W. 806.

the suit is single and the defendants have an interest therein though their interests may be distinct;⁴⁶ or, according to some decisions, the acts of the several defendants of which complainant complains, all affect the same property,⁴⁷ a bill joining such defendants is not multifarious. Nor will the objection of multifariousness lie where a complainant seeks appropriate relief from the acts of several defendants who have combined or acted together in reference to the subject matter, though the interests of the several defendants may not be identical.⁴⁸ So too, it is held that several defendants who claim or have interests in the subject matter of the bill which can be conveniently settled in the one suit, may be joined without rendering the bill multifarious.⁴⁹

Matters arising from the same transaction or affecting the same subject matter in which several defendants are interested will be found elsewhere in this article.⁵⁰

Interest Need Not Extend to Entire Bill. — It is not necessary that all the parties should have an interest in all the matters contained in the suit; the objection will be defeated if it appears that each party has

46. **U. S.**—United States *v.* Flournoy, etc. Co., 69 Fed. 886; Chase *v.* Cannon, 47 Fed. 674. **Fla.**—Brown *v.* Solary, 37 Fla. 102, 19 So. 161. **Md.** See Beachey *v.* Heiple, 101 Atl. 553. **N. C.**—Heggie *v.* Hill, 95 N. C. 303.

47. **U. S.**—Louisville & N. R. Co. *v.* Smith, 128 Fed. 1, 63 C. C. A. 1; Dastervignes *v.* United States, 122 Fed. 30, 58 C. C. A. 346; Woodruff *v.* North Bloomfield, etc. Co., 16 Fed. 25, 8 Sawy. 628. **Ala.**—Hinds *v.* Hinds, 80 Ala. 225. **Ga.**—Graham *v.* Dahlongega Gold-Mining Co., 71 Ga. 296. **Mich.** Proctor *v.* Plumer, 112 Mich. 393, 70 N. W. 1028.

48. **U. S.**—Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Alma First Nat. Bank *v.* Moore, 48 Fed. 799; McMullen Lumb. Co. *v.* Strother, 136 Fed. 295, 69 C. C. A. 433; Campbell *v.* Clark, 101 Fed. 972, 42 C. C. A. 123; Barcus *v.* Gates, 89 Fed. 783, 32 C. C. A. 337. **Ala.**—Northwestern Land Assn. *v.* Grady, 137 Ala. 219, 33 So. 874. **Conn.**—Bissell *v.* Beckwith, 33 Conn. 357. **Ga.**—Vaughn *v.* Georgia Co-operative Loan Co., 98 Ga. 288, 25 S. E. 441; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254. **Ill.**—North American Ins. Co. *v.* Yates, 214 Ill. 272, 73 N. E. 423. **Me.**—Brown *v.* Haven, 12 Me. 164. **Md.**—Beachey *v.* Heiple, 101 Atl. 553. **Miss.**—Butler *v.* Spann, 27 Miss. 234. **Mo.**—Tucker *v.* Tucker, 29 Mo. 350; Bray *v.* Thatcher, 28 Mo. 129. **N. J.**—Vulcan Detinning Co. *v.* American Can Co., 67 N. J. Eq. 243,

58 Atl. 290. **N. Y.**—Bates *v.* Plonsky, 62 How. Pr. 429; Bank of America *v.* Pollock, 4 Edw. Ch. 215. **R. I.**—Winsor *v.* Pettis, 11 R. I. 506. **Va.**—Almond *v.* Wilson, 75 Va. 613. **W. Va.** See Arnold *v.* Arnold, 11 W. Va. 449.

[a] **Distinct frauds** on part of several defendants cannot be united. Woodruff *v.* Young, 43 Mich. 548, 6 N. W. 85.

49. **U. S.**—Allen *v.* Luke, 141 Fed. 694; Illinois Cent. R. Co. *v.* Caffrey, 128 Fed. 770 (where claim against each is the same and joinder will save multiplicity of suits); Pacific Live-Stock Co. *v.* Hanley, 98 Fed. 327. **Ala.**—Adams *v.* Wilson, 137 Ala. 632, 34 So. 831; Christian, etc. Co. *v.* Kling, 121 Ala. 292, 25 So. 629; Russell *v.* Garrett, 75 Ala. 348. **Conn.**—Cornwell *v.* Lee, 14 Conn. 524. **Ind.**—Demarest *v.* Holde- man, 157 Ind. 467, 62 N. E. 17. **Md.** Brian *v.* Thomas, 63 Md. 476. **Mich.** Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512. **Miss.**—Wright *v.* Lauderdale, 71 Miss. 800, 15 So. 116. **Mo.** See Lindley *v.* Russell, 16 Mo. App. 217. **N. J.**—Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449. **R. I.**—Brown *v.* Tilley, 25 R. I. 579, 37 Atl. 380. **S. C.**—Melton *v.* Withers, 2 S. C. 561. **Tenn.**—Fogg *v.* Rogers, 2 Coldw. 290. **Va.**—Brown *v.* Buckner, 86 Va. 612, 10 S. E. 882.

Where multiplicity of suits avoided, see *supra*, II, F.

50. See *supra*, II, G.

an interest in some matters in the suit, and they are connected with the others.⁵¹

Same Defendant in Several Capacities.—One defendant cannot be sued in a single bill on claims both as an individual and in a representative capacity,⁵² except, perhaps, under the same circumstances in which separate persons might be joined.

I. WHAT CONSIDERED IN DETERMINING.—The court will look to the bill only in determining the question of multifariousness.⁵³

III. REASON FOR RULES AGAINST.—The object of the rule against multifariousness has been said to be to protect a defendant from unnecessary expense,⁵⁴ or inconvenience or embarrassment,⁵⁵ and prevent unnecessary confusion,⁵⁶ in the conduct of the litigation.

IV. RAISING THE OBJECTION OF.—A. TIME OF RAISING.

51. **U. S.**—Curran *v.* Campion, 85 Fed. 67, 29 C. C. A. 26; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14. **Ala.**—Truss *v.* Miller, 116 Ala. 494, 22 So. 863. **Ark.**—Winter *v.* Smith, 45 Ark. 549. **Cal.**—Wilson *v.* Castro, 31 Cal. 420. **Fla.**—Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163. **Ga.**—Booth *v.* Stamper, 10 Ga. 109; Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Warthen *v.* Brantley, 5 Ga. 571. **Mass.**—Lenz *v.* Prescott, 144 Mass. 505, 11 N. E. 923. **N. C.**—Robertson *v.* Stevens, 36 N. C. 247. **Tenn.**—Neal *v.* Read, 7 Baxt. 333. **Eng.**—Parr *v.* Attorney-General, 8 Clark & F. 409, 8 Eng. Reprint 159; Attorney-General *v.* Mayor of Poole, 4 Myl. & C. 17, 41 Eng. Reprint 7; Campbell *v.* Mackay, 1 Myl. & C. 603, 40 Eng. Reprint 507.

52. **Ind.**—Bryan *v.* Blythe, 4 Blackf. 249, as individual and as heir. **Miss.**—Wren *v.* Gayden, 1 Miss. 365, as individual and as administrator or guardian. **N. Y.**—Davoue *v.* Fanning, 4 Johns. Ch. 199, as individual and as executor. **R. I.**—W. E. A. Legg & Co. *v.* Dewing, 25 R. I. 568, 57 Atl. 373. **Tenn.**—Mitchell *v.* Williams, 46 S. W. 325. **Va.**—Hill's Admr. *v.* Hill, 79 Va. 592.

53. **U. S.**—Nelson *v.* Hill, 5 How. 127, 12 L. ed. 81. **Ala.**—Halstead *v.* Shepard, 23 Ala. 558. **S. C.**—Edwards *v.* Sartor, 1 S. C. 266.

Scope of inquiry on demurrer generally, see 6 STANDARD PROC. 978.

54. **Gaines v. Chew**, 2 How. (U. S.) 619, 11 L. ed. 402.

55. **Gaines v. Chew**, 2 How. (U. S.) 619, 11 L. ed. 402; **Horman Patent Mfg. Co. v. Brooklyn City R. Co.**, 15

Blatchf. 444, 13 Fed. Cas. No. 6,703; **Gamewell Fire-Alarm Tel. Co. v. Chilli-cothe**, 7 Fed. 351, the court saying: "It may be drawn from the cases, and is in accordance with the reason of the rule, that the test of multifariousness is: What is the burden imposed on the defendant? to what defense is he forced? can he make one defense to the whole bill?"

[a] "The question in all cases where the objection is interposed, is whether the court can accord full and substantial relief to all parties in interest without embarrassing the chances for defense." **Wade v. Pulsifer**, 54 Vt. 45.

[b] "Courts, in dealing with this question, look particularly to convenience in the administration of justice; and, if this is accomplished by the mode of proceeding adopted, the objection of multifariousness will not lie, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense. So that when we look to see if a bill is multifarious, the first question to be determined is, does the bill propose to reach the end aimed at in a convenient way for all concerned? And, if the mode adopted does accomplish the end of convenience, then the question arises, is any one hurt by it, or so injured as to make it unjust for the suit to be maintained in that form?" **County School Board of Albemarle County v. Farish's Admr.**, 92 Va. 156, 23 S. E. 221.

56. **Horman Patent Mfg. Co. v. Brooklyn City R. Co.**, 15 Blatchf. 444, 13 Fed. Cas. No. 6,703.

As a rule the objection of multifariousness cannot be raised for the first time on appeal, it being deemed waived if not taken in the trial court,⁵⁷ but some authorities hold that in an extreme case the objection may be taken in the upper court for the first time.⁵⁸

Generally the objection must be raised before hearing on the merits in the trial court.⁵⁹ After decree, the objection comes too late,⁶⁰ even though the defendant failed to appear and the decree went against him by default.⁶¹

B. MANNER OF RAISING.—The weight of authority is that the objection of multifariousness must be taken by demurrer or it will be waived, unless it be not apparent on the face of the bill in which case

57. **U. S.**—*Oliver v. Piatt*, 3 How. 333, 412, 11 L. ed. 622, the court says: "An appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity." **Ala.**—*Betts v. Betts*, 18 Ala. 787; *Wellborn v. Tiller*, 10 Ala. 305. **Ill.**—*Gilmore v. Sapp*, 100 Ill. 297; *Thornton v. Houtze*, 91 Ill. 199. **Ia.**—*Hines v. Horner*, 86 Iowa 594, 53 N. W. 317. **Ky.**—*McKee v. Pope*, 18 B. Mon. 548. **Neb.**—*North Bend First Nat. Bank v. Miltonberger*, 23 Neb. 847, 51 N. W. 232. **N. J.**—*Brown v. Grandin* (N. J. Eq.), 13 Atl. 266. **Vt.**—*Wade v. Pulsifer*, 54 Vt. 45. **Wis.**—*Williams v. Smith*, 22 Wis. 594; *Stilwell v. Kellogg*, 14 Wis. 461.

See also cases cited *infra*, IV, B.

[a] **Even Though Decree Taken Pro Confesso.**—*Gilmore v. Sapp*, 100 Ill. 297.

[b] **Reason for Rule.**—"The ground on which the doctrine of multifariousness rests is the inconvenience of mixing up in one bill several distinct matters having no necessary connection with each other, and which may require different proceedings and distinct decrees (Story's Equity Pl., p. 280), thus embarrassing the court as well as the defendants. But to allow the objection at this time, under the circumstances of this case instead of being productive of convenience, would be productive of inconvenience, expense and delay, for the same question that has been decided would have to be re-litigated, and the same decree rendered upon the same allegations and proof that should have been rendered if the bill had not contained the prayer for a divorce. Under such circumstances we will treat the question of multifariousness as it appears

to have been treated in the court below, that is, as waived or abandoned." *Betts v. Betts*, 18 Ala. 787.

58. **U. S.**—*Hefner v. Northwestern, etc. Life Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. ed. 309, the court in its discretion may take the objection at the hearing or on appeal, and order the bill to be amended or dismissed. **Ill.**—*Gilmore v. Sapp*, 100 Ill. 297. **Md.**—*Ashton v. Ashton*, 35 Md. 496, 504.

[a] See also *Gray v. Payne*, 43 Mo. 203, where the court says: "As the case is now presented, the only question which will be noticed arises upon the pleadings. That there is a misjoinder of causes of action combined in the petition is patent, and that the objection is fatal is well established by a uniform current of decisions in this court. It is true the point was not raised in the court below by the defendant's counsel, but the matter is apparent upon the face of the record, and will be noticed here on either error or appeal, whether exceptions were saved or not."

59. See cases cited *infra*, IV, B, and *Watertown v. Cowen*, 4 Paige (N. Y.) 510.

Manner of raising in trial court, see *infra*, IV, B.

[a] **After filing of master's report too late**; should be made in the pleadings. *Fitchett v. Blows*, 74 Fed. 47, 20 C. C. A. 286.

[b] **At hearing on bill and answer too late.** *Miner v. Wilson*, 107 Mich. 57, 64 N. W. 874.

60. *Labadie v. Hewitt*, 85 Ill. 341; *Luckett v. White*, 10 Gill & J. (Md.) 480.

61. *Grove v. Fresh*, 9 Gill & J. (Md.) 280.

the objection may be taken on plea or answer.⁶² However, in some states it is held that the objection may always be raised by the plea or answer,⁶³ or in others the objection is raised not by demurrer but by motion to strike out,⁶⁴ or by a motion to make the pleading more

62. **U. S.**—Hefner *v.* Northwestern Mut. L. Ins. Co., 123 U. S. 747, 8 Sup. Ct. 337, 31 L. ed. 309; Nelson *v.* Hill, 5 How. 127, 12 L. ed. 81; Ranger *v.* Champion Cotton-Press Co., 52 Fed. 611. **Conn.**—Bissell *v.* Beckwith, 33 Conn. 357, 362. **Fla.**—Robinson *v.* Springfield Co., 21 Fla. 203. **Ill.**—Labadie *v.* Hewitt, 85 Ill. 341; Henderson *v.* Cummings, 44 Ill. 325; Whiteside *v.* Burchell, 31 Ill. 68. **Ind.**—Bryan *v.* Blythe, 4 Blackf. 249. **Md.**—Tartar *v.* Gibbs, 24 Md. 323, 337; Grove *v.* Fresh, 9 Gill & J. 280; Luckett *v.* White, 10 Gill & J. 480; Gibbs *v.* Claggett, 2 Gill & J. 14. **Mass.**—Crocker *v.* Dillon, 133 Mass. 91. **Mich.**—Miner *v.* Wilson, 107 Mich. 57, 64 N. W. 874; Childs *v.* Pellett, 102 Mich. 558, 61 N. W. 54; Burnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176; Snook *v.* Pearsall, 95 Mich. 534, 55 N. W. 459; Payne *v.* Avery, 21 Mich. 524. **Miss.**—Roberts *v.* Starke, 47 Miss. 257; Darcey *v.* Lake, 46 Miss. 109. **Neb.**—Snowden *v.* Tyler, 21 Neb. 199, 31 N. W. 661. **N. H.**—Bell *v.* Woodward, 42 N. H. 181. **N. J.**—Cresse *v.* Security Land Inv. Co., 54 N. J. Eq. 447, 35 Atl. 540; Sanborn *v.* Adair, 27 N. J. Eq. 425; Rockwell *v.* Morgan, 13 N. J. Eq. 384. **N. C.**—Buffalow *v.* Buffalow, 37 N. C. 113, 118. **Ohio.**—Ohio *v.* Ellis, 10 Ohio 456. **Pa.**—Hill's Assignee *v.* Bonaffon, 2 Wkly. N. Cas. 356. **Tenn.**—Moreau *v.* Saffarans & Co., 3 Sneed 595, 67 Am. Dec. 582; Hickman *v.* Cooke, 3 Humph. 640; Fay *v.* Jones, 1 Head 442; Thurman *v.* Shelton, 10 Yerg. 383.

See generally the title "Pleas in Equity."

[a] **Special demurrer is necessary,** see Darcey *v.* Lake, 46 Miss. 109; Fay *v.* Jones, 1 Head (Tenn.) 442.

[b] **General Demurrer Sufficient.** Whiteside *v.* Burchell, 31 Ill. 68; Dunn *v.* Dunn, 26 Gratt. (67 Va.) 291.

Forms of demurrer for multifariousness, see 9 STANDARD PROC. 857.

[c] **Must Be Before Answer.**—Nelson *v.* Hill, 5 How. (U. S.) 127, 12 L. ed. 81.

[d] **Reason.**—"Where advantage of multifariousness is desired to be taken by defendants, the desirable prac-

tice is for them to present the objection by demurrer, that the court may pass upon it before the expense of reference and testimony is incurred. If, instead of taking this course, they only by their answer reserve the privilege of making the objection at the hearing, when the expenses are already incurred, and when the court is put to the trouble of a full discussion of the case, they cannot complain if the court disregards their objection, unless the nature of the case is such that justice cannot be done to the parties upon the pleadings and evidence as then presented. At that stage of the case, the court, instead of the party, is to take the objection of multifariousness." Payne *v.* Avery, 21 Mich. 524.

[e] "We think it may be found that the term multifariousness has not always been used in the same sense, being in some instances confined to cases where a misjoinder of parties or subjects appears on the face of the bill; and in others extended so as to include cases where the answer or plea shows a misjoinder, which was not apparent before. In cases where the answer or plea, by the denial of a fact stated in the bill, or by the introduction of a new fact, shows that there is a misjoinder, this is not, perhaps, to be considered as multifariousness in the strict sense of the term, but as a variance from the case stated in the bill. If the variance is material, the plaintiff fails, because he has not made out the case which he stated. If the objection does not appear in the bill, but is shown by the plea or answer, it is, perhaps, not very material whether it is demonstrated multifariousness, or a misjoinder, or a variance; the defendant must be allowed to insist on the objection by his plea or answer, as he would not do it by demurrer." Abbot *v.* Johnson, 32 N. H. 9.

63. Cuyler *v.* Moreland, 6 Paige 273; Sims *v.* Aughtery, 4 Strobb. Eq. 103.

64. Waldo *v.* Thweatt, 64 Ark. 126, 40 S. W. 782; Ashley *v.* Little Rock, 56 Ark. 391, 19 S. W. 1058; Dyer *v.*

specific,⁶⁵ or to compel plaintiff to elect on which ground he will proceed.⁶⁶ A motion to dismiss has been held not proper as the error may be cured by amendment.⁶⁷

C. WHO MAY RAISE.—1. **Generally.**—The objection of multifariousness generally can only be raised by the person who is prejudiced by reason thereof.⁶⁸ Thus a defendant liable for each of the claims in the suit cannot object because of multifariousness.⁶⁹

2. **The Court.**—Where a defendant omits to demur for multifariousness the court may sua sponte, take the objection and dismiss the bill or order it to be amended,⁷⁰ though this prerogative of the court should be used only in a strong case.⁷¹ Where necessary to pre-

Jacoway, 42 Ark. 186; *Riley v. Norman*, 39 Ark. 158.

[a] **Misjoinder under codes** must be by motion. *Colo.*—*Brewer v. McCain*, 21 Colo. 382, 41 Pac. 822. *Ind.*—*Armstrong v. Dunn*, 143 Ind. 443, 41 N. E. 540. *Wis.*—*Akerly v. Villas*, 25 Wis. 703; *Clark v. Langworthy*, 12 Wis. 441.

[b] **Objection waived** if not so taken. *Riley v. Norman*, 39 Ark. 158.

65. *Clements v. Lampkin*, 34 Ark. 598.

66. *Clements v. Lampkin*, 34 Ark. 598; *Sale v. Crutchfield*, 8 Bush (Ky.) 636.

67. *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058, should be to strike out.

Court may dismiss on its own motion, see *infra*, IV, C, 2.

68. **U. S.**—*Buerk v. Imhaeuser*, 8 Fed. 457; *Atwill v. Ferrett*, 2 Blatchf. 39, 2 Fed. Cas. No. 640. *Ala.*—*Toulmin v. Hamilton*, 7 Ala. 362. *Ark.*—*Christian v. Crocker*, 25 Ark. 327, 99 Am. Dec. 223; *Gartland v. Nunn*, 11 Ark. 720. *Mich.*—*Torrent v. Hamilton*, 95 Mich. 159, 54 N. W. 634. *N. J.*—*Couse v. Columbia Powder Mfg. Co.* (N. J. Eq.), 33 Atl. 297; *Olds v. Reagan* (N. J. Eq.), 32 Atl. 827; *Bermes v. Frick*, 38 N. J. Eq. 88; *Miller v. Jamison*, 24 N. J. Eq. 41. *N. Y.*—*Cherry v. Monro*, 2 Barb. Ch. 618; *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Crosby v. Berger*, 4 Edw. Ch. 210. *Pa.*—*Hill's Assignee v. Bonaffon*, 2 Wkly. N. Cas. 356. *Tenn.*—*Payne v. Berry*, 3 Tenn. Ch. 154.

Who may demur in general, see 6 STANDARD PROC. 854.

69. *Buerk v. Imhaeuser*, 8 Fed. 457, "As he is in no worse position by

having only one suit against him than if there were three."

70. **U. S.**—*Hefner v. Northwestern Mut. L. Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. ed. 309; *Barney v. Latham*, 103 U. S. 205, 215, 26 L. ed. 514. *Ala.*—*Bean v. Bean's Admr.*, 37 Ala. 17; *Felder v. Davis*, 17 Ala. 418. *Fla.*—*Bauknight v. Sloan*, 17 Fla. 284, 288; *Mattair v. Payne*, 15 Fla. 682. *Ga.*—*Warthen v. Brantley*, 5 Ga. 571. *Ill.*—*Gilmore v. Sapp*, 100 Ill. 297. *Md.*—*Ashton v. Ashton*, 35 Md. 496; *Tartar v. Gibbs*, 24 Md. 323; *Chew v. Baltimore Bank*, 14 Md. 299. *Mich.*—*Childs v. Pellett*, 102 Mich. 558, 564, 61 N. W. 54; *Payne v. Avery*, 21 Mich. 524. *Miss.*—*Darcey v. Lake*, 46 Miss. 109. *N. J.*—*Droste v. Hall* (N. J. Eq.), 29 Atl. 437; *Hendrickson v. Wallace's Exr.*, 31 N. J. Eq. 604; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Swayze v. Swayze*, 9 N. J. Eq. 273. *Ohio.*—*State v. Ellis*, 10 Ohio 456. *S. C.*—*Sims v. Aughtery*, 4 Strobb. Eq. 103. *Tenn.*—*Hickman v. Cooke*, 3 Humph. 640. *Va.*—*Wells v. Sewell's Point Guano Co.*, 89 Va. 708, 17 S. E. 2; *Dunn v. Dunn*, 26 Gratt. (67 Va.) 291.

[a] "Whether this will be done or not must depend on the nature of the case, and the course of proceedings at the time of the hearing." *Chew v. Baltimore Bank*, 14 Md. 299.

71. *Ala.*—*Bean v. Bean's Admr.*, 37 Ala. 17, 20; *Felder v. Davis*, 17 Ala. 418. *Md.*—*Chew v. Baltimore Bank*, 14 Md. 299; *Ashton v. Ashton*, 35 Md. 496, "But it must be a very strong case which will induce them to do it. If they can get to a final decree without serious embarrassment, so indisposed are they to countenance the objection, the error will generally be disregarded." *Mich.*—*Payne v. Avery*, 21 Mich. 524, "It will not . . . sua

vent embarrassment in the administration of justice the court should exercise its power in this regard.⁷²

V. TO WHAT PLEADINGS RULE APPLIES. — The term “multifarious” is not limited to bills in equity but applies to a cross-bill,⁷³ or to a plea.⁷⁴

sponte, take the objection of multifariousness, when it would be merely technical, and when the object for which the parties have incurred their expense and for which the court has been put to the trouble of a hearing and examination, can be substantially accomplished on the record as it stands.”

72. *Bauknight v. Sloan*, 17 Fla. 284; *Swayze v. Swayze*, 9 N. J. Eq. 273.

73. *Hildebrand v. Beasley*, 7 Heisk. (Tenn.) 121.

74. **U. S.**—*Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. ed. 423. **N. J.**—*Harrison v. Farrington*, 38 N. J. Eq. 358. **Va.**—*Porter v. Young*, 85 Va. 49, 6 S. E. 803.

Vol. XX

MULTIPLICITY OF SUITS

By the Editorial Staff.)

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I. JURISDICTION OF EQUITY TO PREVENT.—A. GENERAL-
LY.—It is a well settled principle of our legal system that for the
purpose of preventing the vexatious recurrence of litigation, equity
will assume jurisdiction.¹ Pursuant to this equitable principle, legis-

1. **U. S.**—Hale *v.* Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380 (a leading case); Sharon *v.* Tucker, 144 U. S. 533, 541, 12 Sup. Ct. 720, 36 L. ed. 532. **N. Y.**—Brinkerhoff *v.* Brown, 6 Johns. Ch. 139. **Pa.**—Corbe *v.* Burkert, 33 Pa. Super. 317. **Tex.**—Steger & Sons P. Mfg. Co. *v.* MacMaster, 51 Tex. Civ. App. 527, 113 S. W. 337. **Utah.**—Enright *v.* Grant, 5 Utah 334, 340, 15 Pac. 268. **Eng.**—Mayor of York *v.* Pilkington, 1 Atk. 282, 26 Eng. Reprint 180; London *v.* Perkins, 3 Brown Parl. Cas. (Tomlin's ed.) 602, 1 Eng. Reprint 1524.

[a] **Difficult Rule To Apply.**—"It is easy to say it rests upon the pre-

vention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on

lation in some of the states has partially defined this jurisdiction.²

The necessity for invoking this rule arises, first, when numerous persons assert similar claims against one individual,³ or when similar claims are asserted by one individual against many;⁴ and, second,

this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction." *Hale v. Allinson*, 188 U. S. 56, 77, 23 Sup. Ct. 244, 47 L. ed. 380. See also *Cumberland Tel. & Tel. Co. v. Williamson*, 101 Miss. 1, 57 So. 559; *Johnson v. Swanke*, 128 Wis. 68, 75, 107 N. W. 481, 5 L. R. A. (N. S.) 1048.

2. See generally the statutes, and the following: *Cal.*—*Flaherty v. Kelly*, 51 Cal. 145; *Crowley v. Davis*, 37 Cal. 268; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304. *Ky.*—*Illinois Cent. R. Co. v. Baker*, 155 Ky. 512, 159 S. W. 1169, 49 L. R. A. (N. S.) 496. *Mass.* *Carr v. Silloway*, 105 Mass. 543.

3. *U. S.*—*Stephens v. Ohio State Tel. Co.*, 240 Fed. 759; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160, 167; *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. 824. *Ala.*—*Turner v. Mobile*, 135 Ala. 73, 33 So. 132; *Allen v. La Fayette*, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. *Ark.*—*Greedup v. Franklin*, 30 Ark. 101. *Cal.*—*Geurkink v. Petaluma*, 112 Cal. 306, 44 Pac. 570. *Colo.*—*Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580. *Ga.* *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135. *Ill.*—*Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Chicago v. Collins*, 175 Ill. 445, 51 N. E.

907, 67 Am. St. Rep. 224, 49 L. R. A. 408. *Ind.*—*First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481. *Ky.* *Illinois Cent. R. Co. v. Baker*, 155 Ky. 512, 159 S. W. 1169, 49 L. R. A. (N. S.) 496, holding in favor of the rule only when the threatened cases against one defendant are groundless. *Me.*—*Carlton v. Newman*, 77 Me. 408, 1 Atl. 194. *Mass.*—*Smith v. Smith*, 148 Mass. 1, 18 N. E. 595; *Cadigan v. Brown*, 120 Mass. 493. *Mich.*—*Clee v. Sanders*, 74 Mich. 692, 42 N. W. 154; *Seofield v. Lansing*, 17 Mich. 437. *Mo.*—*Ranney v. Bader*, 67 Mo. 476. *Neb.*—*Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889. *N. J.*—*Rowbotham v. Jones*, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663. *N. Y.*—*Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139. *Pa.*—*Wetherill v. Gallagher*, 211 Pa. 306, 60 Atl. 905, 107 Am. St. Rep. 575. *R. I.*—*Lonsdale Co. v. Woonsocket*, 21 R. I. 498, 44 Atl. 929; *Me-Twiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962. *Utah.*—*Enright v. Grant*, 5 Utah 334, 340, 15 Pac. 268. *Vt.*—*International Paper Co. v. Bellows Falls Canal Co.*, 100 Atl. 684. *W. Va.*—*Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Williams v. County Court*, 26 W. Va. 488, 53 Am. Rep. 94. *Wis.*—*Younkin v. Milwaukee, etc. Co.*, 112 Wis. 15, 87 N. W. 861. *Eng.*—*Cowper v. Clerk*, 3 P. Wms. 155, 24 Eng. Reprint 1010.

4. *U. S.*—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Sharon v. Tucker*, 144 U. S. 533, 542, 12 Sup. Ct. 720, 36 L. ed. 532; *Virginia-Carolina Chemical Co. v. New York Home Ins. Co.*, 113 Fed. 1, 51 C. C. A. 21; *United States v. Southern Pac. R. Co.*, 117 Fed. 544. *Ala.* *Jones v. Hardy*, 127 Ala. 221, 28 So. 564. *Cal.*—*Beatty v. Dixon*, 56 Cal. 619, 622. *Ga.*—*Smith v. Dobbins*, 87 Ga. 303, 13 S. E. 496; *Guess v. Stone Mountain G. & Ry. Co.*, 67 Ga. 215. *Ia.*—*Harrison County v. Ogden*, 165 Iowa 325, 145 N. W. 681. *Me.*—*Farm-*

when the controversy is always between two parties and the relief sought or claim prosecuted involves successively an indefinite number of actions at law,⁵ or when the actions are brought simultaneously and all involve the same legal questions and depend upon the same or similar facts.⁶

ington Village Corp. v. Sandy River Nat. Bk., 85 Me. 46, 26 Atl. 965; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763. **Minn.**—Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83. **Miss.**—Tisdale v. Ins. Co. of North America, 84 Miss. 709, 36 So. 568; Illinois Cent. R. Co. v. Garrison, 81 Miss. 257, 32 So. 996; Lowenstien v. Abramsohn, 76 Miss. 890, 25 So. 498. **Neb.**—Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889. **N. J.** Johnson v. Tennessee Oil, etc. Co., 74 N. J. Eq. 32, 69 Atl. 788; American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 39 Atl. 400. **N. M.**—Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663. **N. Y.**—Board of Suprs. of Saratoga County v. Deyoe, 77 N. Y. 219, 225; Kellog v. Chenango Val. Sav. Bk., 11 App. Div. 458, 42 N. Y. Supp. 379. **N. C.**—Vann v. Hargett, 22 N. C. 31, 32 Am. Dec. 689. **Vt.**—Stockwell v. Fitzgerald, 70 Vt. 468, 41 Atl. 504. **W. Va.**—Chesapeake & O. R. Co. v. Miller, 19 W. Va. 408. **Wis.**—Ellis v. Northern Pac. R. Co., 77 Wis. 114, 45 N. W. 811. **Eng.**—Mayor of York v. Pilkington, 1 Atk. 282, 26 Eng. Reprint 180; London v. Perkins, 3 Brown Parl. Cas. (Tomlin's ed.) 602, 1 Eng. Reprint 1524; Sheffield Waterworks v. Yeomans, L. R. 2 Ch. 8, 15 L. T. N. S. 342, 15 Wkly. Rep. 76.

5. **U. S.**—Sharon v. Tucker, 144 U. S. 533, 542, 12 Sup. Ct. 720, 36 L. ed. 532; Preteca v. Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607. **Ill.** Hacker v. Barton, 84 Ill. 313. **Minn.** McRoberts v. Washburne, 10 Minn. 23. **Miss.**—Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559. **Neb.**—Crawford County v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889. **N. H.** Eastman v. Amoskeag Mfg. Co., 47 N. H. 71. **N. J.**—Carlisle v. Cooper, 21 N. J. Eq. 576. **N. Y.**—Livingston v. Livingston, 6 Johns. Ch. 497, 10 Am. Dec. 353. **Okla.**—Minnetonka Oil Co. v. Cleveland V. B. Co., 27 Okla. 180, 111 Pac. 326. **Pa.**—Scheetz's Appeal,

35 Pa. 88. **Vt.**—Lyon v. McLaughlin, 32 Vt. 423. **Wis.**—Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265. **Eng.**—Hanson v. Gardiner, 7 Ves. Jr. 305, 32 Eng. Reprint 125.

[a] **Particular Instances.**—(1) Continuing nuisance (**Mass.**—Ballou v. Hopkinton, 4 Gray 324. **Mo.**—Desberger v. University Hts. R. & D. Co., 126 Mo. App. 206, 102 S. W. 1060. **R. I.**—Whipple v. Guile, 22 R. I. 576, 48 Atl. 935, 84 Am. St. Rep. 855), (2) waste (Hughlett v. Harris, 1 Del. Ch. 349, 12 Am. Dec. 104), (3) trespass (Carney v. Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; Livingston v. Livingston, 6 Johns. Ch. [N. Y.] 497, 10 Am. Dec. 353), (4) boundary disputes (Boyd v. Dowie, 65 Barb. [N. Y.] 237; Hill v. Proctor, 10 W. Va. 59, 77), (5) ejectment. **U. S.**—Sharon v. Tucker, 144 U. S. 533, 542, 12 Sup. Ct. 720, 36 L. ed. 532. **Cal.**—Knowles v. Inches, 12 Cal. 212. **N. Y.**—Huntington v. Nicoll, 3 Johns. 566, 589.

For particular cases generally see the particular titles.

[b] **Bills of Peace.**—The phrase, "bills of peace," was given to bills in equity in cases falling in the first class, and also those cases of the second class when the suit was to restrain the reiteration of an unsuccessful claim. Hale v. Allinson, 188 U. S. 56, 72, 23 Sup. Ct. 244, 47 L. ed. 380; Equator Min. & S. Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. ed. 114; 8 STANDARD PROC. 443.

6. **U. S.**—Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333. **Ind.** Rushville v. Rushville Nat. Gas Co., 132 Ind. 375, 28 N. E. 853, 15 L. R. A. 321; Davis v. Fasig, 128 Ind. 271, 27 N. E. 726. **Mo.**—Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. **N. Y.**—Third Ave. R. Co. v. Mayor of New York, 54 N. Y. 159; Cuthbert v. Chauvet, 60 Hun 577, 14 N. Y. Supp. 385. **N. C.** Featherstone v. Carr, 132 N. C. 800, 44 S. E. 592. **Tex.**—Steger & Sons P. Mfg. Co. v. MacMaster, 51 Tex. Civ.

B. REQUISITE JURISDICTIONAL ELEMENTS.—The right to invoke the jurisdiction of equity to prevent a multiplicity of suits arises out of the inadequacy of legal remedies to afford relief.⁷ It is not an independent source of jurisdiction and therefore may not be invoked by one who has no prior existing cause of action or defense.⁸ The legal relief to which one may be entitled need not be of the same kind as that which he demands and obtains from a court of equity.⁹ It must appear that the danger of a multiplicity of suits is real and not merely a possibility,¹⁰ that the exercise of the jurisdiction of equity is necessary,¹¹ and that the result to be obtained will be a simplification of the issues, that is, avail to prevent a multiplicity of suits.¹²

App. 527, 113 S. W. 337. **Wis.**—Schlitz Brew. Co. v. Superior, 117 Wis. 297, 93 N. W. 1120. **Eng.**—Kensington v. White, 3 Price 164.

Contra, Chicago, B. & Q. R. Co. v. Ottawa, 148 Ill. 397, 36 N. E. 85; Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; Ewing v. Webster City, 103 Iowa 226, 72 N. W. 511.

[a] **The mere fact that several actions** are to be brought, one of ejectment, one of replevin, and one of debt, is not sufficient. Weston v. Fisher (Mo. App.), 180 S. W. 1038.

[b] **Separate and Distinct Matters.** Where the causes of action are based upon separate and distinct matters, notwithstanding they are between the same parties, equity will not assume jurisdiction on the ground of multiplicity. Reynolds Corp. v. Knoxville Lith. Co. (Tenn.), 197 S. W. 897.

7. **U. S.**—Hale v. Allinson, 188 U. S. 56, 72, 23 Sup. Ct. 244, 47 L. ed. 380; Brown v. Allebach, 156 Fed. 697. **N. Y.** Allegany & K. R. Co. v. Weidenfeld, 5 Misc. 43, 25 N. Y. Supp. 71, 76. **Okla.**—Minnetonka Oil Co. v. Cleveland V. B. Co., 27 Okla. 180, 111 Pac. 326. **Pa.**—Corbe v. Burkert, 33 Pa. Super. 317.

8. **Ala.**—Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737. **Fla.** Storrs v. Pensacola, etc. R. Co., 29 Fla. 617, 634, 11 So. 226. **Md.**—Roland Park Co. v. Hull, 92 Md. 301, 48 Atl. 366. **Miss.**—Gulf & S. I. R. Co. v. Barnes, 94 Miss. 484, 48 So. 823. **N. Y.** Purdy v. Manhattan Elec. R. Co., 13 N. Y. Supp. 295, 36 N. Y. St. 43.

9. **U. S.**—Smyth v. Ames, 169 U. S. 466, 517, 18 Sup. Ct. 418, 42 L. ed. 819. **Cal.**—Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570. **Wis.**—Younkin

v. Milwaukee L. H. & T. Co., 112 Wis. 15, 87 N. W. 861.

10. **U. S.**—Sharon v. Tucker, 144 U. S. 533, 543, 12 Sup. Ct. 720, 36 L. ed. 532; United Cigarette Mach. Co. v. Winston C. Mach. Co., 194 Fed. 947, 958, 114 C. C. A. 583; Hicks v. Penn Mut. Life Ins. Co., 210 Fed. 464. **Ill.** Andel v. Starkel, 192 Ill. 206, 61 N. E. 356. **Me.**—Farmington Valley Corp. v. Sandy River Nat. Bk., 85 Me. 46, 26 Atl. 965. **Mass.**—Fellows v. Spaulding, 141 Mass. 89, 92, 6 N. E. 548. **N. Y.** Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495.

[a] **A mere possibility** that a multiplicity of suits may occur is not ground for equitable relief. Pechstein v. Smith, 14 App. Cas. (D. C.) 27.

11. **U. S.**—Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 276, 286, 29 Sup. Ct. 426, 53 L. ed. 796; Hale v. Allinson, 188 U. S. 56, 72, 23 Sup. Ct. 244, 47 L. ed. 380; Washington v. Williams, 111 Fed. 801, 49 C. C. A. 621. **Ill.**—White v. Y. M. C. A., 233 Ill. 526, 84 N. E. 658. **Mass.** Greenhood v. McDonald, 183 Mass. 342, 67 N. E. 336. **Mo.**—Merchants' Exchange v. Knott, 212 Mo. 616, 111 S. W. 565. **Tenn.**—State v. Richards, 120 Tenn. 477, 113 S. W. 370. **Vt.**—Clark v. Peek's Exrs., 79 Vt. 275, 65 Atl. 14.

[a] **Consolidation.**—Equity will not assume jurisdiction when the same result may be obtained at law by a consolidation of actions. Murphy v. Wilmington, 6 Houst. (Del.) 108, 2 Am. St. Rep. 345; Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47.

12. **U. S.**—Hale v. Allinson, 188 U. S. 56, 72, 23 Sup. Ct. 244, 47 L. ed. 380. **Ill.**—Postal T.-C. Co. v. Staehle, 188 Ill. App. 464. **Ind.**—Vandalia Coal

C. LIMITATIONS ON RIGHT TO INVOKE. — According to some early decisions, when the multiplicity of suits to be avoided fell in that class where numerous persons assert similar claims against one individual or where similar claims are asserted by one individual against many,¹³ there had to be a community of interest in the subject-matter of the controversy, or the right or title involved,¹⁴ but recently a sharp division of opinion has arisen, some courts adhering to the rule that there must at least be a community of interest in the subject-matter,¹⁵ while others maintain that the community of interest may subsist merely in the questions at issue and the kind of relief sought; that it is sufficient if the questions of law and fact are the same.¹⁶ When the

Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47. **N. J.**—Miller v. Willett, 71 N. J. Eq. 741, 65 Atl. 981. **Vt.**—International Paper Co. v. Bellows Falls Canal Co., 88 Vt. 93, 90 Atl. 943.

13. See *supra*, I, A.

14. Birkley v. Presgrave, 1 East 220, 227, 102 Eng. Reprint 86; Bouverie v. Prentice, 1 Brown's Ch. Rep. 200, 28 Eng. Reprint 1082; Ward v. Duke of Northumberland, 2 Anstr. (Eng.) 469. But compare Mayor of York v. Pilkington, 1 Atk. 282, 26 Eng. Reprint 180; London v. Perkins, 3 Brown's Parl. Cas. (Toml. ed.) 602, 1 Eng. Reprint 1524.

15. **U. S.**—Watson v. Huntington, 215 Fed. 472, 131 C. C. A. 520; Rochester German Ins. Co. v. Schmidt, 175 Fed. 720, 727, 99 C. C. A. 296. **Ala.** Aetna Ins. Co. v. Hann, 196 Ala. 234, 72 So. 48; Southern Steel Co. v. Hopkins, 174 Ala. 465, 57 So. 11, Ann. Cas. 1914B, 692, 40 L. R. A. (N. S.) 464, reversing 157 Ala. 175, 47 So. 274, 131 Am. St. Rep. 20, 20 L. R. A. (N. S.) 848, 16 Ann. Cas. 690. **Conn.** Dodd v. Hartford, 25 Conn. 232. **Ind.** Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47. **Mich.**—Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Lapeer v. Hart, Harr. Ch. 157. **Miss.**—Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559. **N. J.**—Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663; Marselis v. Morris Canal & B. Co., 1 N. J. Eq. 31. But see American Cent. Ins. Co. v. Landau, 56 N. J. Eq. 513, 36 Atl. 400. **Ore.**—Van Auken v. Dammeier, 27 Ore. 150, 40 Pac. 89. **Tenn.**—Ducktown S. C. & I. Co. v. Fain, 109 Tenn. 56, 70 S. W. 813, strict view endorsed but bill denied because complainant had an adequate remedy at law. But see Dixie Fire Ins. Co.

v. American Confectionery Co., 124 Tenn. 247, 136 S. W. 915, 34 L. R. A. (N. S.) 897. **Wis.**—Illinois Steel Co. v. Schroeder, 133 Wis. 561, 113 N. W. 51, 126 Am. St. Rep. 977, 14 L. R. A. (N. S.) 239.

[a] In Mississippi (1) the rule has undergone frequent change. As first laid down, it was held a community of interest in the questions of law and fact involved was sufficient. Pollock & Co. v. Okolona Sav. Inst., 61 Miss. 293; Nevitt v. Gillespie, 1 How. (Miss.) 108, 26 Am. Dec. 696. (2) But later it was decided that the community of interest must be in the subject matter. Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 12 So. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660. (3) This case was overruled and the broader doctrine reestablished for a time. Gulf & S. I. R. Co. v. Barnes, 94 Miss. 484, 48 So. 823; Whitlock v. Yazoo & M. V. R. Co., 91 Miss. 779, 45 So. 861; Tisdale v. Ins. Co. of North America, 84 Miss. 709, 36 So. 568, overruling Crawford v. Mobile, etc. R. Co., 83 Miss. 708, 36 So. 82, 102 Am. St. Rep. 476; Illinois Cent. R. Co. v. Garrison, 81 Miss. 257, 32 So. 996, 95 Am. St. Rep. 469. (4) These cases in turn have been overruled and the stricter view as announced in the Tribette case is now endorsed. Cumberland Tel. & Tel. Co. v. Williamson, 101 Miss. 1, 57 So. 559.

16. **U. S.**—Hale v. Allinson, 188 U. S. 56, 78, 23 Sup. Ct. 244, 47 L. ed. 380 (holding that the court "was not disposed to deny" that community of interest as to the questions of law and fact involved is alone sufficient); Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Virginia-Carolina Chemical Co. v. New York Home Ins. Co., 113 Fed. 1, 51 C. C. A. 21 (affirming 109 Fed. 681); Slater Trust Co. v. Randolph

numerous threatened actions belonged to that class involving successively an indefinite number of actions at law between two parties,¹⁷ particularly those which were the reiteration of an unsuccessful claim, the early doctrine compelled the complainant to establish his right or title to the thing in controversy by repeated recoveries at law before he could invoke the jurisdiction of equity;¹⁸ but now it is generally held that one recovery is sufficient, the criterion being the establishment of the right and not the number of adjudications in his favor.¹⁹

II. INJUNCTION.—Subject to the requisite jurisdictional ele-

Macon Coal Co., 166 Fed. 171; *Brown v. Allebach*, 156 Fed. 697. **Colo.**—Keese v. Denver, 10 Colo. 112, 15 Pac. 825; *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580. **Ga.**—Massachusetts Bond & Ins. Co. v. Realty Trust Co., 137 Ga. 693, 73 S. E. 1053. **Ill.**—German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94. **Ia.**—Corey v. Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490. **Me.**—Farmington Valley Corp. v. Sandy River Nat. Bk., 85 Me. 46, 26 Atl. 965. **Mo.**—Michael v. St. Louis, 112 Mo. 610, 20 S. W. 666; *Breimeyer v. Star Bottling Co.*, 136 Mo. App. 84, 117 S. W. 119. **Neb.**—Paxton Irr. Dist. v. Conway, 94 Neb. 205, 142 N. W. 797. **N. H.**—Smith v. Bank of New England, 69 N. H. 254, 45 Atl. 1082. **N. Y.**—Meyer v. Phillips, 97 N. Y. 484, 49 Am. Rep. 538; *Third Ave. R. Co. v. Mayor of New York*, 54 N. Y. 159; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Schwarz v. International L. G. W. Union*, 68 Misc. 528, 124 N. Y. Supp. 968. **N. C.**—Worth v. Fayetteville Comrs., 60 N. C. 617. **Pa.**—Mengel v. Lehigh C. & N. Co., 24 Pa. Co. Ct. 152. **Utah.**—Enright v. Grant, 5 Utah 334, 340, 15 Pac. 268. **Vt.**—Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176. **Va.**—Carey v. Coffee Stem Mach. Co., 20 S. E. 778.

[a] Different grounds of liability is such a divergent interest as will prevent the jurisdiction of equity from being invoked. *Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 So. 737.

17. See *supra*, I, A.

18. *Sharon v. Tucker*, 144 U. S. 533, 542, 12 Sup. Ct. 720, 36 L. ed. 532; *Mayor of York v. Pilkington*, 1 Atk. 282, 26 Eng. Reprint 180.

[a] **An Obsolete Proceeding Under the Statute.**—The equity of the plaintiff in cases involving the continued prosecution of an unsuccessful claim arose from the protracted litigation for

the possession of property which the action of ejectment at common law permitted. A recovery in one action constituted no bar to another similar action or to any number of such actions. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. Under the statutes on ejectment this proceeding is no longer necessary. See the statutes, and *Sharon v. Tucker*, 144 U. S. 533, 542, 12 Sup. Ct. 720, 36 L. ed. 532; *Leighton v. Leighton*, 1 P. Wms. 671, 2 Eq. Cas. Abr. 523, pt. 4, 1 Str. 404, 24 Eng. Reprint 563.

19. **U. S.**—United Cigarette Mach. Co. v. Winston C. Mach. Co., 194 Fed. 947, 953, 114 C. C. A. 583; *Kennedy v. Elliott*, 85 Fed. 832. **Ala.**—Bowling v. Crook, 104 Ala. 130, 16 So. 131. **Cal.**—Knowles v. Inches, 12 Cal. 212. **Fla.**—Carney v. Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. **Ill.**—Hartford Fire Ins. Co. v. Ledford, 151 Ill. App. 413. **Ind.**—Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892. **Ky.**—Newport v. Taylor's Exrs., 16 B. Mon. 699. **Mich.**—Lapeer v. Hart, Harr. Ch. 157. **Miss.**—Illinois Cent. R. Co. v. Garrison, 81 Miss. 257, 32 So. 996, 95 Am. St. Rep. 469. **Neb.**—Kinkaid v. Hiatt, 24 Neb. 562, 39 N. W. 600. **N. H.**—Eastman v. Amoskeag Mfg. Co., 47 N. H. 71. **N. J.**—Paterson & H. R. Co. v. Jersey City, 9 N. J. Eq. 434. **N. Y.**—Empire Eng. Corp. v. Mack, 217 N. Y. 85, 111 N. E. 475, reversing 158 App. Div. 889, 143 N. Y. Supp. 1116. **Ore.**—Haines v. Hall, 17 Ore. 165, 20 Pac. 831, 3 L. R. A. 609.

[a] **Right Must Be Established.**—A multiplicity of suits is not a ground of equity jurisdiction where the right is disputed between two persons only and such right has not been established at law. *Cleland v. Campbell*, 78 Ill. App. 624.

ments and limitations previously stated, where multiplicity exists equity will take jurisdiction to determine the rights of all the parties in one proceeding, and will enjoin all actions at law relating to the same subject-matter.²⁰ So an injunction will issue when a multiplicity of suits between the same parties is threatened;²¹ or, as formerly occurred at common law, when vexatious ejectment suits were repeatedly brought;²² or when numerous unnecessary suits are brought, not in good faith, but to cause annoyance;²³ or when, having jurisdiction on other grounds, multiplicity may be avoided by adjudicating other questions, incidental to the principal case, but relating to the same subject-matter.²⁴

III. PARTIES.²⁵—Either party may invoke the jurisdiction of equity to prevent a multiplicity of suits,²⁶ but in the federal courts

20. **U. S.**—Camp v. Boyd, 229 U. S. 530, 33 Sup. Ct. 785, 57 L. ed. 1317; Kohlhamer v. Smietanka, 239 Fed. 408; Wolcott v. National Elec. Signaling Co., 228 Fed. 811. **D. C.**—Painter v. Drane, 2 MacArthur 163. **Ga.**—Guess v. Stone Mountain G. & Ry. Co., 67 Ga. 215. **Ky.**—Illinois Cent. R. Co. v. Rice, 154 Ky. 198, 156 S. W. 1075. **Mass.**—Carr v. Silloway, 105 Mass. 543. **Miss.**—Guice v. Illinois Cent. R. Co., 111 Miss. 36, 71 So. 259; Bishop Bros. v. Rosenbaum, 58 Miss. 84. **Mo.**—Damschroeder v. Thias, 51 Mo. 100. **N. J.**—Maher v. Mutual Elec. Mfg. Co. (N. J. Eq.), 17 Atl. 968. **N. Y.**—Seaboard Nat. Bank v. Reid, 172 App. Div. 135, 158 N. Y. Supp. 250; Corn v. Suderov, 160 App. Div. 916, 145 N. Y. Supp. 527. **Ohio.**—Pittsburgh, C. C. & St. L. R. Co. v. Copenhaver, 12 Ohio Cir. Ct. (N. S.) 69. **Pa.**—Pittsburgh & L. E. R. Co. v. Peterson, 58 Pa. Super. 44; Hower v. Garrett, 18 Pa. Dist. 847. **P. R.**—Wenar v. Jones, 14 Porto Rico 422. **Tex.**—McCloskey v. San Antonio Tract. Co. (Tex. Civ. App.), 192 S. W. 1116; Superior Lodge of F. N. A. v. Ray (Tex. Civ. App.), 166 S. W. 46. **Vt.**—Paddock v. Palmer, 19 Vt. 581. **Va.**—Royall's Admrs. v. Royall's Admr., 5 Munf. (19 Va.) 82. **Eng.**—Sheffield Waterworks v. Yeomans, L. R. 2 Ch. 8, 15 L. T. R. (N. S.) 342, 15 Wkly. Rep. 76.
21. Third Ave. R. Co. v. New York, 54 N. Y. 159; Cuthbert v. Chauvet, 60 Hun 577, 14 N. Y. Supp. 385.
- [a] But an injunction may be refused when a party makes assurance that only one suit will be brought. Louisville & N. R. Co. v. Kentucky R. Commission, 214 Fed. 465.
22. **U. S.**—Craft v. Lathrop, 2 Wall. Jr. 103, 6 Fed. Cas. No. 3,318. **Ga.**—Bond v. Little, 10 Ga. 395. **Ill.**—Pratt v. Kendig, 128 Ill. 293, 21 N. E. 495. **Ky.**—Dedman v. Chiles, 3 Mon. 426. **Mich.**—Woods v. Monroe, 17 Mich. 238. **Va.**—Shanks v. Calvert Mtg. & Dep. Co., 119 Va. 239, 89 S. E. 99. **Eng.**—Leighton v. Leighton, 4 Bro. P. C. 378, 1 Str. 404, 2 Eng. Reprint 256.
23. **Ala.**—Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737. **Cal.**—Southern Pac. Co. v. Robinson, 132 Cal. 408, 64 Pac. 572. **Ga.**—Jenkins v. Jenkins, 85 Ga. 208, 11 S. E. 608; Mahone v. Central Bank, 17 Ga. 111. **Kan.**—Jordan v. Western U. Tel. Co., 69 Kan. 140, 76 Pac. 396. **Mont.**—Maloney v. King, 30 Mont. 414, 76 Pac. 939. **Neb.**—Shevalier v. Stephenson, 92 Neb. 675, 139 N. W. 233. **Pa.**—Pittsburg & L. E. R. Co. v. Peterson, 23 Pa. Dist. 809; Sprout v. Nussina, 16 Pa. Dist. 304. **Tenn.**—Walker v. Fox, 85 Tenn. 154, 2 S. W. 98. **Tex.**—Cannon v. Hendrick, 5 Tex. 339. **Wis.**—Milwaukee Elec. R. & L. Co. v. Bradley, 108 Wis. 467, 84 N. W. 870. **Eng.**—Waters v. Taylor, 2 Ves. & B. 299, 13 Rev. Rep. 91, 35 Eng. Reprint 333.
24. **Ga.**—Goodwynne v. Bellerby, 116 Ga. 901, 43 S. E. 275. **Ill.**—Redfield v. Lorimer-Lundquist Co., 174 Ill. App. 547. **N. Y.**—Hastrich v. Pilcher, 171 App. Div. 470, 157 N. Y. Supp. 613.
25. See generally the titles "Equity Jurisdiction and Procedure," "Parties."
- Joinder of parties in bill for injunction**, see 13 STANDARD PROC. 40.
26. **N. H.**—Smith v. New England Bank, 69 N. H. 254, 45 Atl. 1082. **N. Y.**—Bauer v. Platt, 72 Hun 326, 25 N. Y. Supp. 426, 55 N. Y. St. 196. **N. C.**

this right is limited to the party aggrieved.²⁷ One of a numerous class may appear on behalf of all.²⁸

IV. PLEADING.²⁹ — A. IN GENERAL. — It must appear from the facts stated in the bill that a multiplicity of suits will result if complainant is left to his legal remedy,³⁰ and the bill must show that complainant possesses a good cause of action or defense.³¹

B. OBJECTIONS TO JURISDICTION. — Objection to the jurisdiction of equity, when the defect is apparent on the face of the bill, may be made by demurrer,³² but under the federal procedure such objection must be made by answer,³³ or motion to dismiss.³⁴

Vann v. Hargett, 22 N. C. 31, 32 Am. Dec. 689.

27. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 51, 29 Sup. Ct. 404, 53 L. ed. 682; Watson v. Huntington, 215 Fed. 472, 131 C. C. A. 520; Scruggs v. American Cent. Ins. Co., 176 Fed. 224, 100 C. C. A. 142, 36 L. R. A. (N. S.) 92.

[a] "It does not rest with complainant to urge, as a foundation for his suit, that the defendant may thereby be saved a multiplicity of suits by other parties when the defendant raises no objection to such possible suits and urges no such ground for jurisdiction in equity of the complainant's suit." Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 51, 29 Sup. Ct. 404, 53 L. ed. 682, reversing 151 Fed. 1, 81 C. C. A. 1.

28. U. S.—Pennefeather v. Baltimore S. V. Co., 58 Fed. 481. Ind. Muncie Nat. Gas Co. v. Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822. Ia.—Corey v. Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490. N. H.—Smith v. New England Bank, 69 N. H. 254, 45 Atl. 1082. N. Y.

Bauer v. Platt, 72 Hun 326, 25 N. Y. Supp. 426, 55 N. Y. St. 196. N. C. Vann v. Hargett, 22 N. C. 31, 32 Am. Dec. 689.

See generally the title "Parties."

29. See generally the titles "Bills and Answers;" "Equity Jurisdiction and Procedure."

30. Cruickshank v. Bidwell, 176 U. S. 73, 81, 20 Sup. Ct. 280, 44 L. ed. 377. See *supra*, I, B, note 10, and 13 STANDARD PROC. 84.

31. U. S.—United Cigarette Mach. Co. v. Winston C. Mach. Co., 194 Fed. 947, 958, 114 C. C. A. 583. Ala.—Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737. Miss.—Gulf & S. I. R. Co. v. Barnes, 94 Miss. 484, 48 So. 823.

32. See generally 8 STANDARD PROC. 480; 6 STANDARD PROC. 892.

33. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 554, 15 Sup. Ct. 673, 39 L. ed. 759; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. ed. 934; Wylie v. Cox, 15 How. (U. S.) 415, 420, 14 L. ed. 753.

34. See Rule 29.

MUNICIPAL CORPORATIONS

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CROSS-REFERENCES:

Corporations;	Public Service Corporations;
Highways, Streets and Bridges;	Schools and School Districts;
Injunctions;	Special Assessment;
Mandamus;	States and Territories;
Officers;	Taxation;
Pensions and Bounties;	Towns.

For forms, see 9 STANDARD PROC. 857, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. SCOPE AND DEFINITIONS. — This article embraces proceedings involving municipal corporations proper, and their officers, as well as counties; it excludes, however, matters particularly relating to those quasi-municipal corporations such as towns,¹ school districts,² and drainage and irrigation districts,³ which are treated elsewhere in this work.

Definitions. — A municipal corporation is a body corporate and politic established by law to share in the civil government of the country but chiefly to regulate and administer local or internal affairs.⁴ It possesses a dual character, governmental and private, and

1. See the title "Towns."

2. See the title "Schools and School Districts."

3. See the title "Waters and Water-courses."

4. East Tennessee University *v.*

in the latter capacity is to be regarded as a private corporation.⁵ In the broader sense, and in common usage, the term municipal corporations includes counties.⁶

II. SUITS AND ACTIONS GENERALLY.—A. BY AND AGAINST MUNICIPAL CORPORATIONS.—1. **Generally.**—While municipal corporations generally possess only such powers as are granted to them by the legislature,⁷ the capacity to sue,⁸ and be sued,⁹ is either expressly conferred upon them by statute,¹⁰ or is implied as a necessary incident of the corporate existence of a municipality.¹¹ A statutory or charter provision expressly giving a municipal corporation the power to sue and be sued carries with it the authority to compromise claims,¹² and includes actions in equity.¹³ Neither the fact that a

Knoxville, 6 Baxt. (Tenn.) 166.

[a] For other definitions see the following cases: **U. S.**—*Omaha Water Co. v. Omaha*, 156 Fed. 922, 85 C. C. A. 54. **Cal.**—*Payne v. Treadwell*, 16 Cal. 220; *Holland v. San Francisco*, 7 Cal. 361. **Ga.**—*Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133. **Ill.**—*Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519. **Ind.**—*State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79. **Md.**—*Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 692. **Mass.**—*Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. **Mo.**—*Heller v. Stremmel*, 52 Mo. 309. **Neb.**—*Wahoo v. Reeder*, 27 Neb. 770, 43 N. W. 1145. **W. Va.**—*State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343.

5. *Safety Insulated W. & C. Co. v. Baltimore*, 66 Fed. 140, 13 C. C. A. 375.

6. *Rathbone v. Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674. To the same effect, see *Dunn v. Wilcox*, 85 Ala. 144, 4 So. 661; *People v. Carpenter*, 31 App. Div. 603, 52 N. Y. Supp. 781. And compare *Board of Comrs. v. Searight C. Co.*, 3 Wyo. 777, 31 Pac. 268, drawing a distinction between counties and municipal corporations, proper.

7. *Boise Artesian, etc. Water Co. v. Boise City*, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. ed. 1400.

8. **Colo.**—*Goldfield v. MacDonald*, 52 Colo. 143, 119 Pac. 1069. **Ill.**—*Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176. **Me.**—*Augusta v. Leadbetter*, 16 Me. 45. **N. J.**—*Dummer v. Den ex dem. Selectmen of Jersey City*, 20 N. J. L. 86, 40 Am. Dec. 213. **N. Y.**—*Haverstraw v. Eckerson*, 124 App. Div. 18, 108 N. Y. Supp. 506.

Vt.—*Castleton v. Langdon*, 19 Vt. 210. **Wis.**—*Milwaukee v. Zoehrlaut Leather Co.*, 114 Wis. 276, 90 N. W. 187.

9. **Cal.**—*San Francisco v. Holladay*, 76 Cal. 18, 17 Pac. 942. **Miss.**—*Pyland v. Purvis*, 87 Miss. 433, 40 So. 7. **N. Y.**—*Farley v. Lockport*, 61 Misc. 417, 113 N. Y. Supp. 702. **R. I.**—*Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648.

10. See the statutes, and the cases cited in the preceding notes.

[a] **In Federal Courts.**—A municipal corporation created by one state may be sued in the federal courts by citizens of another state. *Cowles v. Mercer County*, 7 Wall. (U. S.) 118, 19 L. ed. 87.

11. *Jonesboro v. McKee*, 2 Yerg. (Tenn.) 167.

[a] Although no express authority is given in the legislative act incorporating a municipality for the prosecution of suits for debts or other demands, yet there is no doubt of such authority under the general powers conferred upon all corporations. *Warren v. Philips*, 30 Barb. (N. Y.) 646.

12. **Ill.**—*Spring Valley v. Franckey*, 150 Ill. App. 435. **Neb.**—*Farnham v. Lincoln*, 75 Neb. 502, 106 N. W. 666. **Tex.**—*San Antonio v. San Antonio St. Ry. Co.*, 22 Tex. Civ. App. 148, 54 S. W. 281.

13. **Colo.**—*Goldfield v. MacDonald*, 52 Colo. 143, 119 Pac. 1069. **Mich.**—*Reed City v. Reed City Veneer & P. Works*, 165 Mich. 599, 131 N. W. 385. **N. Y.**—*New York v. North Shore, etc. Co.*, 9 Hun 620. **Wis.**—*Milwaukee v. Gimbel Bros.*, 130 Wis. 31, 110 N. W. 7.

[a] **Action To Quiet Title.**—*San Francisco v. Holladay*, 76 Cal. 18, 17 Pac. 942.

party having a claim against a municipal corporation may compel the payment thereof by mandamus,¹⁴ nor the right to appeal from the decision rejecting a claim,¹⁵ affect the right to maintain an action against a municipal corporation.¹⁶ Such a corporation may be sued upon express contracts made with it,¹⁷ and upon an implied contract within the scope of its authority.¹⁸ An action upon a quantum meruit, however, does not lie where the municipality had no power under any circumstances to enter into an express contract in reference to the subject matter.¹⁹ And a breach of a void contract on the part of the municipality creates no liability upon which an action can be brought against it.²⁰ Nor can a municipality recover damages for breach of a contract which is clearly beyond its power to make, although it has on its part fully performed the same.²¹

A municipal corporation may maintain ejectment²² to recover land

14. *Vacheron v. New York*, 34 Misc. 420, 69 N. Y. Supp. 608. See *infra*, IV, C, 12.

15. *Pyland v. Purvis*, 87 Miss. 433, 40 So. 7. See *infra*, VII.

16. See the preceding notes.

17. **U. S.**—*Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483. **Ill.** *Chicago v. Peck*, 196 Ill. 260, 63 N. E. 711. **Ind.**—*Gosport v. Pritchard*, 156 Ind. 400, 59 N. E. 1058. **Mo.**—*Catron v. La Fayette Co.*, 106 Mo. 659, 17 S. W. 577. **Wash.**—*Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878. **Wis.**—*Sharp v. Mauston*, 92 Wis. 629, 66 N. W. 803.

[a] **Except Where Contract Is in Violation of Law.**—*Wakefield v. Brophy*, 122 N. Y. Supp. 632; *Moriarty v. New York*, 110 N. Y. Supp. 842. See *People ex rel. Williams' Eng. & Cont. Co. v. Metz*, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201.

[b] **An action upon a parol contract cannot be maintained under a statute providing that a municipal corporation cannot enter into any contract otherwise than in writing.** *Savage v. Springfield*, 83 Mo. App. 323.

18. **U. S.**—*Austin v. Bartholomew*, 107 Fed. 349, 46 C. C. A. 327. **Me.** *Farwell v. Rockland*, 62 Me. 296. **Minn.** *Laird Norton Yards v. Rochester*, 117 Minn. 114, 134 N. W. 644, 41 L. R. A. (N. S.) 473. **N. Y.**—*Kramrath v. Albany*, 127 N. Y. 575, 28 N. E. 400; *Port Jervis Water Co. v. Port Jervis*, 71 Hun 66, 24 N. Y. Supp. 497, 54 N. Y. St. 84. **Tenn.**—*Nashville v. Toney*, 10 Lea 643. **Wash.**—*Washington W. Power Co. v. Spokane*, 89 Wash. 149, 154 Pac. 329. **W. Va.**

Johnson v. Alderson, 33 W. Va. 473, 10 S. E. 815.

[a] **Even though an express contract was made but was not properly executed.** *Nebraska Tel. Co. v. Red Cloud*, 94 Neb. 6, 142 N. W. 534.

[b] **Invalidity of a contract with a municipality because not in writing as required by the charter, does not prevent a recovery upon a quantum meruit.** *Gas-Light Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25.

[c] **The doctrine of implied municipal liability applies where money or other property of a party is received.** *Nelson v. Mayor of New York*, 63 N. Y. 535, 544. *Contra*, *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127.

19. **U. S.**—*Burrill v. Boston*, 2 Cliff. 590, 4 Fed. Cas. No. 2,198. **N. Y.** *McSpedon v. New York*, 7 Bosw. 601, 20 How. Pr. 395; *La France Fire-Engine Co. v. Syracuse*, 33 Misc. 516, 68 N. Y. Supp. 894. **Tex.**—*Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

[a] **No implication of an obligation arises from the acceptance of benefits on a forbidden contract.** *Edison Elec. Co. v. Pasadena*, 178 Fed. 425, 102 C. C. A. 401.

20. *Wade v. Newbern*, 77 N. C. 460.

21. *Portland v. Bituminous Pav., etc. Co.*, 33 Ore. 307, 52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527.

22. **Cal.**—*San Francisco v. Sullivan*, 50 Cal. 603. **Ga.**—*Savannah v. Steamboat Co.*, Charl't. 342. **Ill.**—*Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; *Chicago v. Wright*, 69 Ill. 318. **N. Y.**—*New York v. Law*, 125 N. Y. 380, 26 N. E. 471.

reserved by it for municipal purposes, and may bring an action of trespass.²³

In the absence of an express statute no action can be maintained against a municipal corporation for a breach of duty imposed upon it in the exercise of its governmental functions,²⁴ even though the plaintiff has sustained special damages.²⁵ Hence, a municipal corporation cannot be sued for failure to enforce its ordinances,²⁶ or to exercise its discretionary power.²⁷ But where a municipal corporation exercises proprietary or business powers it may be sued for damages alike with private corporations.²⁸

2. Prerequisites to Action Against Municipality.—*a. Necessity for Notice of Claim.*—It is ordinarily provided by the statute or municipal charter that claims against a municipality shall be first presented to the municipal authorities for allowance or rejection before suit can be brought thereon.²⁹ But in the absence of such pro-

See 7 STANDARD PROC. 988.

[a] **Ejectment To Compel Removal of Obstruction in Street.**—See *Hawshurst v. Asbury Park*, 65 N. J. Eq. 496, 56 Atl. 697. See also 6 STANDARD PROC. 988. But see *Grand Rapids v. Whittlesey*, 33 Mich. 109.

23. *Castleton v. Langdon*, 19 Vt. 210. See generally the title "Trespas."

24. *Colo.*—*Addington v. Littleton*, 50 Colo. 623, 115 Pac. 896, Ann. Cas. 1912C, 753, 34 L. R. A. (N. S.) 1012. *Conn.*—*Dyer v. Danbury*, 85 Conn. 128, 81 Atl. 958, Ann. Cas. 1913A, 784, 39 L. R. A. (N. S.) 405. *Ga.*—*Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787. *Mass.*—*Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63. *N. Y.* *Levy v. New York*, 1 Sandf. 465. *Tex.* *Givens v. Paris*, 5 Tex. Civ. App. 705, 24 S. W. 974.

25. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Sussex v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530.

26. *Salmon v. Kansas City*, 241 Mo. 14, 145 S. W. 16, 39 L. R. A. (N. S.) 328.

[a] **Non-Enforcement of Ordinances.** While the construction and maintenance of a street in a reasonably safe condition for travel is a corporate duty and an action will lie against a municipality for a breach thereof, the regulation of the use of streets brings into exercise governmental powers, and a failure of municipal officers to enforce an ordinance prohibiting the running at large of dogs in the streets of a city does not create a liability of the municipality for damages unless

the statute makes the municipality liable therefor. *Addington v. Littleton*, 50 Colo. 623, 115 Pac. 896, Ann. Cas. 1912C, 753, 34 L. R. A. (N. S.) 1012.

27. *White v. Buffalo*, 131 App. Div. 531, 115 N. Y. Supp. 1021.

28. *Ala.*—*Athens v. Miller*, 190 Ala. 82, 66 So. 702. *Kan.*—*Fowler v. Kansas City*, 64 Kan. 566, 68 Pac. 33. *N. J.*—*Tomlin v. Hildreth*, 65 N. J. L. 438, 47 Atl. 649. *Ore.*—*Coleman v. La Grande*, 73 Ore. 521, 144 Pac. 468.

[a] **Wilful wrongdoing on the part of municipal officers creates no cause of action against a municipality.** *Hathaway v. Everett*, 205 Mass. 246, 91 N. E. 296, 137 Am. St. Rep. 436.

29. *Ala.*—*Athens v. Miller*, 190 Ala. 82, 66 So. 702; *Rumsey & Co. v. Bessemer*, 138 Ala. 329, 35 So. 353. *Cal.* *Geimann v. Board of Police Comrs.*, 158 Cal. 748, 112 Pac. 553. *Colo.* *Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040. *Conn.*—*Cassidy v. Southbury*, 85 Conn. 221, 82 Atl. 198; *Biesiegel v. Seymour*, 58 Conn. 43, 19 Atl. 372. *Ga.*—*Bostwick v. Griffin*, 141 Ga. 120, 80 S. E. 657. *Ill.*—*Walters v. Ottawa*, 144 Ill. App. 379. *Ind.*—*Touhey v. Deatur*, 175 Ind. 98, 93 N. E. 540; *East Chicago v. Gilbert*, 59 Ind. App. 613, 108 N. E. 29, 109 N. E. 404. *Ia.*—*McGee v. Jones County*, 161 Iowa 296, 142 N. W. 957, 48 L. R. A. (N. S.) 141. *Kan.*—*Knoll v. Salina*, 98 Kan. 428, 157 Pac. 1167. *Me.*—*Spear v. Westbrook*, 104 Me. 496, 72 Atl. 311, 20 L. R. A. (N. S.) 804. *Mass.*—*Bowes v. Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365. *Mich.*—*Detroit v. Michigan Pav. Co.*, 38 Mich. 358. *Minn.*

vision, the filing of a notice of claim with the municipality prior to the commencement of an action is not necessary.³⁰ And a municipality cannot by ordinance prescribe that all claims against it must be presented before the institution of legal proceedings thereon.³¹

Statutory or charter provisions requiring the presentation of claims prior to the commencement of an action, are generally regarded as a condition precedent and are deemed mandatory.³² The claim must be presented within the prescribed time unless the claimant is wholly incapacitated from doing so.³³ But in some jurisdictions the omission to present a claim as required does not bar an action thereon but merely deprives plaintiff of his right to the recovery of costs.³⁴ Where the statutory or charter provision gives the municipal authorities a certain period of time within which to pass on the claim, no

Diamond Iron Wks. v. Minneapolis, 129 Minn. 267, 152 N. W. 647; State *ex rel.* Barber Asphalt Pav. Co. v. District Court, 90 Minn. 457, 97 N. W. 132. **Mont.**—Murray v. Butte, 51 Mont. 258, 151 Pac. 1051; Tonn v. Helena, 42 Mont. 127, 111 Pac. 715, 36 L. R. A. (N. S.) 1136. **Neb.**—Schmidt v. Fremont, 70 Neb. 577, 97 N. W. 830. **N. H.**—Sargent v. Gilford, 66 N. H. 543, 27 Atl. 306. **N. Y.**—Casey v. New York, 217 N. Y. 192, 111 N. E. 764; Jones v. Albany, 151 N. Y. 223, 226, 45 N. E. 557. **N. C.**—Pender v. Salisbury, 160 N. C. 363, 76 S. E. 228. **R. I.**—Maloney v. Cook, 21 R. I. 471, 44 Atl. 692. **S. D.**—Baldwin v. Aberdeen, 23 S. D. 636, 123 N. W. 80, 26 L. R. A. (N. S.) 116. **Tex.**—Puckett v. Ft. Worth (Tex. Civ. App.), 180 S. W. 1115. **Utah.**—McKay v. Salt Lake City, 29 Utah 247, 81 Pac. 81. **Vt.**—Barton v. Montpelier, 30 Vt. 650. **Wash.**—Lenhart v. Hoquiam, 86 Wash. 168, 149 Pac. 650. **Wis.**—Moyer v. Oshkosh, 151 Wis. 586, 139 N. W. 378.

In actions for injuries on highways and streets, see 11 STANDARD PROC. 199, et seq.

Claim against county, see *infra*, II, B, 2.

30. **Cal.**—Gill v. Oakland, 124 Cal. 335, 57 Pac. 150; Lehn v. San Francisco, 66 Cal. 76, 4 Pac. 965. **Miss.**—Pyland v. Purvis, 87 Miss. 433, 40 So. 7. **N. Y.**—Bradley v. Union Village, 164 App. Div. 565, 150 N. Y. Supp. 107; Vacheron v. New York, 34 Misc. 420, 69 N. Y. Supp. 608. **Vt.**—Judevine v. Hardwick, 49 Vt. 180.

31. Alabama City, G. & A. R. Co. v. Gadsden, 185 Ala. 263, 64 So. 91, Ann. Cas. 1916C, 573; Bowling Green

v. Duncan, 122 Ky. 244, 91 S. W. 268.

32. **Ala.**—Rumsey & Co. v. Bessemer, 138 Ala. 329, 35 So. 353. **Mo.**—Hill v. St. Joseph, 143 Mo. App. 389, 128 S. W. 214. **Neb.**—Lincoln v. Finkle, 41 Neb. 575, 59 N. W. 915; Lincoln v. Grant, 38 Neb. 369, 56 N. W. 995. **N. Y.**—Reining v. Buffalo, 102 N. Y. 308, 6 N. E. 792. **Tex.**—English v. Ft. Worth (Tex. Civ. App.), 152 S. W. 179. **Wash.**—Lenhart v. Hoquiam, 86 Wash. 168, 149 Pac. 650.

[a] Claims by way of set-off are not included in a statutory provision prescribing their presentation prior to the commencement of an action. Taylor v. New York, 82 N. Y. 10.

33. Murphy v. Ft. Edward, 213 N. Y. 397, 107 N. E. 716, Ann. Cas. 1916C, 1040; Hartsell v. Asheville, 166 N. C. 633, 82 S. E. 946.

[a] By statute incapacity excuses. See Stoliker v. Boston, 204 Mass. 522, 90 N. E. 927; May v. Boston, 150 Mass. 517, 23 N. E. 220; Ray v. St. Paul, 44 Minn. 340, 46 N. W. 675. See Haynes v. Seattle, 87 Wash. 375, 151 Pac. 789.

[b] Incapacity Does Not Excuse. Peoples v. Valparaiso, 178 Ind. 673, 100 N. E. 70; McCollum v. South Omaha, 84 Neb. 413, 121 N. W. 438. See Haynes v. Seattle, 87 Wash. 375, 151 Pac. 789; Ehrhardt v. Seattle, 33 Wash. 664, 74 Pac. 827.

34. **U. S.**—St. Charles v. Stookey, 154 Fed. 772, 85 C. C. A. 494. **Kan.**—Knoll v. Salina, 98 Kan. 428, 157 Pac. 1167; Garnett v. Hamilton, 69 Kan. 866, 77 Pac. 583. **Okla.**—Idabel v. Harrison, 42 Okla. 469, 141 Pac. 1110.

action can be brought prior to the expiration of such time.³⁵

Actual notice, by the municipal authorities, of the claim, does not dispense with the necessity of giving the statutory notice.³⁶ But it has been held that where a presentation of the claim would have been manifestly useless, it is not a condition precedent to the maintenance of an action.³⁷ Thus, where the debt is wholly repudiated by the municipality the statutory requirement of notice has no application.³⁸ Statutory and charter provisions requiring the presentation of claims are not applicable to actions for equitable relief solely.³⁹ Hence, a claim against a municipal corporation arising from a nuisance need not be presented to the municipal authorities before an action thereon can be maintained.⁴⁰

Such provisions for notice are not to be construed liberally against the rights of a claimant but are applicable only to cases which clearly come within their terms.⁴¹ Thus, a provision that demands against a municipal corporation,⁴² or that all accounts and demands against it⁴³ shall be presented for allowance or rejection prior to the commencement of an action is not applicable to actions arising out of a tort. Nor does a statutory provision declaring that no action shall be brought against a municipality for any debt or demand without

35. *Saunders v. Fitzgerald*, 113 Ga. 619, 38 S. E. 978.

[a] But where the municipal authorities fail to act upon the claim for an unreasonable length of time an action may be maintained by the claimant. *Kraft v. Madison*, 98 Wis. 252, 73 N. W. 775.

36. *Conn.*—*Crocker v. Hartford*, 66 Conn. 387, 34 Atl. 98. *Ind.*—*Rushville v. Morrow*, 54 Ind. App. 538, 101 N. E. 659. *Me.*—*Rich v. Eastport*, 110 Me. 537, 87 Atl. 374. *N. C.*—*Pender v. Salisbury*, 160 N. C. 363, 76 S. E. 228. *Wis.*—*Sowle v. Tomah*, 81 Wis. 349, 51 N. W. 571.

37. *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826.

38. *Mee v. Montclair*, 83 N. J. L. 274, 83 Atl. 764.

39. *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515.

40. *Cal.*—*Bloom v. San Francisco*, 64 Cal. 503, 3 Pac. 129. *N. Y.*—*De Moll v. New York*, 163 App. Div. 676, 148 N. Y. Supp. 966. *Ohio.*—*Ironton v. Wiehle*, 78 Ohio St. 41, 84 N. E. 425. *Wis.*—*Carthew v. Platteville*, 157 Wis. 322, 147 N. W. 375.

[a] An action against a municipality to enjoin a continuing nuisance, though coupled with a claim of damages therefor, is not one to which the statutory provision of filing a notice of claim is applicable as "it is un-

reasonable to suppose that the legislature intended to withhold for any time whatever the ordinary and proper remedy where a city or village is causing irreparable injury to private property, or is unlawfully imposing a nuisance thereon." *Joyce v. Janesville*, 132 Minn. 121, 155 N. W. 1067, L. R. A. 1916D, 426.

41. *Mich.*—*Pollard v. Cadillac*, 133 Mich. 503, 95 N. W. 536; *Tattan v. Detroit*, 128 Mich. 650, 87 N. W. 894. *Minn.*—*Kelly v. Faribault*, 95 Minn. 293, 104 N. W. 231. *Neb.*—*Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. (N. S.) 174. *N. Y.*—*Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622. *N. D.*—*Gaustad v. Enderlin*, 23 N. D. 526, 137 N. W. 613. *Ohio.*—*Scherer v. Cincinnati*, 8 Ohio Dec. (Reprint) 552. *Wash.*—*Taylor v. Spokane*, 91 Wash. 629, 158 Pac. 478; *Connolly v. Spokane*, 70 Wash. 160, 126 Pac. 407. *Wis.*—*Carthew v. Platteville*, 157 Wis. 322, 147 N. W. 375.

42. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978. *Contra*, *Adams v. Modesto* (Cal.), 61 Pac. 957.

43. *Idaho.*—*Giffen v. Lewiston*, 6 Idaho 231, 55 Pac. 545. *Mich.*—*Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475. *Mont.*—*Dawes v. Great Falls*, 31 Mont. 9, 77 Pac. 309. *N. Y.*—*Harrigan v. Brooklyn*, 119 N. Y. 156, 23 N. E. 741.

previous presentation apply to actions *ex contractu* where the damages are unliquidated.⁴⁴ And where a provision expressly refers to actions for damages for injuries it does not include actions for damages based upon breach of contract.⁴⁵ A statutory provision requiring presentation of claims for personal injuries likewise cannot be applied to actions for injuries to property.⁴⁶ But where the law expressly provides that no action can be brought against a municipality without the previous filing of a notice of the claim, the prior presentation of the claim is essential to the maintenance of an action growing out of a tort,⁴⁷ except, it has been held, where the statute or charter provides for "auditing" the claim.⁴⁸ Some statutes⁴⁹ and municipal charters⁵⁰ provide in express terms that all claims for damages must be first presented to the municipal authorities before an action may be brought thereon.

b. *Form and Sufficiency Thereof.* — Where the statute prescribes the form and manner of presentation of claims, it must be followed.⁵¹ Thus, under a provision requiring the submission of a verified claim in writing no other form will suffice.⁵² As a rule, however, a substantial

44. *Sugg v. Greenville*, 169 N. C. 606, 86 S. E. 695.

45. *Bradley v. Union Village*, 164 App. Div. 565, 150 N. Y. Supp. 107; *Williams v. Seattle*, 78 Wash. 15, 138 Pac. 300.

46. *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676.

47. *Barrett v. Mobile*, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54; *O'Donnell v. New London*, 113 Wis. 292, 89 N. W. 511.

48. *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293, the term "audit" has no application to tort claims. See also *Sheridan v. Salem*, 14 Ore. 328, 12 Pac. 925.

49. See the statutes, and *Ga.*—*Saunders v. Fitzgerald*, 113 Ga. 619, 38 S. E. 978. *Minn.*—*Diamond Iron Works v. Minneapolis*, 129 Minn. 267, 152 N. W. 647. *N. Y.*—*Casey v. New York*, 217 N. Y. 192, 111 N. E. 764; *Biggs v. Geneva*, 100 App. Div. 25, 90 N. Y. Supp. 858. *Tenn.*—*White v. Nashville*, 134 Tenn. 688, 185 S. W. 721, Ann. Cas. 1917D, 960.

50. *Cal.*—*Bancroft v. San Diego*, 120 Cal. 432, 52 Pac. 712. *N. C.*—*Hartsell v. Asheville*, 166 N. C. 633, 82 S. E. 946. *Tex.*—*Puckett v. Ft. Worth* (Tex. Civ. App.), 180 S. W. 1115.

51. *Ruprecht v. New York*, 102 App. Div. 309, 92 N. Y. Supp. 421; *Richardson v. Salem*, 51 Ore. 125, 94 Pac. 34.

[a] *Service by mail* is not sufficient where the statute requires that a no-

tice of claim shall be filed with the corporation counsel. *Burford v. Mayor of New York*, 26 App. Div. 225, 49 N. Y. Supp. 969.

[b] *Husband as Agent of Wife.*

(1) The presentation of a claim to a municipality by a husband for injury to property of his wife without any showing that he acted as the agent for his wife is insufficient to satisfy the requirements of a charter in reference to notice. *Birmingham v. Chestnutt*, 161 Ala. 253, 49 So. 813. See 11 STANDARD PROC. 201, note 1. (2) But where under the statute both husband and wife are proper parties to an action for personal injuries to the wife either may properly present and verify the claim where the charter does not require all the claimants to join in a claim or specify which claimant shall verify the claim where there is more than one such claimant. *James v. Seattle*, 68 Wash. 359, 123 Pac. 472.

52. *Wesley v. New York*, 170 App. Div. 888, 154 N. Y. Supp. 461; *Borst v. Sharon*, 24 App. Div. 599, 48 N. Y. Supp. 996; *Patterson v. Brooklyn*, 6 App. Div. 127, 40 N. Y. Supp. 581; *Farley v. Lockport*, 113 N. Y. Supp. 702.

[a] *And a complaint which shows service not of a verified statement containing the particulars prescribed by the law, but simply of a notice of intention to commence action and*

compliance with the requirements of the statutory or charter provision is sufficient,⁵³ and under some statutes no particular form of notice is required.⁵⁴ The notice should be sufficiently specific to apprise the municipality of the nature of the claim and to provide the means by which it might pursue an investigation of the merits of the claim.⁵⁵ And the rule of liberal construction is generally adopted by the courts in determining the sufficiency of a notice of claim.⁵⁶ A statement of the time⁵⁷ and place⁵⁸ of the occurrence, however, is one of the essential elements of a notice of claim. Some statutes⁵⁹ ex-

fails to show the presentation of same to the common council, is insufficient. *Ryan v. Schenectady*, 91 Misc. 296, 154 N. Y. Supp. 890.

53. *Ala.*—*McKinnon v. Birmingham*, 196 Ala. 56, 71 So. 463. *Ga.*—*Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133. *Ill.*—*Reichert v. Chicago*, 169 Ill. App. 493. *Mo.*—*Lyons v. St. Joseph*, 112 Mo. App. 681, 87 S. W. 588. *N. Y.*—*Tolchinsky v. New York*, 164 App. Div. 636, 149 N. Y. Supp. 1016; *McDonald v. New York*, 42 App. Div. 263, 59 N. Y. Supp. 16. *Wash.*—*Decker v. Seattle*, 80 Wash. 137, 141 Pac. 338. *Wis.*—*Moyer v. Oshkosh*, 151 Wis. 586, 139 N. W. 378.

[a] Where an effort to comply with the statute has been made by plaintiff and the notice served when reasonably construed is such as to accomplish the object of the statute, it is sufficient. *Sheehy v. New York*, 160 N. Y. 139, 54 N. E. 749.

[b] The service of a proper notice on a city solicitor's assistant is a substantial compliance with a statute requiring service of notice on the solicitor. *Rafferty v. Pittsburg*, 15 Pa. Super. 77.

[c] But notice of intention to commence an action on the claim is essential and a notice which does not contain a statement to that effect is fatally defective. *Wesley v. New York*, 151 N. Y. Supp. 587.

54. *McComb v. Chicago*, 263 Ill. 510, 105 N. E. 294.

55. *Ala.*—*Bland v. Mobile*, 142 Ala. 142, 37 So. 843. *Colo.*—*Denver v. Bradbury*, 19 Colo. App. 441, 75 Pac. 1077. *Ill.*—*McComb v. Chicago*, 263 Ill. 510, 105 N. E. 294. *Ia.*—*Palmer v. Cedar Rapids*, 165 Iowa 595, 146 N. W. 827; *Bauer v. Dubuque*, 122 Iowa 500, 98 N. W. 355. *Kan.*—*Ottawa v. Black*, 10 Kan. App. 439, 61 Pac. 985. *Me.*—*Joy*

v. York, 99 Me. 237, 58 Atl. 1059. *Mass.*—*Noonan v. Lawrence*, 130 Mass. 161. *Mich.*—*Pearl v. Bay City*, 174 Mich. 643, 140 N. W. 938. *Mo.*—*Kelley v. St. Joseph*, 170 Mo. App. 358, 156 S. W. 804. *Mont.*—*Murray v. Butte*, 51 Mont. 258, 151 Pac. 1051. *N. Y.*—*Weisman v. New York*, 169 App. Div. 558, 155 N. Y. Supp. 418. *R. I.*—*Foxwell v. Sullivan*, 34 R. I. 538, 84 Atl. 1092. *Wis.*—*Salladay v. Dodgeville*, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

See 11 STANDARD PROC. 202, et seq.

[a] Where the notice of claim is not calculated to mislead and contains such statement of identity of place and person as to enable the municipal officers to make a proper investigation, the notice is sufficient in the absence of proof that it did in fact mislead. *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621, Ann. Cas. 1916E, 720.

56. *Ind.*—*East Chicago v. Gilbert*, 59 Ind. App. 613, 108 N. E. 29, 109 N. E. 404. *Me.*—*York v. Athens*, 99 Me. 82, 58 Atl. 418. *Mass.*—*Burke v. Lynn*, 219 Mass. 302, 106 N. E. 995. *Mich.*—*Hayes v. St. Clair*, 173 Mich. 631, 139 N. W. 1037. *Minn.*—*Ackeret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976, Ann. Cas. 1916E, 897, L. R. A. (N. S.) 1111. *R. I.*—*Foxwell v. Sullivan*, 34 R. I. 538, 84 Atl. 1092.

[a] An inaccuracy as to the time, place or cause of the injury, made through inadvertence, which did not mislead the municipality, does not invalidate the notice. *Pueblo v. Babitt*, 47 Colo. 596, 108 Pac. 175.

57. *Carter v. St. Joseph*, 152 Mo. App. 503, 133 S. W. 851. See 11 STANDARD PROC. 203, 205.

58. *English v. Ft. Worth (Tex. Civ. App.)*, 152 S. W. 179. See also 11 STANDARD PROC. 203, 205.

59. *Tobin v. Brimfield*, 182 Mass. 117, 65 N. E. 28; *Inlagen v. Gary*, 34 S. D. 198, 147 N. W. 965.

pressly provide that a notice of claim shall not be deemed invalid by reason of any inaccuracy therein contained.

c. *Mode of Presentation of Claim.*—In the absence of a provision requiring the presentation of claims to a designated officer the service of a notice of claim on the mayor is proper.⁶⁰ But where the statute designates the officer upon whom service of the notice of claim should be made, service thereof upon another municipal officer is insufficient.⁶¹ Thus, under a statute providing for presentation to the chief fiscal officer of the municipality it must be presented to its treasurer;⁶² and it is not sufficient to present it to the board of trustees.⁶³ But service of notice on an assistant of a designated municipal officer is equivalent to service on such officer,⁶⁴ and under a statute requiring the service on the city council, service on the clerk of the council meets the statutory requirement.⁶⁵ Where the statute designates several officers upon whom the notice of claim must be served, service must be made upon all of them.⁶⁶

d. *Waiver of Notice of Claim.*—Where the notice of claim is an indispensable prerequisite to the right of maintaining an action thereon, the municipal authorities cannot waive the filing of such notice,⁶⁷

60. *McCartney v. Washington*, 124 Iowa 382, 100 N. W. 80; *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359.

61. *Colo.*—*Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098. *Minn.*—*Doyle v. Duluth*, 74 Minn. 157, 76 N. W. 1029. *N. Y.*—*Watts v. New York*, 133 App. Div. 400, 117 N. Y. Supp. 612; *Smith v. New York*, 88 App. Div. 606, 85 N. Y. Supp. 150; *King v. Randolph*, 28 App. Div. 25, 50 N. Y. Supp. 902. *R. I.*—*Seamons v. Fitts*, 21 R. I. 236, 42 Atl. 863. *Tex.*—*Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704. *Wash.*—*Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58. *Wis.*—*Harris v. Fond du Lac*, 104 Wis. 44, 80 N. W. 66; *Dorsey v. Racine*, 60 Wis. 292, 18 N. W. 928.

See 11 STANDARD PROC. 207.

[a] The city clerk is not a municipal officer within the meaning of a statute providing for such notice to one of the municipal officers, but such notice must be given to the mayor or aldermen. *Huntington v. City of Calais*, 105 Me. 144, 73 Atl. 829.

62. *Baine v. Rochester*, 85 N. Y. 523, 62 How. Pr. 346; *King v. Randolph*, 28 App. Div. 25, 50 N. Y. Supp. 902; *Hunt v. Oswego*, 45 Hun 305, 12 N. Y. St. 429.

63. *Gage v. Hornellsville*, 106 N. Y. 667, 12 N. E. 817.

64. *Mass.*—*McCabe v. Cambridge*,

134 Mass. 484. *Minn.*—*Kelly v. Minneapolis*, 77 Minn. 76, 79 N. W. 653. *N. Y.*—*McMahon v. Mayor of New York*, 1 App. Div. 321, 37 N. Y. Supp. 289. *Pa.*—*Rafferty v. Pittsburgh*, 15 Pa. Super. 77.

65. *Kelly v. Minneapolis*, 77 Minn. 76, 79 N. W. 653; *Blount v. Troy*, 110 App. Div. 609, 97 N. Y. Supp. 182; *Dobson v. Oneida*, 106 App. Div. 377, 94 N. Y. Supp. 958.

66. *Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80; *Bernreither v. New York*, 123 App. Div. 291, 107 N. Y. Supp. 1006. *Compare Clark v. Austin*, 38 Minn. 487, 38 N. W. 615.

67. *Conn.*—*Hoyle v. Putnam*, 46 Conn. 56. *Ill.*—*Cross v. Chicago*, 195 Ill. App. 86. *Ind.*—*Touhey v. Decatur*, 175 Ind. 98, 93 N. E. 540; *Rushville v. Morrow*, 54 Ind. App. 538, 101 N. E. 659. *Ia.*—*Starling v. Bedford*, 94 Iowa 194, 62 N. W. 674. *Me.*—*Rich v. Eastport*, 110 Me. 537, 87 Atl. 374. *Mass.*—*Gay v. Cambridge*, 128 Mass. 387. *N. Y.*—*Merwin v. Utica*, 172 App. Div. 51, 158 N. Y. Supp. 257. *N. C.*—*Pender v. Salisbury*, 160 N. C. 363, 76 S. E. 228. *Tenn.*—*White v. Nashville*, 134 Tenn. 688, 185 S. W. 721, Ann. Cas. 1917D, 960. *Vt.*—*Gregg v. Weathersfield*, 55 Vt. 385.

[a] An agreement to arbitrate does not constitute a waiver. *Clark v. Davison*, 118 Mich. 420, 76 N. W. 971.

[b] The omission to object to a complaint either by demurrer or an-

though they may waive a defect therein.⁶⁸ But a retention by the city authorities of a claim without objection as to its sufficiency constitutes no waiver of the right to rely upon the defects in the notice as a defense to the action.⁶⁹

3. Jurisdiction and Venue.—Municipal corporations, under some statutes, may be sued only in the courts of the county in which they are situated regardless of the ground upon which the cause of action rests.⁷⁰ Where an action against a municipality is improperly brought outside of the county of its residence the action according to some cases may be removed to the proper county,⁷¹ while in other cases it is held that in such event a change of venue cannot be granted but the action must be dismissed for want of jurisdiction.⁷² In some jurisdictions courts of record have exclusive jurisdictions of actions brought against municipal corporations.⁷³

Where exclusive jurisdiction over actions against a municipal corporation is given by statute to a specified court, municipal officers cannot by consent confer jurisdiction upon another court.⁷⁴

4. Form of Action.—A municipal corporation may be sued in any form appropriate to the cause of action and its liability does not differ as respects the form of action from that of a private corporation or individual.⁷⁵

5. Parties.⁷⁶—A municipal corporation must sue in its corporate

swer upon the ground that no prior notice of the claim had been given is deemed a waiver of such notice. *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831.

68. *Warner v. Wyandotte*, 175 Mich. 695, 141 N. W. 568.

69. *Mack Pav. Co. v. New York*, 142 App. Div. 702, 127 N. Y. Supp. 738.

70. *Cal.*—*Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845. *Ga.*—*Murray v. Tifton*, 143 Ga. 301, 84 S. E. 967. *Mich.* *Pack v. Greenbush*, 62 Mich. 122, 28 N. W. 746. *N. Y.*—*Maisch v. New York*, 193 N. Y. 460, 86 N. E. 458. *Tenn.*—*Piercy v. Johnson City*, 130 Tenn. 231, 169 S. W. 765, L. R. A. 1915F, 1029; *Nashville v. Webb*, 114 Tenn. 432, 85 S. W. 404. *Wash.*—*North Yakima v. Superior Court*, 4 Wash. 655, 30 Pac. 1053.

[a] **Statute Not Applicable to Municipal Corporations.**—A statute permitting suits against corporations in general to be brought wherever they transact business is not applicable to municipal corporations. *Phillips v. Baltimore*, 110 Md. 431, 72 Atl. 902, 25 L. R. A. (N. S.) 711.

[b] **In the absence of such a statute**, an action for personal injuries caused by a defective highway need not be brought in the county where the ac-

cident occurred. *Hunt v. Pownal*, 9 Vt. 411.

[c] **City on Boundary Line.**—The jurisdiction of the courts over a municipality which is partly within one and partly within another county is to be determined by the place where its seat of government is located. *Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370.

71. *Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845; *Jones v. Statesville*, 97 N. C. 86, 2 S. E. 346.

72. *North Yakima v. Superior Court*, 4 Wash. 655, 30 Pac. 1053.

73. *Albers v. Grand Rapids*, 113 Mich. 640, 71 N. W. 1110.

[a] **A justice of the peace has no jurisdiction of actions against a municipal corporation for the reason that he has no power to issue a writ of mandamus and thus cannot enforce the execution of a judgment against a municipality.** *Pueblo v. Dye*, 44 Colo. 35, 96 Pac. 969.

74. *Callahan v. New Pork*, 66 N. Y. 656.

75. *Winslow v. Perquimans Co.*, 64 N. C. 218.

76. See generally the title "Parties," and *infra*, II, B, 4; IV, B, 3; V, F.

name;⁷⁷ and a municipal officer cannot maintain an action in his name on behalf of the municipality although he may be compelled by mandamus to perform a certain duty,⁷⁸ unless the charter of the municipality expressly provides that it shall have the power to sue and be sued in the name of certain officers.⁷⁹

Actions against a municipal corporation as a rule must be brought in the corporate name conferred upon it.⁸⁰ But where no distinct corporate name has been given it, an action against it may be brought in the name of the officers in whom under the charter the corporate power is vested.⁸¹ A municipality re-incorporated under a new corporate name is a necessary party to an action upon an obligation incurred by its predecessor.⁸² And a municipal corporation which has acquired mortgaged property is a necessary party to an action brought by the mortgagee to foreclose the mortgage.⁸³ The inhabitants are not parties to an action brought against a municipal corporation and cannot be joined as such although their property may be taken to satisfy the judgment against the municipality.⁸⁴ Joint tort feorsors with a city may be joined in an action against it,⁸⁵ and the statute sometimes requires such joinder.⁸⁶

Where an action is brought by a municipal officer in his representative capacity a municipality which did not authorize the bringing of the action may intervene therein.⁸⁷ In an action upon a claim against a city payable out of a fund in the hands of its treasurer, the latter,

77. *Ala.*—*Powers v. Decatur*, 54 *Ala.* 214. *Ky.*—*Williamsburg v. Weesner*, 164 *Ky.* 769, 176 *S. W.* 224. *Me.*—*Garland v. Reynolds*, 20 *Me.* 45. *Mass.*—*Boston v. Schaffer*, 9 *Pick.* 415. *Neb.*—*Lincoln St. R. Co. v. Lincoln*, 61 *Neb.* 109, 84 *N. W.* 802. *Vt.*—*Castleton v. Langdon*, 19 *Vt.* 210.

78. *Pounds v. Lee Ave. Theatre Co.*, 84 *Misc.* 623, 147 *N. Y. Supp.* 815.

79. *Gainesville v. Caldwell*, 81 *Ga.* 76, 7 *S. E.* 99.

80. *Ga.*—*East Rome v. Rome*, 129 *Ga.* 290, 58 *S. E.* 854; *Augusta S. Ry. Co. v. Tennille*, 119 *Ga.* 804, 47 *S. E.* 179; *Dexter v. Gay*, 115 *Ga.* 765, 42 *S. E.* 94; *Boon v. Mayor of Jackson*, 98 *Ga.* 490, 25 *S. E.* 518. *Mass.*—*Lowell v. Morse*, 1 *Metc. (Mass.)* 473. *N. Y.*—*Miller v. Bush*, 87 *Hun* 507, 34 *N. Y. Supp.* 286. *N. C.*—*Young v. Barden*, 90 *N. C.* 424.

[a] It is not necessary to add the words "a municipal corporation" to the name of a municipality as such words are descriptive only. *Decatur v. Eady (Ind. App.)*, 105 *N. E.* 590.

[b] Amendment. — A failure to make the municipality a defendant in its corporate name may be corrected

by amendment. *Latonia v. Hopkins*, 104 *Ky.* 419, 47 *S. W.* 248.

[c] A change of name of a municipality during the pendency of an action against it does not require any amendment in the pleadings. *People ex rel. Frank v. San Francisco*, 21 *Cal.* 668.

[d] Where one municipality becomes merged into another the name of the original defendant may be stricken out and the name of the municipality liable by reason of such consolidation may be inserted instead. *Birmingham v. Darden*, 1 *Ala.* 479, 55 *So.* 1014.

81. *Neely v. Yorkville*, 10 *S. C.* 141.

82. *Amy & Co. v. Selma*, 77 *Ala.* 103.

83. *Centerville v. Fidelity Trust & Guar. Co.*, 118 *Fed.* 332, 55 *C. C. A.* 348.

84. *Mather v. San Francisco*, 115 *Fed.* 37, 52 *C. C. A.* 631.

85. See 11 *STANDARD PROC.* 210, et seq.

86. *Bessemer v. Whaley*, 10 *Ala. App.* 569, 65 *So.* 691.

87. *State v. Dubuclet*, 22 *La. Ann.* 365.

if not in default in any way, is not a proper party defendant.⁸⁸ If a municipal officer is sued as such upon a claim payable by the city from its corporate funds, the city must be joined as a defendant.⁸⁹

6. Process and Appearance.—a. *Generally.*—The general statute regulating service upon corporations has no application to municipal corporations and in the absence of an express statute in reference thereto service on the mayor or other head officer in accordance with the common law is sufficient.⁹⁰ Some statutes designate the officer upon whom service in behalf of a municipal corporation is to be made,⁹¹ and where a particular method of service of process upon a municipal corporation is prescribed by the statute, such method must be followed.⁹² To support a default judgment against a municipal corporation, it must appear of record that the person who was served with process has such a relation to the municipality that service on him was tantamount to service on the corporation.⁹³

b. *Waiver of Process.*—Service of process upon a municipal corporation, as a rule, cannot be waived without express authorization,⁹⁴ but the entry of an appearance by a city attorney for a municipality renders the service of process unnecessary and in the absence of a showing to the contrary such appearance will be presumed to

88. *Berlin Iron Bridge Co. v. San Antonio* (Tex. Civ. App.), 50 S. W. 408.

89. *Emmert v. De Long*, 12 Kan. 67.

[a] But where the action is brought by the state to recover money unlawfully converted by municipal officers to their own use the municipality need not be joined as party. *People v. Tweed*, 13 Abb. Pr. N. S. (N. Y.), 25.

90. Ga.—*Martin v. Tifton*, 6 Ga. App. 16, 63 S. E. 1132; *Smith v. Washington*, 4 Ga. App. 514, 61 S. E. 923. Ill.—*People v. Cairo*, 50 Ill. 154. Mo. *Cloud v. Pierce City*, 86 Mo. 357. N. C.—*Loughran v. Hickory*, 129 N. C. 281, 40 S. E. 46. Tex.—*Houston v. Emery*, 76 Tex. 282, 13 S. W. 264.

[a] Where no manner of service is prescribed by the statute, the service on the town clerk and councilmen is sufficient. *Cooper v. Cape May Point*, 67 N. J. L. 437, 51 Atl. 511.

[b] The municipality must be named in the process, and service of process on a municipal officer named in the process does not make the municipal corporation a party to the action. *Matteson v. Whaley*, 19 R. I. 648, 35 Atl. 962.

91. *Illinois Bridge & Iron Co. v. Sullivan*, 149 Ill. App. 450; *Maisch v. New York*, 193 N. Y. 460, 86 N. E. 458.

92. *Mariner v. Waterloo*, 75 Wis. 438, 44 N. W. 512; *Watertown v. Robinson*, 69 Wis. 230, 34 N. W. 139.

[a] Under a statute providing for service on the mayor and clerk of a municipality, the fact that the office of the mayor is vacant does not legalize a service of process upon another officer of the municipality. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946.

[b] *General Law and Charter Different.*—Where the general law prescribing the manner of service of summons upon municipal corporations is different from a charter provision of a municipality, the latter provision must be followed and is not superseded by the general law. *Stabler v. Alexandria*, 42 Fed. 490.

93. *Cloud v. Pierce City*, 86 Mo. 357.

[a] *Evidence of Official Capacity.* But a return of the sheriff showing service of summons by delivering to the mayor of the city a copy thereof is sufficient to authorize a judgment by default against the city without evidence aliunde that the person named in the return was in fact mayor. *Meridian v. Trussell*, 52 Miss. 711. Compare *Lyon v. Lorant*, 3 Ala. 151.

94. *Chicago, B. & Q. R. Co. v. Hitchcock*, 60 Neb. 722, 84 N. W. 97.

have been authorized.⁹⁵ And it has been held that the entry of an appearance by the mayor of a city without service of process is binding upon the municipality.⁹⁶

c. *Appearance by and Authority of Counsel.*—A municipal corporation having the power to sue and be sued may appear of record by any counsel it may choose to employ.⁹⁷ But where an action is brought for a municipality by a city attorney who under the municipal charter is authorized to conduct its law business it is not necessary to aver that the municipality directed the commencement of the action,⁹⁸ and the acts of a city attorney within the general scope of his authority are binding upon the municipality.⁹⁹ Counsel for a municipal corporation generally has the same powers in reference to the disposition of a cause as an attorney representing a private person.¹ He may, unless expressly restricted in his authority, consent to a reference of a cause,² and take an appeal from a judgment against a municipal corporation.³

7. *Declaration or Complaint.*—a. *Generally.*—It is not necessary to allege that a municipality organized under a charter is a corporation as the court will take judicial notice of the charter and the identity of such municipality.⁴ In the absence of a charter, averments that the defendant is a municipal corporation organized under a certain statute,⁵ or that it is a municipality of a certain class,⁶ a city⁷ or a village⁸ sufficiently show the corporate existence of the defendant municipality. The various preliminary steps by which the municipality became organized need not be set forth.⁹ A municipal corporation which appears and defends in its corporate name admits its corporate existence,¹⁰ and cannot thereafter raise an issue as to its organization.¹¹

95. *Rankin v. Chariton*, 160 Iowa 265, 139 N. W. 560, 141 N. W. 424; *Dugan v. Baltimore*, 70 Md. 1, 16 Atl. 501.

See the section following.

96. *North Lawrence v. Hoysradt*, 6 Kan. 170.

97. *New York v. Hamilton Ins. Co.*, 10 Bosw. 537; *Deatriek v. Defiance*, 1 Ohio Cir. Ct. 340, 1 Ohio Cir. Dec. 189.

98. *Seattle v. McDonald*, 26 Wash. 98, 66 Pac. 145; *Milwaukee v. Zoehrlaut L. Co.*, 114 Wis. 276, 90 N. W. 187.

See the section preceding.

99. *Connett v. Chicago*, 114 Ill. 233, 29 N. E. 280.

[a] *City attorney has right to control case* though associate counsel may be employed. *State v. Patterson*, 40 N. J. L. 186.

1. *People v. New York*, 11 Abb. Pr. (N. Y.) 66; *Lowber v. New York*, 5 Abb. Pr. (N. Y.), 325.

2. *Buckland v. Conway*, 16 Mass. 396.

3. *Hanna v. Kankakee*, 34 Ill. App. 186; *Boon v. Utica*, 4 Misc. 583, 25 N. Y. Supp. 846.

4. *Cal.*—*Owens v. Dudley*, 162 Cal. 422, 122 Pac. 1087. *Ill.*—*People v. Wilson*, 3 Ill. App. 368. *Wis.*—*Rains v. Oshkosh*, 14 Wis. 372.

5. *Eubank v. Edina*, 88 Mo. 650.

6. *Eskridge v. Lewis*, 51 Kan. 376, 32 Pac. 1104.

[a] *Judicial Notice of Class.* Where the statute requires judicial notice of cities of a certain class, an averment that the city was within that class is unnecessary. *Brookfield v. Tooev*, 141 Mo. 619, 43 S. W. 387. See 7 ENCY. OF EV. 1022, note 62.

7. *Stier v. Oskaloosa*, 41 Iowa 353.

8. *Clark v. Muskegon*, 88 Mich. 308, 50 N. W. 254; *Crockett v. Barre*, 66 Vt. 269, 29 Atl. 147.

9. *Eubank v. Edina*, 88 Mo. 650.

10. *Eubank v. Edina*, 88 Mo. 650.

11. *Erie v. Phelps*, 56 Kan. 135, 42 Pac. 336.

The charter of a municipal corporation, being a public law, need not be pleaded,¹² and a recital of the provisions of a charter may be stricken out as redundant matter.¹³ But where the act incorporating a municipality is not a public law the courts cannot take judicial notice of its provisions unless it is pleaded.¹⁴ It is not necessary for a municipal corporation to allege that it has a legal capacity to sue.¹⁵ And where the action is brought in the corporate name of the municipality by its proper officers it need not be averred that it authorized the bringing of the action as such authorization will be presumed until the contrary is shown.¹⁶

Notice of Claim. — Where the presentation to the municipal authorities of a notice of claim is by the statute or charter made a condition precedent to the maintenance of an action thereon, an omission to show in the complaint a substantial compliance with such provision renders the complaint fatally defective.¹⁷ So too, it must appear from the complaint that such notice had been presented within the prescribed time,¹⁸ or a sufficient excuse for the failure to do so must be shown.¹⁹ But it is not necessary to attach to the complaint a copy of the notice of claim presented to the municipal authorities,²⁰ or to recite the con-

12. *Dwyer v. Brenham*, 65 Tex. 526.

13. *Dureh v. Chippewa Co.*, 60 Wis. 227, 19 N. W. 79.

14. *O'Brien v. Wabash, St. L. & P. Ry. Co.*, 21 Mo. App. 12; *Wisdom v. Wabash, etc., Ry. Co.*, 19 Mo. App. 324.

15. *City of Janesville v. Milwaukee, etc., R. Co.*, 7 Wis. 484.

16. *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802.

17. *Ala.*—*Bland v. Mobile*, 142 Ala. 142, 37 So. 843; *Barrett v. Mobile*, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54; *Huntsville v. Goodenrath*, 13 Ala. App. 579, 68 So. 676. *Cal.*—*Bigelow v. Los Angeles*, 141 Cal. 503, 75 Pac. 111. *Conn.*—*Forbes v. Suffield*, 81 Conn. 274, 70 Atl. 1023. *Ga.*—*Tallapoosa v. Brock*, 138 Ga. 622, 75 S. E. 644. *Ill.*—*Walters v. Ottawa*, 240 Ill. 259, 88 N. E. 651; *Cross v. Chicago*, 195 Ill. App. 86; *Enberg v. Chicago*, 191 Ill. App. 101; *Donaldson v. Dieterich*, 157 Ill. App. 38. *Ind.*—*Touhey v. Decatur*, 175 Ind. 98, 92 N. E. 540, 32 L. R. A. (N. S.), 350; *Rushville v. Morrow*, 54 Ind. App. 538, 101 N. E. 659. *Ky.*—*Farmers' Bank v. Wickliffe*, 129 Ky. 679, 112 S. W. 835. *Minn.*—*Mitchell v. Chisholm*, 116 Minn. 323, 133 N. W. 804. *Mo.*—*Ferguson v. St. Louis*, 6 Mo. 499. *Mont.*—*Butte Mach. Co. v. Butte*, 43 Mont. 351, 116 Pac. 357. *Neb.*—*Nothdurft v. Lincoln*, 75 Neb. 76, 105 N. W. 1084. *N. Y.*—*De Moll*

v. New York, 163 App. Div. 676, 148 N. Y. Supp. 966; *Conway v. New York*, 139 App. Div. 446, 124 N. Y. Supp. 660. *N. C.*—*Pender v. Salisbury*, 160 N. C. 363, 76 S. E. 228. *Ore.*—*Richardson v. Salem*, 51 Ore. 125, 94 Pac. 34. *Wash.*—*Lindblom v. Seattle*, 86 Wash. 305, 150 Pac. 422. *Wis.*—*Terry v. Milwaukee*, 15 Wis. 490.

Necessity for claim, see *supra*, II, A, 2, a.

[a] Where it appears from the complaint that the notice given included only part of the damages claimed, the complaint is not vulnerable to a general demurrer, since it at least constitutes a good cause of action for some amount. *Sweet v. Salt Lake City*, 43 Utah 306, 134 Pac. 1167.

[b] Where notice is not a condition precedent, but in the nature of a statute of limitations, a compliance with the statute need not be averred. *Hawley v. Johnstown*, 40 App. Div. 568, 58 N. Y. Supp. 49; *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515.

18. *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650.

19. *Colo.*—*Central v. Wilcoxen*, 3 Colo. 566. *Neb.*—*Lincoln v. Finkle*, 41 Neb. 575, 59 N. W. 915. *N. Y.*—*Hungerford v. Waverly*, 125 App. Div. 311, 109 N. Y. Supp. 438.

20. *Columbus v. McDaniel*, 117 Ga. 823, 45 S. E. 59.

tents thereof,²¹ although it has been held, that the complaint must disclose that the plaintiff by such notice furnished the municipal authorities with information sufficient to pass upon the claim.²² An averment that the claim sued upon has been rejected by the municipal authorities likewise is essential to the statement of a good cause of action.²³ While a failure to allege a due presentation of a notice of claim ordinarily may be remedied by an amendment,²⁴ it is a fatal defect which is not cured by verdict.²⁵

b. *In Actions on Contracts.*—A general allegation that the municipality duly entered into the contract sued upon ordinarily is sufficient to show that it was authorized to make such contract,²⁶ and it is not necessary to set forth every step which led up to the making of the contract.²⁷ But a complaint on a contract must show the validity of the contract under the statute or municipal charter,²⁸ and some authorities require the complaint to show that officers executing a contract were authorized to contract for the municipality.²⁹ An averment that the municipality has ratified a contract made by its officers is not sufficient unless it sets forth the acts by which such ratification was

21. *Wilson v. St. Joseph*, 139 Mo. App. 557, 123 S. W. 504.

[a] **An averment of presentation of notice of claim in the terms of a charter provision is sufficient.** *San Antonio v. Ashton* (Tex. Civ. App.), 135 S. W. 757.

22. *Walpole v. Pueblo*, 12 Colo. App. 151, 54 Pac. 910.

23. *Lenhart v. Hoquiam*, 86 Wash. 168, 149 Pac. 650.

[a] **It is not sufficient to aver that no payment has been made on the claim.** *Casey v. New York*, 217 N. Y. 192, 111 N. E. 764.

24. *Dockery v. Hamlet*, 162 N. C. 118, 78 S. E. 13. See also the title "**New Cause of Action or Defense.**" But see *Prouty v. Chicago*, 159 Ill. App. 82.

25. *Smith v. Chicago Heights*, 141 Ill. App. 538; *Philomath v. Ingle*, 41 Ore. 289, 68 Pac. 803.

26. Ind.—*Gosport v. Pritchard*, 156 Ind. 400, 59 N. E. 1058. Wash.—*British Columbia Bank v. Port Townsend*, 16 Wash. 450, 47 Pac. 896; *Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878. Wis.—*Merrill Ry. & L. Co. v. Merrill*, 80 Wis. 358, 49 N. W. 965.

27. U. S.—*Hughes Co. v. Livingston*, 104 Fed. 306, 43 C. C. A. 541. Mo.—*Catron v. La Fayette Co.*, 106 Mo. 659, 17 S. W. 577. Wash.—*Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878.

28. *Eureka Fire Hose Mfg. Co. v.*

City of Eastman, 16 Ga. App. 630, 85 S. E. 929.

[a] **Where non-compliance with the statute prescribing the mode of making a contract appears from the complaint the action must be dismissed.** *Parker Co. v. New York*, 110 App. Div. 360, 97 N. Y. Supp. 200.

[b] **Contract by City of Certain Population.**—But where the contract sued upon is such as can be entered into only by a municipality of a certain population, the complaint must show that the defendant is such a municipality. *Texas Water & Gas Co. v. Cleburne*, 1 Tex. Civ. App. 580, 21 S. W. 393.

[c] **Where a ratification of the contract by the voters is necessary under the charter, the complaint must show a compliance with such requirement.** *Harrodsburg v. Harrodsburg Water Co.*, 23 Ky. L. Rep. 956, 64 S. W. 658; *Morrison v. Bernards*, 36 N. J. L. 219.

29. Ohio.—*Kerr v. Bellefontaine*, 13 Ohio Cir. Ct. 24. Tex.—*Peck-Smead Co. v. Sherman*, 26 Tex. Civ. App. 208, 63 S. W. 340. Wis.—*Lauenstein v. Fond du Lac*, 28 Wis. 336.

[a] **Where the contract is made with a special board which can be created only under the circumstances and conditions prescribed by the statute, it must appear from the complaint that the board was organized in accordance with the statute.** *Hol-*

accomplished.³⁰ The complaint need not show that the city was not indebted beyond the constitutional limit or that the amount involved did not exceed the appropriations.³¹ But where the contract provides that the payments thereon are to be made out of the current revenues it must be stated in the complaint that such revenues were available,³² and that the municipality had funds which it was authorized to apply to such purpose.³³

Where the right to compensation for services rendered to a municipality depends upon certain conditions the complaint must show the existence of such conditions.³⁴ In actions on implied contracts for services rendered, it is sufficient to allege the employment without designating the particular officer through whom the municipality acted,³⁵ or his authority to act,³⁶ but it must affirmatively appear from the complaint that the services were accepted by the municipal corporation.³⁷ In an action based upon an alleged wrongful rescission of a contract the orders of the municipal council in regard thereto must be set forth.³⁸

c. *In Tort Actions*.—In actions against a municipal corporation for the recovery of damages arising from a tort the complaint must show that the tortious act was done by a municipal officer while acting for the municipality in its corporate,³⁹ and not governmental character.⁴⁰ The plaintiff, however, is not required to name the particular officer whose neglect caused the injury complained of.⁴¹ But it is essential to show that the tortious act was committed by an agent or servant of the municipal corporation, and an averment that the municipality committed the act without reference to its servants or agents fails to state a cause of action.⁴² Where the action is based upon negligence the general rules regulating the mode of pleading negligence are applied.⁴³ The complaint must set forth facts showing

royd v. Indian Lake, 75 App. Div. 197, 77 N. Y. Supp. 672.

30. Lauenstein v. Fond du Lac, 28 Wis. 336.

[a] Allegations of acts done by the mayor personally will be stricken out, unless it is shown that the municipality ratified such acts. De-structor Co. v. Atlanta, 219 Fed. 996.

31. Chicago v. Peek, 196 Ill. 260, 63 N. E. 711.

32. Waterworks Co. v. San Antonio (Tex. Civ. App.), 48 S. W. 205.

33. Kerr v. Bellefontaine, 13 Ohio Cir. Ct. 24; Peck-Smead Co. v. Sherman, 26 Tex. Civ. App. 208, 63 S. W. 340.

34. Pritchett v. Stanislaus Co., 73 Cal. 310, 14 Pac. 795.

35. Rochester v. Shaw, 100 Ind. 268.

36. Reed v. Orleans, 1 Ind. App. 25, 27 N. E. 109.

37. Stubbs v. Galveston, 3 Wills. Civ. Cas. (Tex.), §143.

38. Terre Haute v. Lake, 43 Ind. 480.

39. Ala.—Huntville v. Ewing, 116 Ala. 576, 22 So. 984. Kan.—Fowler v. Kansas City, 64 Kan. 566, 68 Pac. 33. N. J.—Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649. Ore.—Caspary v. Portland, 19 Ore. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

40. Caspary v. Portland, 19 Ore. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

41. U. S.—Wilson v. City of Reading, 105 Fed. 217. Ala.—Athens v. Miller, 190 Ala. 82, 66 So. 702. Ind.—Lafayette v. Allen, 81 Ind. 166. Wash.—Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149.

42. Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649.

43. See the title "Negligence."

the duty of the municipality,⁴⁴ and a breach thereof.⁴⁵ But the duty of the municipality in the premises need not be averred in terms,⁴⁶ such an allegation without the facts, being a mere conclusion of law.⁴⁷ Where a certain duty is imposed upon a municipality by the general statute or charter it need not be specially pleaded.⁴⁸

The act or omission constituting the negligence must be stated in the complaint.⁴⁹ And the complaint likewise must show that the alleged breach of duty proximately caused the damage.⁵⁰ The rules regulating the necessity of pleading freedom from negligence on the

44. *Ala.*—*Huntville v. Ewing*, 116 *Ala.* 576, 22 *So.* 984. *Colo.*—*Oliver v. Denver*, 13 *Colo. App.* 345, 57 *Pac.* 729. *Conn.*—*Dyer v. Danbury*, 85 *Conn.* 128, 81 *Atl.* 958, *Ann. Cas.* 1913A, 784, 39 *L. R. A. (N. S.)* 405. *Del.*—*Downs v. Comrs. of Smyrna*, 2 *Penne.* 132, 45 *Atl.* 717. *Ill.*—*Lefkowitz v. Chicago*, 238 *Ill.* 23, 87 *N. E.* 58. *Ind.*—*Vincennes v. Spees*, 35 *Ind. App.* 389, 74 *N. E.* 277. *Ia.*—*Ross v. Clinton*, 46 *Iowa* 606, 26 *Am. Rep.* 169. *Md.* *Havre de Grace v. Fletcher*, 112 *Md.* 562, 77 *Atl.* 114. *Mo.*—*Coulter v. Independence*, 168 *Mo. App.* 710, 154 *S. W.* 860. *N. H.*—*Edgerly v. Concord*, 59 *N. H.* 341. *R. I.*—*Sneeson v. Kupper*, 21 *R. I.* 560, 45 *Atl.* 579. *W. Va.* *Lutz v. Charleston*, 76 *W. Va.* 657, 86 *S. E.* 561.

45. *Ala.*—*Huntville v. Ewing*, 116 *Ala.* 576, 22 *So.* 984. *Cal.*—*Coffey v. Berkeley*, 170 *Cal.* 258, 149 *Pac.* 559. *Colo.*—*Oliver v. Denver*, 13 *Colo. App.* 345, 57 *Pac.* 729. *Ill.*—*English v. Danville*, 170 *Ill.* 131, 48 *N. E.* 328. *Ind.*—*Alexandria v. Liebler*, 162 *Ind.* 438, 70 *N. E.* 512. *Mich.*—*Storrs v. Grand Rapids*, 110 *Mich.* 483, 68 *N. W.* 258. *Miss.*—*Stainback v. Meridian*, 79 *Miss.* 447, 28 *So.* 947, 30 *So.* 607. *Ohio.*—*Chase v. Cleveland*, 44 *Ohio St.* 505, 9 *N. E.*, 225, 58 *Am. Rep.* 843. *Wis.*—*Koepke v. Milwaukee*, 112 *Wis.* 475, 88 *N. W.* 238.

46. *Coulter v. Independence*, 168 *Mo. App.* 710, 154 *S. W.* 860.

47. *Conn.*—*Hewison v. New Haven*, 34 *Conn.* 136, 91 *Am. Dec.* 718. *Ill.*—*Chicago v. Selz, Schwab & Co.*, 202 *Ill.* 545, 67 *N. E.* 386. *R. I.* *Wakefield v. Newell*, 12 *R. I.* 75, 34 *Am. Rep.* 598. *Utah.*—*Herndon v. Salt Lake City*, 34 *Utah* 65, 95 *Pac.* 646, 131 *Am. St. Rep.* 827.

See generally the titles "Conclusions of Law;" "Negligence."

48. *Mass.*—*Cronan v. Woburn*, 185

Mass. 91, 70 *N. E.* 38. *Mich.*—*Hayes v. West Bay City*, 91 *Mich.* 418, 51 *N. W.* 1067. *Pa.*—*Erie v. Schwingle*, 22 *Pa.* 384, 60 *Am. Dec.* 87. *W. Va.* *Michaelson v. Charleston*, 71 *W. Va.* 35, 75 *S. E.* 151; *Hysell v. Central City*, 64 *W. Va.* 133, 61 *S. E.* 43.

49. *Fla.*—*Daytona v. Edson*, 64 *Fla.* 463, 34 *So.* 954. *Ind.*—*Town of Royal Center v. Bingaman*, 37 *Ind. App.* 626, 77 *N. E.* 811. *La.*—*Hills v. New Orleans*, 139 *La.* 537, 71 *So.* 797. *Mont.*—*Pullen v. Butte*, 38 *Mont.* 194, 99 *Pac.* 290, 21 *L. R. A. (N. S.)* 42. *Ohio.*—*Groveport v. Bradfield*, 2 *Ohio Cir. Ct.* 145, 1 *Ohio Cir. Dec.* 411. *Va.* *McCoull v. Manchester*, 4 *S. E.* 848.

See generally the title "Negligence."

50. *Ala.*—*Montgomery v. Gilmer*, 33 *Ala.* 116, 70 *Am. Dec.* 562. *Fla.*—*De Funiak Springs v. Purdue*, 69 *Fla.* 326, 68 *So.* 234. *Ga.*—*Shaw v. Macon*, 6 *Ga. App.* 306, 64 *S. E.* 1102. *Ill.*—*English v. Danville*, 170 *Ill.* 131, 48 *N. E.* 328. *Ind.*—*Franklin v. Smith*, 175 *Ind.* 236, 93 *N. E.* 993; *Greenfield v. Roback*, 45 *Ind. App.* 70, 90 *N. E.* 136. *Mich.*—*Alexander v. Big Rapids*, 76 *Mich.* 282, 42 *N. W.* 1071. *Minn.*—*Kleopfert v. Minneapolis*, 90 *Minn.* 158, 95 *N. W.* 908. *Miss.*—*Tyler v. Bay St. Louis*, 34 *So.* 215. *N. Y.*—*Hartman v. Lowenstein*, 90 *Misc.* 686, 154 *N. Y. Supp.* 205; *Goldstein v. Rodgers*, 153 *N. Y. Supp.* 935. *Utah.*—*Soule v. Weatherby*, 39 *Utah* 580, 118 *Pac.* 833, *Ann. Cas.* 1913E, 75. *Wash.*—*Shearer v. Buckley*, 31 *Wash.* 370, 72 *Pac.* 76. *W. Va.*—*Waggener v. Point Pleasant*, 42 *W. Va.* 798, 26 *S. E.* 352. *Wis.* *Bodah v. Deer Creek*, 99 *Wis.* 509, 75 *N. W.* 75.

[a] That a tree fell by reason of its decayed condition must appear, where negligence in allowing it to stand, is alleged. *Indianapolis v. Slider*, 48 *Ind. App.* 38, 95 *N. E.* 334.

part of plaintiff,⁵¹ and the pleading of damages⁵² are treated elsewhere.

8. Answer or Plea.—*a. Generally.*—The general rules of pleading pertaining to answer or plea are applicable to actions against municipal corporations.⁵³ The answer to a verified complaint must be made under oath of the proper municipal officer.⁵⁴ Where the fact alleged in the complaint is presumptively within defendant's knowledge a denial of such allegation upon information and belief is insufficient.⁵⁵ New matter constituting the defense of a municipality must be pleaded. Thus, the omission to present the claim sued on within the prescribed time,⁵⁶ the sufficiency of the notice of claim,⁵⁷ the invalidity of the contract sued upon,⁵⁸ and fraud in obtaining it,⁵⁹ as a rule must be specially averred.

b. Ultra Vires.—Where a corporation seeks to avoid its own contract on the ground of its want of power to contract it must make good its defense by the plea of *ultra vires*.⁶⁰

9. Trial.—*a. Variance.*—The general rules in reference to variance⁶¹ apply to actions by and against municipal corporations. Thus a variance between the allegations and proof is not material unless it misleads the adverse party to his prejudice.⁶² Under an averment

51. See the title "Negligence."

52. See the title "Injuries to Persons and Property."

53. See generally the titles "Answers;" "Bills and Answers;" "Denials;" "Pleas;" and titles dealing with particular pleas.

54. *Hitchcock v. Galveston*, 3 Woods 287, 12 Fed. Cas. No. 6, 534; *Bradley v. Spickardsville*, 90 Mo. App. 416.

[a] Affidavit of defense unnecessary. *Malone v. Philadelphia*, 8 Pa. Co. Ct. 385. See the title "Affidavits of Merits and Defense."

55. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

[a] Denial of knowledge of presentation of claim is frivolous. *Bogart v. New York*, 128 App. Div. 139, 112 N. Y. Supp. 549.

56. *City of Birmingham v. Darden*, 1 Ala. App. 479, 55 So. 1014.

57. *McHugh v. New York*, 31 App. Div. 299, 52 N. Y. Supp. 623.

58. *Louisville v. Gosnell*, 22 Ky. L. Rep. 1524, 60 S. W. 411; *McNulty v. New York*, 168 N. Y. 117, 61 N. E. 111.

59. *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364.

60. Cal.—*Brown v. Pomona*, 103 Cal. 531, 37 Pac. 503. Ill.—*Miller v. Goodwin*, 70 Ill. 659. Ind.—*Anderson v. O'Conner*, 98 Ind. 168. Ia.—*Fitzgerald v. Sharon*, 143 Iowa 730, 121 N. W.

523; *Ryan v. Lone Tree*, 122 Iowa 420, 98 N. W. 287. N. Y.—*Ocorr & Rugg Co. v. Little Falls*, 77 App. Div. 592, 79 N. Y. Supp. 251.

See the title "Ultra Vires."

[a] *Ultra vires* is an affirmative defense and must be pleaded and the question cannot be raised by demurrer to a complaint which simply sets out the making of the contract by the municipality and its performance by the other party. *Richmond County Soc. v. New York*, 73 App. Div. 607, 77 N. Y. Supp. 41.

[b] Lack of Authorization.—The fact that the municipal authorities failed to take the requisite steps to authorize the contract which otherwise was within the general scope of the power of the municipality must be pleaded. *Chicago v. Peck*, 196 Ill. 260, 63 N. E. 711.

[c] Ordinance.—A municipality may plead that its ordinance is *ultra vires*. *Peters v. St. Louis*, 226 Mo. 62, 125 S. W. 1134.

61. See the title "Variance and Failure of Proof."

62. D. C.—*District of Columbia v. Healler*, 4 App. Cas. 405. Ill.—*Karczenska v. Chicago*, 239 Ill. 483, 88 N. E. 188. Ia.—*Stokes v. Sac. City*, 162 Iowa 514, 144 N. W. 639; *Pace v. Webster City*, 138 Iowa 107, 115 N. W. 888. Ky.—*Frankfort v. Buttimer*, 146 Ky. 815, 143 S. W. 410. Mich.—

of knowledge of danger on the part of the municipality evidence of actual as well as constructive notice is admissible.⁶³ But a material variance between the claim as presented to the municipal authorities and the proof is fatal.⁶⁴ Where the proof substantially sustains the statements contained in the notice of claim, an inaccuracy in the notice which could not have misled the municipality is not material.⁶⁵ But the variance is material where the proof shows that plaintiff's injury was received at a different place,⁶⁶ or on a different day⁶⁷ than that designated in the notice of claim. A variance as to the amount of damage claimed is not material and the fact that a claimant in his notice specified a less amount of damage than the amount sued upon does not preclude him from recovery of the whole amount demanded in the complaint,⁶⁸ though there is authority to the effect that the right of recovery of damages is limited to the amount specified in the notice of claim.⁶⁹ Proof of waiver of notice of claim is a fatal variance from an allegation that such notice was given.⁷⁰

Pursuant to the general rule⁷¹ that in actions founded upon negligence recovery may be had only for the specific acts of negligence charged, proof that the damage was caused by an act different from that pleaded constitutes a fatal variance,⁷² unless the averments of the

Epelett v. Sault Ste. Marie, 144 Mich. 392, 108 N. W. 360. **Mo.**—*Roberts v. Piedmont*, 166 Mo. App. 1, 148 S. W. 119; *Snowden v. St. Joseph*, 163 Mo. App. 667, 147 S. W. 492. **Pa.**—*Lynch v. Winton Borough*, 54 Pa. Super. 93.

63. *Pace v. Webster City*, 138 Iowa 107, 115 N. W. 888; *Dinsmore v. St. Louis*, 192 Mo. 255, 91 S. W. 95.

[a] "Constructive notice is included within actual notice and . . . is sufficient under a pleading charging the latter. In other words, the greater includes the less." *Maki v. Cloquet*, 116 Minn. 17, 133 N. W. 80.

64. **Colo.**—*Denver v. Barron*, 6 Colo. App. 72, 39 Pac. 989. **Ill.**—*Nicastro v. Chicago*, 175 Ill. App. 634. **Mass.**—*McDougall v. Boston*, 134 Mass. 149. **N. Y.**—*Gilbert v. New York*, 173 App. Div. 259, 159 N. Y. Supp. 460, 469. **Wash.**—*McCarroll v. Spokane*, 34 Wash. 344, 75 Pac. 973.

65. **Ga.**—*Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133. **Mich.**—*Williams v. Lansing*, 152 Mich. 169, 115 N. W. 961. **Wis.**—*Van Fraehen v. Ft. Howard*, 88 Wis. 570, 60 N. W. 1062.

66. *Brannon v. Birmingham*, 177 Ala. 419, 59 So. 63.

67. *Anthony v. St. Joseph*, 152 Mo. App. 180, 133 S. W. 371; *Taylor v. Peck*, 29 R. I. 481, 72 Atl. 645.

68. **Kan.**—*Wyandotte v. White*, 13

Kan. 191; *Salina v. Kerr*, 7 Kan. App. 223, 52 Pac. 901. **Mich.**—*Johnson v. Bay City*, 164 Mich. 251, 129 N. W. 29; *Ann. Cas.* 1912 B, 866; *Hunter v. Ithaca*, 135 Mich. 281, 97 N. W. 712. **Minn.**—*Terryll v. Faribault*, 84 Minn. 341, 87 N. W. 917. **N. H.**—*Noble v. Portsmouth*, 67 N. H. 183, 30 Atl. 419. **N. Y.**—*Reed v. New York*, 97 N. Y. 620. **Okla.**—*Oklahoma City v. Welsh*, 3 Okla. 288, 41 Pac. 598. **R. I.**—*Burdick v. Richmond*, 16 R. I. 502, 17 Atl. 917. **Vt.**—*Perry v. Putney*, 52 Vt. 533, 537.

[a] **Amount of Damages Need Not Be Stated.**—*Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545.

69. *Perrine v. Southern-Bituminous Co.*, 190 Ala. 96, 66 So. 705; *Marsh v. Benton*, 75 Iowa 469, 39 N. W. 713.

70. *Merwin v. Utica*, 172 App. Div. 51, 153 N. Y. Supp. 257.

71. See the title "Negligence."

72. **D. C.**—*District of Columbia v. Donaldson*, 38 App. Cas. 259. **Ga.**—*Williams v. Mayor, etc., of Washington*, 142 Ga. 281, 92 S. E. 656, *Ann. Cas.* 1916B, 196, L. R. A. 1915A, 325; *Montezuma v. Wilson*, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150. **Kan.**—*Martin v. Columbus*, 93 Kan. 79, 143 Pac. 421. **Ky.**—*Oakdale v. Sanders' Exrs.*, 155 Ky. 352, 159 S. W. 812. **Mass.**—*Lund v. Tyngsboro*, 11 Cush. 563, 59 Am. Dec. 159. **N. Y.**—*Bonny*

complaint are sufficiently broad to cover the negligent act, which the proof shows caused the injury.⁷³

b. *Province of Court and Jury.*—Whether the mode of presentation and delivery of a notice of claim constituted a compliance with the statute in reference thereto is not a question for the jury but must be determined by the court,⁷⁴ as must the legal sufficiency of the notice,⁷⁵ unless the issue is raised as to whether the statements contained in the notice of claim placed the municipality in a position to investigate the claim.⁷⁶ But where the notice of claim was filed after expiration of the time provided therefor the question whether such notice was presented within a reasonable time after plaintiff's disability ceased is for the jury.⁷⁷ And where the evidence is conflicting it is for the jury to determine whether or not the notice of claim was duly served on the municipal corporation.⁷⁸ The question whether a notice of claim was prepared with the intent to mislead and in fact misled the municipal authorities must likewise be submitted to the jury.⁷⁹

Where the action against a municipal corporation is founded upon negligence, the rules regulating the province of court and jury in such cases⁸⁰ apply. Accordingly, the questions as to what duty the municipal corporation owed to the plaintiff,⁸¹ whether there was a breach of duty on its part,⁸² and what the proximate cause of the

1. New York, 156 App. Div. 287, 141 N. Y. Supp. 8.

73. Chicago v. Wieland, 139 Ill. App. 197; Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095.

74. Wolf v. Venice, 152 Ill. App. 585.

75. Colo.—Denver v. Barron, 6 Colo. App. 72, 39 Pac. 989. Ill.—Reichert v. Chicago, 169 Ill. App. 493. Me.—York v. Athens, 99 Me. 82, 53 Atl. 418; Rogers v. Shirley, 74 Me. 144. Mass.—Shea v. Lowell, 132 Mass. 187. N. H.—Robin v. Bartlett, 64 N. H. 426, 13 Atl. 645. Vt.—Harris v. Townshend, 56 Vt. 716.

76. Idaho.—Baillie v. Wallace, 24 Idaho 706, 135 Pac. 850. Me.—Chapman v. Nobleboro, 76 Me. 427. Mo.—Roberts v. St. Joseph (Mo. App.), 185 S. W. 1197.

[a] **Certainty of statement as to place of accident is for jury.** Sollenbarger v. Lineville, 141 Iowa 202, 119 N. W. 618.

77. Forsyth v. Oswego, 191 N. Y. 141, 84 N. E. 392.

78. Ljungberg v. North Mankato, 87 Minn. 484, 92 N. W. 401; Schaefer v. Ashland, 117 Wis. 553, 94 N. W. 303.

79. Pueblo v. Babbitt, 47 Colo. 596, 108 Pac. 175.

80. See the title "Negligence."

81. Ind.—Valparaiso v. Chester, 176 Ind. 636, 96 N. E. 765. Mass. Barnes v. Chicopee, 138 Mass. 67, 52 Am. Rep. 259. Mich.—Malloy v. Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695. Pa.—Plymouth v. Graves, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867. Vt.—Drew v. Sutton, 55 Vt. 586, 45 Am. Rep. 644.

82. Ark.—Mullett v. Clarendon Elect. Light & I. Co., 117 Ark. 655, 174 S. W. 560. Cal.—Williams v. San Francisco, etc., R. Co., 6 Cal. App. 715, 93 Pac. 122. Idaho.—Baillie v. Wallace, 24 Idaho 706, 135 Pac. 850. Ia.—Law v. Bryant Asphaltic Pav. Co., 175 Iowa 747, 157 N. W. 175. Ky.—Gatewood v. Frankfort, 170 Ky. 292, 185 S. W. 847; Newport v. Lewis, 155 Ky. 832, 160 S. W. 507; Toebe v. Covington, 145 Ky. 763, 141 S. W. 421. Me.—Larrabee v. Sewall, 66 Me. 376. Mich.—Hunt v. Douglass Tp., 165 Mich. 187, 130 N. W. 648. N. Y. Nicholson v. Stillwater, 208 N. Y. 203, 191 N. E. 858. N. C.—Davis & Son v. Thornburg, 149 N. C. 233, 62 S. E. 1088. Pa.—McManamon v. Hanover Tp., 232 Pa. 439, 81 Atl. 440; Toglatti v. Carriek Borough, 61 Pa. Super. 244. R. I.—Foley v. Ray, 27 R. I. 127, 61 Atl. 50. Vt.—Brown v. Mount Holly,

injury was,⁸³ are to be determined by the jury where different inferences may reasonably be drawn from the evidence. And whether the damage was caused by an act of God,⁸⁴ or was the result of tortious acts of third persons⁸⁵ are questions for the jury to be decided under appropriate instructions of the court. But it is error to submit to the jury the construction of an ordinance.⁸⁶ The question of the validity⁸⁷ or reasonableness of an ordinance,⁸⁸ likewise is to be determined by the court.

c. *Instructions.*—The general rules regulating the giving and refusing of instructions⁸⁹ apply to actions by and against municipal corporations. The charge of the court must apply the law to the facts of the particular case,⁹⁰ and must be based upon the issues as made by the pleadings,⁹¹ and supported by the proof.⁹² It is error

69 Vt. 364, 38 Atl. 69. **Wis.**—Carlou v. Greenfield, 130 Wis. 342, 100 N. W. 208.

83. **Del.**—Jarrell v. Wilmington, 4 Penne. 454, 56 Atl. 379. **Ga.**—Dalton v. Humphries, 139 Ga. 556, 77 S. E. 790. **Idaho.**—Baillie v. Wallace, 24 Idaho 706, 135 Pac. 850. **Ill.**—Flora v. Pruett, 81 Ill. App. 161. **Ia.**—Rose v. Ft. Dodge, 155 N. W. 170. **Me.**—Cleveland v. Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326. **Mass.**—McMahon v. Harvard, 213 Mass. 20, 99 N. E. 458. **Mich.**—Johnson v. Marquette, 154 Mich. 50, 117 N. W. 658; Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047. **Minn.**—Watson v. Duluth, 128 Minn. 446, 151 N. W. 143. **N. Y.**—Hume v. New York, 47 N. Y. 639. **N. C.**—Alexander v. Statesville. 165 N. C. 527, 81 S. E. 763. **Pa.**—Behl v. Philadelphia, 206 Pa. 329, 55 Atl. 1029. **Tex.**—Gonzales v. Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17. **Va.**—Norfolk v. Anthony, 117 Va. 777, 86 S. E. 68. **Wash.**—Woodworth v. Dayton, 89 Wash. 444, 154 Pac. 790.

84. Bemis v. Omaha, 81 Neb. 352, 116 N. W. 31.

85. **Mo.**—Ballentine v. Kansas City, 126 Mo. App. 130, 103 S. W. 564. **N. Y.**—McManus v. New York, 115 N. Y. Supp. 150. **Pa.**—Earley v. Philadelphia, 235 Pa. 153, 83 Atl. 616.

86. Pass Christian v. Washington, 81 Miss. 470, 34 So. 225.

87. People v. Gardner, 143 Mich. 104, 106 N. W. 541; State v. Bass, 171 N. C. 780, 87 S. E. 972, Ann. Cas. 1916D, 583.

88. **Cal.**—*Ex parte* Frank, 52 Cal. 666, 28 Am. Rep. 642. **Ill.**—Lake View v. Tate, 130 Ill. 247, 22 N. E. 791, 6

L. R. A. 268; Flynn v. Springfield, 120 Ill. App. 266. **Kan.**—Lebanon v. Zanditon, 75 Kan. 273, 89 Pac. 10. **Me.**—State v. Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750. **Mass.**—Com. v. Worcester, 3 Pick. 462. **Mich.**—People v. Detroit United Ry., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746. **Minn.**—Evison v. Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434. **Mo.**—St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. (N. E.) 918. **N. C.**—Small v. Edenton, 146 N. C. 527, 60 S. E. 413, 20 L. R. A. (N. S.) 145. **Pa.**—Kneedler v. Norristown, 100 Pa. 368, 45 Am. Rep. 384. **S. C.**—State v. Earle, 66 S. C. 194, 44 S. E. 781. **Tex.**—Brenham v. Holle, 153 S. W. 345; Austin v. Austin City C. Assn., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114. **Wis.**—Maereker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, Ann. Cas. 1914B, 199; L. R. A. 1915 F, 1196; Stafford v. Chippewa V. E. R. Co., 110 Wis. 331, 85 N. W. 1036.

89. See the title "Instructions."

90. Stanley v. Chicago, 177 Ill. App. 245; Herndon v. Salt Lake City, 34 Utah 65, 95 Pac. 646, 131 Am. St. Rep. 827.

91. **Ala.**—Montgomery v. Bradley, 159 Ala. 230, 48 So. 809. **Ill.**—Thompson v. Kinlock, etc. Tel. Co., 183 Ill. App. 619. **Mo.**—McClure v. Feldmann, 184 Mo. 710, 84 S. W. 16. **Vt.**—Holcomb v. Danby, 51 Vt. 428.

92. **Conn.**—Lutton v. Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589. **Mass.**—Murphy v. Hugh Nawn Cont. Co., 223 Mass. 404, 111 N. E. 890. **Mich.**—Wakeham v. St. Clair, 91 Mich. 15, 51 N. W. 696. **N. Y.**—Embler v.

to charge the jury on an issue not supported by any evidence,⁹³ or to omit to charge on an issue which is supported by the proof.⁹⁴ In the absence of a controversy in reference to a notice of claim it is proper to reject an instruction submitting to the jury the question of delivery of such notice.⁹⁵ The giving of an instruction which is not applicable to the issues, however, does not constitute reversible error unless it appears to have been prejudicial to the substantial rights of the complaining party.⁹⁶ Instructions which as far as they are correct are covered by other instructions are properly refused.⁹⁷ And an instruction which attempts to define the liability of the municipality and leaves out one of the basic elements of such liability constitutes prejudicial error.⁹⁸ It is error for the court to assume the existence of contested facts,⁹⁹ unless the facts are such as the court is bound to judicially notice.¹ And the court by its instructions should not invade the province of the jury.² The charge should not be contradictory³ or misleading.⁴ And it is proper to reject a requested instruction which is argumentative⁵ or abstract⁶ and calculated to mislead.⁷

Wallkill, 132 N. Y. 222, 30 N. E. 404. Wis.—Wall v. Highland, 72 Wis. 435, 39 N. W. 560.

93. O'Dwyer v. Northern Market Co., 30 App. Cas. (D. C.) 244. See also Roberts v. Piedmont, 166 Mo. App. 1, 148 S. W. 119; Riley v. Kansas City, 161 Mo. App. 290, 143 S. W. 541; Diel v. Ferguson, 153 Mo. App. 286, 138 S. W. 545.

94. Peteau v. Delaney, 48 Okla. 361, 150 Pac. 208.

95. Wolf v. Venice, 152 Ill. App. 585.

96. Watkins v. Henderson, 168 Ky. 622, 182 S. W. 837.

97. D. C.—District of Columbia v. Duryee, 29 App. Cas. 327. Mo.—Holman v. Macon (Mo. App.), 177 S. W. 1078; Fogg v. Kansas City, 187 Mo. App. 252, 173 S. W. 712. Utah.—Herndon v. Salt Lake City, 34 Utah 65, 95 Pac. 646, 131 Am. St. Rep. 827.

98. Pearce v. Kansas City, 156 Mo. App. 230, 137 S. W. 629.

99. Centralia v. Ayres, 133 Ill. App. 290.

1. Ill.—Joliet v. Shufelt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750. Mo.—Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A. (N. S.) 1082. Utah.—Billo v. Salt Lake City, 37 Utah 597, 109 Pac. 745.

2. Colo.—Colorado Springs v. Floyd, 19 Colo. App. 107, 73 Pac. 1092. Ill.—Chicago v. Kubler, 133 Ill. App.

520. Ia.—Hofacre v. Monticello, 128 Iowa 239, 103 N. W. 488. Md.—Maga-ha v. Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317. Mo.—Dougherty v. St. Louis, 251 Mo. 514, 158 S. W. 326, 46 L. R. A. (N. S.) 330; Morrill v. Kansas City (Mo. App.), 179 S. W. 759. N. Y.—Hayman v. New York, 163 App. Div. 195, 148 N. Y. Supp. 63. Ore.—Delovage v. Old Oregon Co., 76 Ore. 430, 147 Pac. 392, 149 Pac. 317. Utah.—Tucker v. Salt Lake City, 10 Utah 173, 37 Pac. 261. Va.—Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

3. Lincoln v. Heinzl, 134 Ill. App. 439; Roberts v. Piedmont, 166 Mo. App. 1, 148 S. W. 119.

4. D. C.—District of Columbia v. Atchison, 31 App. Cas. 250; District of Columbia v. Holton, 15 App. Cas. 386. Ill.—Stanley v. Chicago, 177 Ill. App. 245. Ky.—Louisville v. Zoeller, 153 Ky. 192, 160 S. W. 500. Mo.—Roberts v. Piedmont, 166 Mo. App. 1, 148 S. W. 119. Wash.—Owen v. Seattle, 64 Wash. 10, 116 Pac. 261. Wis.—Smalley v. Appleton, 70 Wis. 340, 35 N. W. 729.

5. Fisher v. Geneseo, 154 Ill. App. 288; Rockwall v. Heath (Tex. Civ. App.), 90 S. W. 514.

6. Hardin v. Moline, 179 Ill. App. 101; Lawrence v. Channahon, 157 Ill. App. 560.

7. Vesey v. Chicago, 156 Ill. App. 617; Horabunda v. Chicago, 151 Ill.

d. *Judgment and Costs.*—In the absence of a statute prohibiting it, a judgment by default⁸ or confession⁹ may be entered against a municipal corporation in the same manner as against a natural person or a private corporation. A judgment against a municipal corporation, except in a proceeding in rem, should not specify any particular fund from which the judgment is to be paid, but the judgment must leave the plaintiff to pursue the remedy which the law provides to obtain satisfaction of his judgment¹⁰ unless the law upon which the claim is based expressly contains the condition that any amount due thereunder shall be payable out of a certain fund.¹¹ And where a judgment against a municipality provides for its satisfaction out of a certain fund it is error to enter another judgment in an action on the first judgment omitting the restriction as to the mode of payment.¹² A municipal corporation generally is not exempt from payment of costs, and a judgment therefor may be rendered against it.¹³

In some jurisdictions the statute provides that no judgment for costs can be recovered against a city where the claim sued on was not previously presented to the municipal authorities.¹⁴ Such statute must be strictly construed,¹⁵ and does not apply to costs in special proceedings¹⁶ or on appeal.¹⁷

10. *Enforcement of Judgment.*—a. *Generally.*—A judgment against a municipal corporation has no other effect than to establish the validity of the plaintiff's claim,¹⁸ and gives him no greater right to the payment of his claim than is given by the statute in reference to the disposition of the revenues of a municipal corporation.¹⁹ Such a judgment is not a lien upon its public property which is necessary to carry out the general purpose for which such corporation is organized,²⁰ and it is error to award an execution against a municipal cor-

App. 627. See *O'Dwyer v. Northern Market Co.*, 30 App. Cas. (D. C.) 244.

8. *Hunt v. San Francisco*, 11 Cal. 250; *Moran v. Long Island City*, 101 N. Y. 439, 5 N. E. 80.

9. *Smith v. State*, 64 Kan. 730, 68 Pac. 641.

10. *Buck v. Eureka*, 119 Cal. 44, 50 Pac. 1065; *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 676; *Chicago v. Duffy*, 117 Ill. App. 261.

11. *Fernandez v. New Orleans*, 46 La. Ann. 1130, 15 So. 378.

12. *Weaver v. San Francisco*, 146 Cal. 728, 81 Pac. 119.

13. Ill.—*Edwardsville v. Barnsback*, 66 Ill. App. 381. Mo.—*Haggard v. Carthage*, 168 Mo. 129, 67 S. W. 567. N. Y.—*Gage v. Hornellsville*, 106 N. Y. 667, 12 N. E. 817.

14. *Fort Scott v. Elliott*, 68 Kan. 305, 74 Pac. 609; *Brewster v. Hornellsville*, 35 App. Div. 626, 54 N. Y.

Supp. 915; *Hallinan v. Ft. Edward*, 26 Misc. 422, 57 N. Y. Supp. 162.

[a] The presentation of a claim to a board of water commissioners is not a compliance with the statute requiring it to be presented to the chief fiscal officer. *King v. Randolph*, 28 App. Div. 25, 50 N. Y. Supp. 902.

15. *Taylor v. Cohoes*, 105 N. Y. 54, 11 N. E. 282.

[a] A statute providing for exemption from payment of costs in the superior court does not apply to justices' courts. *Marsh v. Lansingburgh*, 31 Hun (N. Y.) 514.

16. In matter of *Jetter*, 78 N. Y. 601.

17. *Utica Water Works Co. v. Utica*, 31 Hun (N. Y.) 426.

18. *Fresno Canal & Irrigation Co. v. McKenzie*, 135 Cal. 497, 67 Pac. 900.

19. *Weaver v. Ogden City*, 111 Fed. 323.

20. Ill.—*People v. Superior Court*,

poration.²¹ An action cannot be maintained by a judgment creditor to strike certain items from the budget of the city on the ground of illegality and substitute his claim on the judgment.²² A judgment creditor of a municipality cannot resort to the individual property of the inhabitants to satisfy a judgment obtained against the corporate body,²³ nor can he maintain an action against them merely because they have failed to pay a certain tax.²⁴

b. *Mandamus*.—The remedy to enforce a judgment against a municipal corporation is to sue out a writ of mandamus in order to compel it to pay the judgment²⁵ by the levy of a tax²⁶ provided that the power to levy such tax exists by virtue of a statute or is clearly implied therefrom.²⁷ A party obtaining a judgment in the federal

55 Ill. App. 376. Ia.—Davenport v. Peoria M. & F. Ins. Co., 17 Iowa 276. Ohio.—Cincinnati v. Frost, Stearns & Co., 8 Ohio Dec. (Reprint) 107. Pa. Schaffer v. Cadwallader, 36 Pa. 126.

21. U. S.—Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; United States v. King, 74 Fed. 493. Ala.—Anniston v. Hurt, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45. Ill.—Chicago v. English, 180 Ill. 476, 54 N. E. 609; Kansas v. Juntgen, 84 Ill. 360; Wicker v. Alton, 140 Ill. App. 135; Gibson v. Murray, 120 Ill. App. 296. Mich. Waterman W. Co. v. School District, 183 Mich. 168, 150 N. W. 104. Neb. Alter v. State, 62 Neb. 239, 86 N. W. 1080. N. J.—Lyon v. Elizabeth, 43 N. J. L. 158. N. C.—Fry v. Montgomery, 82 N. C. 304. Ohio.—State ex rel. O'Hara v. Symmes Twp., 7 Ohio Dec. (Reprint) 326. Pa.—Miller v. Bradford, 19 Pa. Super. 297. S. D.—Evans v. Bradley, 4 S. D. 83, 55 N. W. 721. Tex.—Sherman v. Williams, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

22. Fernandez v. New Orleans, 50 La. Ann. 485, 23 So. 611.

23. Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Thompson v. Perris Irr. Dist., 116 Fed. 769; Lyon v. Elizabeth, 43 N. J. L. 158.

Contra, Beardsley v. Smith, 16 Conn. 368, 41 Am. Dec. 148.

24. Horner v. Coffey, 25 Miss. 434.

25. U. S.—Labette Comrs. v. United States, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. ed. 698; United States v. King, 74 Fed. 493. Ala.—Anniston v. Hurt, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45. Cal.—People ex rel. Frank v. San Francisco, 21 Cal. 668. Ill.—Chicago v. People, 98 Ill. App. 517. N. J.—Lyon v. Elizabeth, 43 N. J. L. 158. N. Y.—Brinkerhoff v. Board

of Education, 37 How. Pr. 499, 6 Abb. Pr. 428, 2 Daly 443. N. C.—Fry v. Montgomery, 82 N. C. 304; Lutterloh v. Cumberland Co., 65 N. C. 403. Ohio. State ex rel. O'Hara v. Symmes Twp., 7 Ohio Dec. (Reprint) 326. Pa.—Miller v. Bradford, 19 Pa. Super. 297. S. D.—Evans v. Bradley, 4 S. D. 83, 55 N. W. 721.

[a] *Mandamus After Judgment*. State ex rel. Dyer v. Middle K. I. Dist., 56 Wash. 488, 106 Pac. 203.

[b] *Mandamus an Ancillary Proceeding*.—Helena v. United States, 104 Fed. 113, 43 C. C. A. 429.

[c] *A proceeding by mandamus cannot be used to confer jurisdiction which the court would not have without it, but it is authorized only when ancillary to a jurisdiction already acquired*. Bath v. Amy, 13 Wall. (U. S.) 244, 20 L. ed. 539.

[d] *Judgment Against City and Other Defendants*.—The right to a writ of mandamus is not affected by the fact that the judgment is rendered against a municipality and other defendants who own property out of which the judgment may be satisfied. Palmer v. Stacy, 44 Iowa 340; Blocker v. Owensboro, 129 Ky. 75, 110 S. W. 369.

Mandamus to enforce claims generally, see *infra*, IV, C, 12.

26. United States v. Oswego, 23 Fed. 55; Alter v. State, 62 Neb. 239, 86 N. W. 1080.

27. Cleveland v. United States, 111 Fed. 341, 49 C. C. A. 383; Bond v. Hoopston, 168 Ill. App. 617. See Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 294.

[a] *Tax beyond statutory limit cannot be compelled by mandamus, whether that limit be fixed by a gen-*

court, however, is not bound to enforce it in that court and may by mandamus brought in a state court compel the payment of such judgment,²⁸ although the jurisdiction of a federal court to render judgment includes the power to enforce its judgment by mandamus and a state court cannot interfere, by injunctive orders or otherwise, to prevent it.²⁹ The right to mandamus is restricted to the period of time within which an execution may issue³⁰ and cannot be issued during the pendency of an appeal from the judgment taken by the municipality.³¹ Under some statutes the municipal officers who have the power to cause a judgment to be paid are necessary parties to mandamus proceedings,³² while in other jurisdiction the municipality alone is the proper party defendant.³³

The general rules³⁴ regulating mandamus proceedings apply to petitions for mandamus against municipal corporations to enforce execution on a judgment. The right to the writ must be legal and clear,³⁵ and it must appear from the allegations of the petition that the petitioner has no other remedy,³⁶ and that the debt is one for which a tax may be levied.³⁷ It is not necessary, however, to allege that the municipality had the necessary funds to pay at the time the debt was contracted.³⁸ The record of the judgment cannot be contradicted in mandamus proceedings,³⁹ nor can the legality of the contract on which the judgment was founded.⁴⁰ A municipality has no discretion to refuse to audit a valid judgment against it and must provide for its payment.⁴¹

B. BY AND AGAINST COUNTY.—1. Generally.—The capacity of

eral or special statute. *Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 692. See *State v. New Orleans*, 116 La. 851, 41 So. 115.

[b] Violation of constitutional limit on indebtedness cannot be compelled. *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167.

28. *Brown v. Crego*, 32 Iowa 498.

29. *United States v. King*, 74 Fed. 493.

30. *Brockway v. Oswego*, 40 Fed. 612; *United States v. Oswego*, 28 Fed. 55.

31. *Pherson v. Young*, 69 Kan. 655, 77 Pac. 693.

32. U. S.—*Labette Comrs. v. United States*, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. ed. 698; *Rose v. McKie*, 145 Fed. 584, 76 C. C. A. 274. Ia.—*Porter v. Thomson*, 22 Iowa 391. Miss.—*Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 692.

Compare *infra*, IV, B, 3.

33. *Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 692; *San Antonio v. Routledge*, 46 Tex. Civ. App. 196, 102 S. W. 756.

34. See generally the title "Mandamus."

35. *Lewis v. Drainage Comrs.*, 111 Ill. App. 222.

36. *San Antonio v. Routledge*, 46 Tex. Civ. App. 196, 102 S. W. 756.

37. *Barksdale v. Hayes*, 134 Ga. 348, 67 S. E. 852; *Brunson v. Caskie*, 127 Ga. 501, 56 S. E. 621, 9 L. R. A. (N. S.) 1002.

38. *Lewis v. Drainage Comrs.*, 111 Ill. App. 222.

39. *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152; *Rankin v. Chariton*, 160 Iowa 265, 139 N. W. 560, 141 N. W. 424.

[a] The fact that the judgment was rendered upon a void claim does not constitute a defense to such proceedings. *New Orleans v. United States*, 49 Fed. 40, 1 C. C. A. 148; *Bear v. Brunswick*, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

40. *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Com. v. Hinkson*, 161 Pa. 266, 28 Atl. 1081.

41. *United States ex rel. Portsmouth Sav. Bank v. Ottawa*, 28 Fed. 407.

a county to sue and be sued depends entirely upon statutory enactments,⁴² and in the absence of statutory authority therefor either expressly conferred or necessarily following from a power granted, an action by or against a county cannot be maintained.⁴³ Some statutes expressly declare counties to be bodies corporate with power to sue and be sued.⁴⁴ And a statute making a county a body corporate, by necessary inference confers upon it the power to sue and be sued.⁴⁵ While the statutes conferring upon counties the power to sue and be sued are in derogation of the common law and therefore must be

42. **Cal.**—Whittaker v. Tuolumne Co., 96 Cal. 100, 30 Pac. 1016; Hunsaker v. Borden, 5 Cal. 288, 63 Am. Dec. 130. **Colo.**—Phillips v. Churning, 4 Colo. App. 321, 35 Pac. 918. **Del.**—Duncan v. Willits, 4 Penne. 493, 57 Atl. 369. **Ga.**—Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72; County of Monroe v. Flint, 80 Ga. 489, 6 S. E. 173. **Ill.**—County of Rock Island v. Steele, 31 Ill. 543. **La.**—St. Helena Police Jury v. Fluker, 1 Rob. 389. **Mass.**—Hampshire Co. v. Franklin Co., 16 Mass. 76. **N. H.**—Plymouth v. Grafton, 68 N. H. 361, 44 Atl. 523. **N. C.**—Bell v. Johnston, 127 N. C. 85, 37 S. E. 136. **Ore.**—Grant County v. Lake County, 17 Ore. 453, 21 Pac. 447. **S. C.**—Scott v. Richland County, 83 S. C. 506, 65 S. E. 729. **Wash.**—Hoexter v. Judson, 21 Wash. 646, 59 Pac. 498.

[a] "A county can have no liability except as authorized, expressly or by necessary implication, by some statutes. Counties are political divisions of the state, created by convenience. They are not corporations with the right to sue and be sued as an incident to their being, but are quasi corporations, invested by statutes with certain powers and subject to certain liabilities and can neither sue nor be sued, except as authorized by statute." *Brabham v. Board of Supervisors*, 54 Miss. 363, 28 Am. Rep. 352.

43. **Ala.**—Lowndes County v. Hunter, 49 Ala. 507. **Cal.**—Gilman v. Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290. **Colo.**—Phillips v. Churning, 4 Colo. App. 321, 35 Pac. 918. **Conn.**—Ward v. County of Hartford, 12 Conn. 404. **Ga.**—Parker v. Spalding County, 134 Ga. 69, 67 S. E. 404; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72; Monroe v. Flint, 80 Ga. 489, 6 S. E. 173. **Ill.**—Hollenbeck v. Winnebago Co., 95 Ill. 143, 35 Am. Rep. 151; County of Schuyler v. County of Mer-

cer, 9 Ill. 20. **Ky.**—Marion County v. Rives, 133 Ky. 477, 118 S. W. 309; Com. for Use of Devoe v. Baske, 124 Ky. 468, 99 S. W. 316, 11 L. R. A. (N. S.) 1104. **Miss.**—Anderson v. State, 23 Miss. 459. **N. C.**—Bell v. Johnston, 127 N. C. 85, 37 S. E. 136; Prichard v. Board of Comrs., etc., 126 N. C. 908, 36 S. E. 353, 78 Am. St. Rep. 679. **Ohio.**—Comrs. Hamilton Co. v. Mighels, 7 Ohio St. 109. **Utah.**—Taylor v. Salt Lake County Court, 2 Utah 405.

[a] An unorganized county having no corporate existence can neither sue nor be sued. *Brewster v. Presidio*, 19 Tex. Civ. App. 638, 48 S. W. 213.

[b] For an exhaustive review of the cases involving the liability of counties for torts, see 39 L. R. A. 33, et seq.

[c] But where a county under the statute has supervision of all public roads it is liable for injuries sustained by reason of its negligence in maintaining such road although there is no statute expressly authorizing such action. *Eastman v. Clackamas County*, 12 Sawy. 613, 32 Fed. 24.

44. **U. S.**—Commissioners v. Bank of Commerce, 97 U. S. 374, 24 L. ed. 1060. **Ala.**—Lowndes County v. Hunter, 49 Ala. 507. **Cal.**—Colusa County v. Glenn County, 117 Cal. 434, 49 Pac. 457. **Ga.**—Cook v. Board of Comrs., 54 Ga. 163. **Neb.**—Ayres v. Thurston, 63 Neb. 96, 88 N. W. 178. **Okla.**—Muskogee County v. Lanning, 151 Pac. 1054. **Ore.**—Grant County v. Lake County, 17 Ore. 453, 21 Pac. 447. **Pa.**—Slegel v. Lauer, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547. **S. C.**—Wheeler v. County of Newberry, 18 S. C. 132. **S. D.**—Lyman County v. State, 9 S. D. 413, 69 N. W. 601.

45. *Boaz v. Ferrell* (Tex. Civ. App.), 152 S. W. 200.

strictly construed, such power may be implied from other rights and powers given by the statute.⁴⁶ Thus, where a county has authority to make a contract it follows as an incident thereto that it may sue or be sued concerning it.⁴⁷ And a statute making the county liable impliedly authorizes the bringing of an action against the county upon such liability.⁴⁸ But it has been held that a statute authorizing counties to commence and prosecute suits at law or in equity does not imply that an action can be maintained against them.⁴⁹ Nor does a statute authorizing county commissioners to sue for the recovery of county funds empower them to bring an action for a tort.⁵⁰

Under some statutes actions may be brought against a county upon implied as well as express contracts.⁵¹ A county is not liable at common law for the tortious acts of its officers whether committed in its behalf or otherwise. Hence, the right to bring an action against a county for a tort must be predicated upon the statute.⁵² In some cases it is held that where a county is empowered to sue and be sued, an action may be brought against it to recover damages for a tort,⁵³ while according to others, such liability cannot be inferred from a statute authorizing the maintenance of actions by and against counties.⁵⁴ Under some statutes actions may be maintained against a county to recover damages sustained by a riot,⁵⁵ and by want of repair of a bridge.⁵⁶

2. Prerequisites to Action.—Some statutes require the presentation of claims to the county as a condition precedent to the maintenance of an action against it.⁵⁷ But in the absence of a statute to

46. *Salt Lake County v. Golding*, 2 Utah 319.

[a] **A statutory provision requiring all claims against a county to be first presented to its board of supervisors and payment demanded implies that after such presentation an action may be brought against the county.** *Armstrong v. Tama*, 34 Iowa 309.

47. *Marion County v. Rives*, 133 Ky. 477, 118 S. W. 309; *First Nat. Bank v. Christian County*, 32 Ky. L. Rep. 634, 106 S. W. 831.

48. *Harris County v. Brady*, 115 Ga. 767, 42 S. E. 71.

49. *Ward v. County of Hartford*, 12 Conn. 404.

50. *Comr. of Hamilton Co. v. Noyes*, 5 Ohio Dec. (Reprint) 281.

51. *Montgomery v. Barber*, 45 Ala. 237; *Cicotte v. Wayne County*, 44 Mich. 173, 6 N. W. 236.

52. *Cal.*—*Barnett v. Contra Costa*, 67 Cal. 77, 7 Pac. 177. *Ill.*—*Hollenbeck v. Winnebago Co.*, 95 Ill. 148, 35 Am. Rep. 151; *Hedges v. County of Madison*, 6 Ill. 567. *Ohio.*—*Comrs. of Hamilton Co. v. Mighels*, 7 Ohio St.

109. *Tex.*—*Boaz v. Ferrell* (Tex. Civ. App.), 152 S. W. 200. *Wash.*—*Hoexter v. Judson*, 21 Wash. 646, 59 Pac. 498.

53. *May v. Mercer*, 30 Fed. 246.

[a] **There is no reason for a distinction between tort actions and actions ex contractu so far as the right of action against a county is concerned.** *Duncan v. Willits*, 4 Penne. (Del.) 493, 57 Atl. 369.

54. *Scales v. Ordinary of Chatahoocche County*, 41 Ga. 225.

55. *Cal.*—*Clear Lake Waterworks Co. v. Lake County*, 45 Cal. 90. *Ill.* *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 53 N. E. 68, 69 Am. St. Rep. 321, 45 L. R. A. 848. *Ohio.*—*Champaign v. Church*, 62 Ohio St. 318, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 738. *Pa.*—*Allegheny v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670.

56. *Woods v. Colfax County*, 10 Neb. 552, 7 N. W. 269; *Scott v. Richland County*, 83 S. C. 506, 65 S. E. 729.

57. *Ala.*—*Searbrough v. Watson*, 140 Ala. 349, 37 So. 281; *Mobile County*

that effect such presentation is unnecessary.⁵⁸ A statute covering all claims and demands against a county includes actions based upon tortious as well as contractual liability.⁵⁹ But a provision that no actions on contract shall be brought without prior presentation of the claim is not applicable to actions to recover damages for personal injuries.⁶⁰

3. Jurisdiction and Venue.⁶¹—In some jurisdictions the statute provides that all suits against a county must be instituted within such county,⁶² but this does not prevent them from being sued in the federal courts.⁶³ Such a statute does not apply to suits by a county, which may be brought in any court having jurisdiction.⁶⁴ In some

v. Sands, 127 Ala. 493, 29 So. 26. **Cal.** Price *v. Sacramento*, 6 Cal. 254. **Colo.** Board of Comrs. of Rio Grande *v. Phye*, 27 Colo. 107, 59 Pac. 55; Board of Comrs. of Rio Grande *v. Bloom*, 14 Colo. App. 187, 59 Pac. 417. **Kan.** Atehison, T. & S. F. R. Co. *v. Board of Comrs. of Kearny County*, 58 Kan. 19, 48 Pac. 583. **Ia.**—Homan *v. Franklin County*, 98 Iowa 692, 68 N. W. 559. **Miss.**—Marion County *v. Woulard*, 77 Miss. 343, 27 So. 619. **S. D.** Thomas *v. Douglas County*, 13 S. D. 520, 83 N. W. 580. **Tex.**—De La Garza *v. Bexar County*, 31 Tex. 484; Boaz *v. Ferrell* (Tex. Civ. App.), 152 S. W. 200. **Wash.**—Hoexter *v. Judson*, 21 Wash. 646, 59 Pac. 498. **W. Va.**—Chapman *v. Wayne County Court*, 27 W. Va. 496. **Wyo.**—Houtz *v. County of Uinta*, 11 Wyo. 152, 70 Pac. 840.

[a] A statute requiring the presentation of unliquidated demands applies to damages for infringement of a patent. *May v. Cass*, 30 Fed. 762.

[b] **Mechanic's Lien.**—But a statutory provision requiring presentation of a claim prior to the commencement of an action thereon is not applicable to an action for the enforcement of a mechanic's lien. Board of Comrs. of Parke County *v. O'Conner*, 86 Ind. 531, 44 Am. Rep. 338.

[c] A statute providing for a second presentation of claim in case of partial allowance thereof, does not apply where the whole claim is rejected by the board. *Millard v. Kern County*, 147 Cal. 682, 82 Pac. 329.

Claims against city, see *supra*, II, A, 2, a.

Claims for injuries caused by defective highways and bridges, see 11 STANDARD PROC. 199, 274.

[d] **The right to resort to the federal courts** cannot be taken away by

a requirement that all claims be presented to a county court. *Thompson v. Searcy*, 57 Fed. 1030, 6 C. C. A. 674.

58. *Clear Lake Waterworks Co. v. Lake County*, 45 Cal. 90.

59. *Little v. Pottawattamie County*, 127 Iowa 376, 101 N. W. 752; *Hoexter v. Judson*, 21 Wash. 646, 59 Pac. 498.

60. *Chancey v. Roane County Ct.*, 51 W. Va. 252, 41 S. E. 156.

61. See the titles "Jurisdiction," "Venue."

62. **Ark.**—*Shaver v. Lawrence County*, 44 Ark. 225. **Ill.**—Board of Suprs. Kane Co. *v. Young*, 31 Ill. 194; *Randolph County v. Ralls*, 18 Ill. 29. **Minn.** *Bingham v. Winona*, 6 Minn. 136. **Mo.** *Givens v. Daviess County*, 107 Mo. 603, 17 S. W. 998; *Gammon v. Lafayette County*, 79 Mo. 223. **N. C.**—Board of Comrs. of Henderson Co. *v. Board of Rutherford Co.*, 70 N. C. 657. **Pa.** *Lehigh County v. Kleckner*, 5 Watts & S. 181. **Tex.**—*Little v. Griffin*, 33 Tex. Civ. App. 515, 77 S. W. 635.

[a] **A proceeding by mandamus** is a suit. *McBane v. People*, 50 Ill. 503.

[b] **A change of venue** may be granted where proper cause exists, on the application of the plaintiff. *County of Jackson v. Hall*, 53 Ill. 440; *McBane v. People*, 50 Ill. 503.

[c] **Where the county enters an appearance** and makes no objection to the jurisdiction of the court in another county, the right to a change of venue is waived thereby. *Clarke v. Lyon County*, 8 Nev. 181, 185.

63. *Cowles v. Mercer County*, 7 Wall. (U. S.) 118, 19 L. ed. 87; *Vincent v. Lincoln County*, 30 Fed. 749.

64. *Dandurand v. County of Kanakee*, 196 Ill. 537, 63 N. E. 1011.

jurisdictions a justice of the peace has jurisdiction of actions against a county,⁶⁵ while in others it is expressly provided by the statute that actions against a county must be brought in a court of general jurisdiction.⁶⁶

4. Parties.—*a. Generally.*—The power of a county to sue and be sued being purely statutory, the mode of instituting an action prescribed by the statute must be strictly followed.⁶⁷ In some jurisdictions actions by or against counties must be prosecuted in their corporate names,⁶⁸ while in others actions by or against a county must be prosecuted or defended in the name of the board of county commissioners,⁶⁹ or board of supervisors.⁷⁰ A statute authorizing a county board to sue on behalf of a county does not empower such board to bring an action in its own name.⁷¹ Accordingly, under a statute requiring county commissioners to sue in the name of the county of which they are commissioners, an action brought by them in their names must be treated as one instituted by them in their individual and not in their representative capacity.⁷² Where the statutory re-

65. *Floral Springs Water Co. v. Rives*, 14 Nev. 431.

66. *Wetzel v. County of Hancock*, 143 Ill. App. 178.

67. *Phillips v. Churning*, 4 Colo. App. 321, 35 Pac. 918; *County of Rock Island v. Steele*, 31 Ill. 543.

68. *Ala.*—*Patrick v. Robinson*, 83 Ala. 575, 3 So. 694. *Cal.*—*Solano County v. Neville*, 27 Cal. 465. *Fla.*—*Panama Inv. Co. v. Ricker*, 70 Fla. 614, 70 So. 596. *Ga.*—*Conyers v. Comrs. of Roads*, 116 Ga. 101, 42 S. E. 419; *Bennett v. Walker*, 64 Ga. 326. *Idaho.* *United States v. Shoup*, 2 Idaho 493, 21 Pac. 656. *Ia.*—*Cedar County v. Sager*, 90 Iowa 11, 57 N. W. 634. *Ky.* *Owen County v. Greene*, 129 Ky. 750, 112 S. W. 854. *Mo.*—*State v. Rubey*, 77 Mo. 610. *N. C.*—*Lenoir County v. Crabtree*, 158 N. C. 357, 74 S. E. 105, 39 L. R. A. (N. S.) 1213. *Okla.*—*Muskogee County v. Lanning*, 151 Pac. 1054; *Showers v. Caddo*, 14 Okla. 157, 77 Pac. 189. *Ore.*—*Weiss v. Jackson County*, 9 Ore. 470. *Pa.*—*Slegel v. Laner*, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547. *S. C.*—*Richland v. Miller*, 16 S. C. 236. *Tenn.*—*Maury County v. Lewis County*, 1 Swan 236. *Tex.* *McConnell v. Wall*, 67 Tex. 323, 3 S. W. 287; *De La Garza v. Bexar County*, 31 Tex. 484. *Wash.*—*Hoeexter v. Judson*, 21 Wash. 646, 59 Pac. 498. *Wyo.* *Sweetwater County v. Young*, 3 Wyo. 684, 29 Pac. 1002.

[a] Where the statute prescribes the corporate name of a county, a suit can only be prosecuted by it in that

name. *Muskogee County v. Lanning* (Okla.), 151 Pac. 1054.

[b] **Action to recover money improperly paid out** by the county treasurer. *Montgomery v. Fry*, 127 N. C. 258, 37 S. E. 259.

69. *U. S.*—*Commissioners v. Sellew*, 99 U. S. 624, 25 L. ed. 333. *Colo.* *Phillips v. Churning*, 4 Colo. App. 321, 35 Pac. 918. *Ind.*—*Board of Comrs. of Tipton Co. v. Kimberlin*, 108 Ind. 449, 9 N. E. 407; *Board of Comrs. of Jackson Co. v. Branaman*, 39 Ind. App. 193, 76 N. E. 1030, 78 N. E. 356. *Ohio.* *Board of Comrs. Hamilton County v. Noyes*, 35 Ohio St. 201; *State v. Piatt*, 15 Ohio 15.

[a] **Where the constitution and statutes of a state do not contain any direction as to the name by which a county shall be sued, an action brought against the commissioners is at most a misnomer amendable at the trial if objected to and to be disregarded, both at the trial and on appeal when such objection is not taken.** *Commissioners v. Bank of Commerce*, 97 U. S. 374, 24 L. ed. 1060.

70. *N. Y.*—*Hill v. Board of Supervisors of Livingston Co.*, 12 N. Y. 52; *Rattigan v. Board of Suprs. of Cayuga County*, 152 N. Y. Supp. 402. *Va.* *Norfolk & W. Ry. Co. v. Board of Supervisors*, 110 Va. 95, 65 S. E. 531. *Wis.*—*Oconto v. Hall*, 42 Wis. 59.

71. *Hastings v. San Francisco*, 18 Cal. 49.

72. *Panama Inv. Co. v. Ricker*, 70 Fla. 614, 70 So. 596.

quirement in regard to the name in which a county must be sued is disregarded, the judgment is a nullity.⁷³

b. *Joinder of Parties*.—A county is a necessary party to an action brought against its treasurer to recover a sum of money owed by the county.⁷⁴ A county auditor is not a necessary party to an action brought against a county for the recovery of salary alleged to be due to one of its officers.⁷⁵ Where a county is sued upon a demand for which other counties are partly liable such counties may be joined by it as parties defendant.⁷⁶

5. *Process*.—The statutory provisions prescribing the manner of service of process upon a county must be strictly complied with.⁷⁷ Under some statutes service of process must be made upon the commissioners,⁷⁸ or the president of the board of county commissioners,⁷⁹ while in accordance with other statutes service of process upon the county clerk is sufficient.⁸⁰

6. *Declaration or Complaint*.—Where the statute requires the presentation of claims to the county as a condition precedent an averment of such presentation is essential,⁸¹ and if the mode of such presentation is prescribed, the complaint must show compliance with such requirement.⁸² A mere allegation that the claim was duly presented and rejected is insufficient.⁸³

Where the cause of action against a county is based upon a special statutory power, every essential element of such power must be set forth in the complaint.⁸⁴ The complaint must affirmatively show all the facts required by law to render the obligation sued upon a valid and subsisting claim against the county.⁸⁵ Where the statute specifies the conditions upon which an action sounding in tort may be brought

73. *Phillips v. Churning*, 4 Colo. App. 321, 35 Pac. 918.

74. *Heritage v. Bronnenberg*, 25 Ind. App. 692, 58 N. E. 1064.

75. *State v. Headlee*, 18 Wash. 220, 51 Pac. 369.

76. *Jeff Davis County v. City Nat. Bank*, 22 Tex. Civ. App. 157, 54 S. W. 39.

77. *Gross v. Sioux County*, 2 Dill. 509, 11 Fed. Cas. No. 5,842; *Schuyler County v. Mercer County*, 9 Ill. 20. See generally the titles "Process;" "Service of Process and Papers."

78. *Kleckner v. County of Lehigh*, 6 Whart. (Pa.) 66.

79. *Board of Clarke Co. v. State*, 61 Ind. 75.

80. *U. S.—Knox County v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. ed. 586. *Ill.—Supervisors Kane Co. v. Young*, 31 Ill. 194. *Mo.—Weil v. Greene County*, 69 Mo. 281.

81. *Ala.—Scarborough v. Watson*, 140 Ala. 349, 37 So. 281. *Ga.—Maddox v. Randolph County*, 65 Ga. 216. *Tex.*

Bell County v. Flint (Tex. Civ. App.), 91 S. W. 329. *W. Va.—Chapman v. Wayne County Ct.*, 27 W. Va. 496.

82. *Ala.—Schroeder v. Colbert*, 66 Ala. 137. *Mont.—First Nat. Bank v. Custer Co. Comrs.*, 7 Mont. 464, 17 Pac. 551. *Pa.—Rice v. Schuylkill*, 14 Pa. Co. Ct. 541.

83. *Rhoda v. Alameda*, 52 Cal. 350.

84. *Weil v. Greene County*, 69 Mo. 281.

85. *Tullos v. Church* (Tex. Civ. App.), 171 S. W. 803.

[a] Must show an express contract where action on implied contract is not permitted. *May v. Ralls*, 31 Fed. 473; *Marion County v. Rives*, 133 Ky. 477, 118 S. W. 309.

[b] *Debt Within Constitutional Limit*.—*Tullos v. Church* (Tex. Civ. App.), 171 S. W. 803.

[c] *Provision for payment of the debt at the time it was created*. *Rogers Nat. Bank v. Marion County* (Tex. Civ. App.), 181 S. W. 884.

against a county the complaint must affirmatively show the existence of such conditions.⁸⁶ A complaint based upon negligence must show that the damage was sustained by neglect or mismanagement on the part of the county.⁸⁷

7. Answer or Plea.—An answer filed in the name of a county and verified by one of its commissioners is not objectionable on the ground that it does not appear therefrom that the commissioner had authority to make the affidavit,⁸⁸ but an answer in an action against the board of commissioners of a county filed by commissioners individually but not as a board is properly stricken out.⁸⁹

8. Judgment.—A judgment by default may be rendered against a county and such judgment need not recite that proof of presentation of the claim to the county has been made.⁹⁰ According to some authorities judgment cannot exceed the amount of the claim presented prior to suit.⁹¹

Under some statutes costs may be awarded against a county.⁹² But in the absence of statutory authority, a county cannot be taxed with costs.⁹³

9. Enforcement Thereof.—No execution or other process for satisfaction can issue on a judgment rendered against a county.⁹⁴ The

86. *Collins v. Hudson*, 54 Ga. 25.

[a] **Defective Ferry—Charging Toll.** Under a statute providing that the county is liable in damages for injury caused by a defective ferry whenever toll is charged thereon, the complaint must show that the county charged toll on the ferry. *Arline v. Laurens*, 77 Ga. 249, 2 S. E. 833.

87. *Scott v. Richland County*, 83 S. C. 506, 65 S. E. 729; *Northern Pac. R. Co. v. Tillotson*, 84 Wash. 678, 147 Pac. 423. See generally the title "Negligence."

88. *Hutchinson v. Lowndes County*, 131 Ga. 637, 62 S. E. 1048.

89. *Board of Comrs. Clarke Co. v. State*, 61 Ind. 75.

90. *Washington County v. Porter*, 128 Ala. 278, 29 So. 185.

91. *Hudgins v. Carter County*, 115 Ky. 133, 72 S. W. 730. But see *supra*, II, A, 2, b.

92. *Ala.*—*State v. Parker*, 83 Ala. 269, 3 So. 552; *Commissioners' Court of Pike County v. Goldthwaite*, 35 Ala. 704. *Colo.*—*Hurd v. Hamill*, 10 Colo. 174, 14 Pac. 126. *Kan.*—*Waters v. Garvin*, 67 Kan. 855, 73 Pac. 902. *N. Y.*—*Rattigan v. Board of Suprs. Cayuga Co.*, 152 N. Y. Supp. 402. *Tenn.* *State v. Alexander*, 115 Tenn. 156, 90 S. W. 20. *Tex.*—*Harris County v. Donaldson*, 20 Tex. Civ. App. 9, 48 S. W. 791.

93. *Ark.*—*Chicot County v. Matthews*, 120 Ark. 505, 179 S. W. 1002. *Colo.*—*Downs v. Reno*, 124 Pac. 582. *Mich.*—*Miner v. Board of Suprs. Shiawassee County*, 49 Mich. 602, 14 N. W. 562. *Pa.*—*Com. v. Buccieri*, 153 Pa. 570, 26 Atl. 245; *Huntingdon County v. Com.*, 72 Pa. 80.

[a] Where the county acts as a public agency of the state it is not liable for costs, which may be allowed against it only where it is prosecuting or defending an action in its own corporate interest. *Ward v. Alton*, 23 Ill. App. 475; *People v. Coultas*, 9 Ill. App. 39.

Liability of state, see 5 STANDARD PROC. 828.

94. *Ala.*—*Edmondson v. De Kalb County*, 51 Ala. 103. *Ill.*—*County of Knox v. Arms*, 22 Ill. 175. *N. C.* *Lutterloh v. Board of Comrs. Cumberland Co.*, 65 N. C. 403.

[a] A statute prohibiting an execution to be issued against the property of a county embraces executions upon decrees in equity. *King v. McDrew*, 31 Ill. 418.

[b] The county revenues in the hands of the treasurer are not the subject of seizure upon execution and a levy thereon is illegal and void. *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290.

[c] A judgment which improperly

remedy of the judgment creditor is to compel by mandamus the levy of a tax sufficient to satisfy the judgment,⁹⁵ and the judgment in such a proceeding is conclusive of all questions which were or might have been litigated in the action.⁹⁶

The docketing of a judgment against a county creates no lien on its lands.⁹⁷

III. ACTIONS CONCERNING WARRANTS AND BONDS. — A.

ACTIONS ON WARRANTS, ORDERS OR DEMANDS. — 1. Generally. — An action on a municipal warrant as a rule may be maintained and the holder thereof is not bound to resort to mandamus proceedings,⁹⁸ or to sue on the original indebtedness,⁹⁹ though there is authority to the effect that a municipal warrant cannot be made the foundation of an action but is merely evidence of the debt.¹ But where a warrant or order is payable out of a particular fund which is exhausted, mandamus is the proper remedy to compel the municipal officers to take the proper steps to raise such fund,² and no action can ordinarily be maintained on such warrant,³ but the holder of the warrant may sue

provides for the issuance of execution against a county is to that extent not capable of being carried into effect, although the validity of the judgment itself is not affected thereby. *Presidio v. City*, Nat. Bank, 20 Tex. Civ. App. 511, 44 S. W. 1069.

95. *Ala.*—*Edmondson v. De Kalb County*, 51 Ala. 103. *N. C.*—*Lutterloh v. Board of Comrs. Cumberland Co.*, 65 N. C. 403; *Gooch v. Gregory*, 65 N. C. 142. *Wis.*—*Buell v. Arnold*, 124 Wis. 65, 102 N. W. 338.

See *supra*, II, A, 10, b.

96. *U. S.*—*Fleming v. Trowsdale*, 85 Fed. 189, 29 C. C. A. 106. *Colo.*—*People v. Rio Grande*, 11 Colo. App. 124, 52 Pac. 748. *N. M.*—*Territory ex rel. Chapman v. Santa Fe County Comrs.*, 14 N. M. 134, 89 Pac. 252.

97. *Buell v. Arnold*, 124 Wis. 65, 102 N. W. 338.

98. *Ill.*—*People v. Clark*, 50 Ill. 213. *Ind.*—*Connorsville v. Connorsville H. Co.*, 86 Ind. 184; *Heritage v. Bronnenberg*, 25 Ind. App. 692, 58 N. E. 1064.

Ia.—*Campbell v. Polk*, 3 Iowa 467. *Kan.*—*Atchison, T. & S. F. Ry. Co. v. Kearny*, 58 Kan. 19, 48 Pac. 583; *Comrs. Leavenworth Co. v. Keller*, 6 Kan. 510. *Mo.*—*International Bank v. Franklin Co.*, 65 Mo. 105, 27 Am. Rep. 261. *N. Y.*—*Staten Island Bank v. New York*, 68 App. Div. 231, 74 N. Y. Supp. 284. *Ore.*—*Goldsmith v. Baker City*, 31 Ore. 249, 49 Pac. 973. *Pa.*—*Scranton v. Hyde Park Gas Co.*, 102 Pa. 382. *S. D.*—*Kane & Co. v. Hughes County*,

12 S. D. 438, 81 N. W. 894. *Wis.*—*Savage v. Crawford Co.*, 10 Wis. 49.

[a] **Illegal Warrant.**—No action can be maintained upon a warrant issued by municipal officers without legal authority. *Smith v. Cheshire*, 13 Gray (Mass.) 318.

[b] **The fact that there is no money in the treasury** provided for the payment of a warrant which is payable out of the general fund cannot prevent the holder of a warrant from bringing an action thereon. *Wilson v. Knox County (Mo.)*, 28 S. W. 896; *International Bank v. Franklin Co.*, 65 Mo. 105, 27 Am. Rep. 261.

99. *Campbell v. Polk*, 3 Iowa 467.

1. *Port Royal v. Graham*, 84 Pa. 426.

2. *Turner v. Guthrie*, 13 Okla. 26, 73 Pac. 283.

3. *Colo.*—*Forbes v. Grand Co.*, 23 Colo. 344, 47 Pac. 388. *Mo.*—*Moody v. Cass County*, 74 Mo. 307. *Neb.*—*Brewer v. Otoe*, 1 Neb. 373. *Wash.*—*See Potter v. New Whatcom*, 20 Wash. 587, 56 Pac. 394.

[a] **Where facts are alleged in the complaint** showing that the warrants though drawn upon a particular fund are payable out of the general fund, the action is maintainable. *Valleau v. Newton*, 81 Mo. 591.

[b] **Action for Diversion of Special Fund.**—*Northwestern Lumb. Co. v. Aberdeen*, 35 Wash. 636, 77 Pac. 1063.

[c] **An action on an order payable out of a fund not otherwise appropriated** cannot be maintained unless

on the original indebtedness.⁴ The holder of the warrant is the only proper plaintiff in an action thereon.⁵

2. **Complaint or Declaration.**—While the complaint must show that the issuance of the warrant was authorized,⁶ and that all the acts prescribed by law have been performed,⁷ an allegation that the warrant was duly issued is generally sufficient.⁸ And it is not necessary to allege that the treasurer had funds with which to pay the warrant sued upon,⁹ unless it was drawn on a special fund, in which event it is essential to show that there were moneys in that fund sufficient to pay the warrant.¹⁰ Where the warrant is payable out of moneys not otherwise appropriated it is likewise necessary to show that there is money in the general fund not appropriated for any specific purpose.¹¹ It is not necessary to allege consideration in a complaint upon a warrant.¹² But the plaintiff, as a rule,¹³ must plead the presentation of the warrant to the municipal authorities for payment,¹⁴ or must allege facts excusing plaintiff from such presentation.¹⁵ It must appear from the complaint that the warrant sued on was presented to the municipal officer whose specific duty it was to pay the warrant,¹⁶ and that the municipality failed to pay the

such a fund exists. *Wetmore v. Monona*, 73 Iowa 88, 34 N. W. 751; *Brown v. Johnson Co.*, 1 G. Gr. (Ia.) 486. But see *British Columbia Bank v. Port Townsend*, 16 Wash. 450, 47 Pac. 896, holding that a holder of a warrant payable out of a special fund may maintain an action upon it for the purpose of obtaining payment out of the general fund, where the city failed to provide such special fund.

[d] **Where the municipality holds money** belonging to such fund, an action may be maintained on the warrant. *Chicago v. McNichols*, 98 Ill. App. 447.

4. *Argenti v. San Francisco*, 16 Cal. 255.

5. *Crawford v. Wilson*, 7 Ark. 214. See the titles "**Assignments**;" "**Parties**;" and *People v. Gray*, 23 Cal. 125, assignment necessary. But see *O'Donnell v. The City*, 7 Phila. (Pa.) 234, subsequent holder of non-negotiable warrant cannot sue in his own name.

6. *Polk v. Tunica County*, 52 Miss. 422.

7. *Freeman v. Huron*, 10 S. D. 368, 73 N. W. 260.

8. *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 266.

9. **U. S.**—*Thompson v. Searcy*, 57 Fed. 1030, 6 C. C. A. 674. **Ind.**—*Connersville v. Connersville H. Co.*, 86 Ind. 184. **Ia.**—*Campbell v. Polk*, 3 Iowa 467. **Mo.**—*International Bank v.*

Franklin County, 65 Mo. 105, 27 Am. Rep. 261.

[a] **An averment that payment was refused** impliedly shows that the municipality had funds. *Sherwood v. La Salle* (Tex. Civ. App.), 26 S. W. 650.

10. *Travelers' Ins. Co. v. Denver*, 11 Colo. 434, 18 Pac. 556; *Reeve v. Oshkosh*, 33 Wis. 477.

[a] **In an action upon a warrant payable out of a special fund alleged to have been diverted** it is not sufficient to allege that the municipality wrongfully paid out moneys from such fund on warrants subsequently issued, but facts must be alleged showing that there was sufficient money in that fund to pay the warrants issued prior to those sued on. *Northwestern Lumb. Co. v. Aberdeen*, 35 Wash. 636, 77 Pac. 1063.

11. *Brewer v. Otoe*, 1 Neb. 373.

12. *Travelers' Ins. Co. v. Denver*, 11 Colo. 434, 18 Pac. 556.

13. **As to the necessity for presentation of claims against municipal corporations generally**, see *supra*, II, A, 2, a; II, B, 2.

14. *Farmers' Bank v. Wickliffe*, 129 Ky. 679, 112 S. W. 835. See *Terry v. Milwaukee*, 15 Wis. 490.

15. *Central v. Wilcoxen*, 3 Colo. 566.

16. *Ferguson v. St. Louis*, 6 Mo. 499.

warrants,¹⁷ but it is not necessary to allege upon what ground payment was refused.¹⁸

3. **Plea or Answer.**¹⁹—Where the execution of the warrants sued upon is denied by a verified answer such answer puts in issue not only the signature of the municipal officers but the authority to issue the warrants on behalf of the municipality.²⁰ The defendant may interpose any defense going to the validity of the warrant.²¹

B. **ACTIONS ON BONDS AND COUPONS.**—1. **Generally.**—An action at law on the bonds²² or coupons,²³ ordinarily is the proper remedy of a holder of municipal bonds or coupons unless an action thereon is expressly prohibited by the statute.²⁴ The fact that the bonds are payable out of a special fund,²⁵ or through the agency of state officials,²⁶ does not affect the right to maintain an action on municipal bonds. Where bonds are issued by a municipal corporation for a lawful purpose but the statutory requirements in regard thereto are not complied with, the bondholder may bring an action for money had and received.²⁷ But where the municipal corporation has not received the proceeds from the sale of the bonds,²⁸ or had no authority to create the indebtedness itself,²⁹ no such action is maintainable. A holder of a municipal bond cannot resort to a suit in equity to compel the municipality to levy a tax for the payment of the bonds before exhausting his remedy at law by bringing an action thereon.³⁰ He cannot recover in the same action a judgment for the amount due and also obtain an order directing the municipality to levy a tax to pay it.³¹

17. *Sherwood v. La Salle* (Tex. Civ. App.), 26 S. W. 650.

18. *Connersville v. Connersville H. Co.*, 86 Ind. 184.

19. See generally the titles "Answers;" "Denials;" "Pleas;" and titles dealing with particular kinds of pleas.

20. *Central v. Brown*, 2 Colo. 703.

21. **Ia.**—*Webster v. Taylor*, 19 Iowa 117, fraud, ultra vires, and failure of consideration. **Kan.**—*Leavenworth Co. v. Keller*, 6 Kan. 510. **S. D.**—*Hubbell v. Custer City*, 15 S. D. 55, 87 N. W. 520.

22. *Hammond v. Place*, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543; *Marsh v. Little Valley*, 64 N. Y. 112.

23. **U. S.**—*Queensbury v. Culver*, 19 Wall. 83, 22 L. ed. 100; *City of Kenosha v. Lamson*, 9 Wall. 477, 19 L. ed. 725. **Ind.**—*Cicero v. Clifford*, 53 Ind. 191. **Vt.**—*First Nat. Bank v. Mount Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

24. *Shapter v. San Francisco*, 110 Fed. 615; *Kennedy v. Sacramento*, 19 Fed. 580.

As to mandamus in such cases, see *infra*, IV, C, 9.

25. *Mather v. San Francisco*, 115 Fed. 37, 52 C. C. A. 631; *Wyandotte v. Zeitz*, 21 Kan. 649.

26. *Toothaker v. Boulder*, 13 Colo. 219, 22 Pac. 468.

27. *Chelsea Sav. Bank v. Ironwood*, 130 Fed. 410, 66 C. C. A. 230; *Rainsburg v. Fyan*, 127 Pa. 74, 17 Atl. 678, 4 L. R. A. 336.

[a] **Antedated Bonds in Avoidance of a Statute.**—*Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153.

28. *Travelers' Ins. Co. v. Johnson City*, 99 Fed. 663, 40 C. C. A. 58, 49 L. R. A. 123.

29. **U. S.**—*Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. ed. 1044. **Ia.**—*Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860; *McPherson v. Foster Bros.*, 43 Iowa 48, 22 Am. Rep. 215. **Tenn.** *Milan v. Tennessee, etc. R. Co.*, 11 Lea 329.

30. *Heine v. Levee Comrs.*, 19 Wall. (U. S.) 655, 22 L. ed. 223.

31. *Browne v. New Orleans*, 35 La. Ann. 51.

Where the bonds are in excess of the constitutional limitation, an action in equity may be maintained to ascertain whether part of the indebtedness of such bonds can be recognized and enforced without violating the constitutional limitation.³² And a holder of municipal bonds payable from a special fund may bring suit in equity either against the municipal corporation to prevent it from misapplying the moneys of the special fund,³³ or against the municipal officers whose duty it is to pay such moneys on the outstanding bonds to compel them to apply the special fund to the payment of the bonds,³⁴ or the interest thereon.³⁵ In some jurisdictions mandamus lies to compel a municipality to levy taxes for the payment of improvement bonds.³⁶ And where one of the conditions upon which the bonds were issued is that no action should be brought thereon, mandamus is the exclusive remedy of a bondholder.³⁷

2. Parties.—The legal holder of municipal bonds³⁸ or coupons³⁹ is the proper party plaintiff in an action on a bond or coupon. And he is not required to bring into such action all the other bondholders.⁴⁰ Nor can the owners of property assessed for the purpose of raising the fund out of which the bonds are payable, be joined as defendants in an action on a bond payable from a special fund.⁴¹

3. Complaint or Declaration.—A complaint upon a municipal bond⁴² or coupon⁴³ must affirmatively show that the municipality had the power to issue the same, unless such power is based upon a general statute,⁴⁴ or appears upon the face of the bond a copy of which

As to the enforcement of judgments against municipal corporations, see *supra*, II, A, 10.

32. *Everett v. Rock Rapids School Dist.*, 109 Fed. 697.

33. *Vickrey v. Sioux City*, 104 Fed. 164.

34. *Spidell v. Johnson*, 128 Ind. 235, 25 N. E. 889.

35. *Murdock v. Aikin*, 29 Barb. (N. Y.) 59.

36. *Com. v. Pittsburgh*, 88 Pa. 66. See the title "Taxation."

[a] **In Federal Courts.**—Mandamus not being available in the first instance in the federal courts it cannot be resorted to in the federal courts even though such remedy exists under state laws to compel the payment of bonds. *Shepard v. Tulare Irr. Dist.*, 94 Fed. 1.

37. *Kennedy v. Sacramento*, 19 Fed. 580.

38. **U. S.**—*McCoy v. Washington Co.*, 3 Phila. 290, 3 Wall. Jr. 381, 15 Fed. Cas. No. 8,731. **Conn.**—*Society for Savings v. New London*, 29 Conn. 174. **Ill.**—*Johnson v. Stark*, 24 Ill. 75. **Tex.**—*Jennings Bkg. & Tr. Co. v. Jef-*

erson, 30 Tex. Civ. App. 534, 70 S. W. 1005.

39. *Augusta Bank v. Augusta*, 49 Me. 507.

40. *Perris Irr. Dist. v. Thompson*, 116 Fed. 832, 54 C. C. A. 336.

41. *Mather v. San Francisco*, 115 Fed. 37, 52 C. C. A. 631.

42. *Catron v. La Fayette*, 106 Mo. 659, 17 S. W. 577; *Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

[a] **Consent of the required majority of taxpayers must appear.** *Morrison v. Bernards*, 36 N. J. L. 219.

[b] **But under a statute providing that in actions founded upon instruments for the payment of money only, it shall be sufficient to set out a copy of the instrument and to allege that a certain amount is due, it is held that plaintiff need not show the authority of the municipality to issue the bonds.** *Veeder v. Lima*, 11 Wis. 419.

43. **U. S.**—*Kennard v. Cass County*, 3 Dill. 147, 14 Fed. Cas. No. 7,697. **Mo.**—*Donaldson v. Butler*, 98 Mo. 163, 11 S. W. 572. **N. J.**—*Cotton v. New Providence*, 47 N. J. L. 401, 2 Atl. 253.

44. *Ring v. Johnson*, 6 Iowa 265.

is attached to the complaint.⁴⁵ It is not necessary, however, to set out the ordinance which conferred upon the municipal corporation the authority to issue the bonds,⁴⁶ or, under some authorities, to show that all the requirements of the statute in reference to the issuance of the bonds have been complied with.⁴⁷ A general allegation that the bonds were executed and issued in conformity to law has been held sufficient.⁴⁸ Under a statute restricting the issuing of bonds by a municipal corporation to a certain amount the plaintiff need not negative the over-issue of the bonds sued on.⁴⁹ Nor is the plaintiff required to allege that the bonds were not issued in excess of the debt limit,⁵⁰ or that they were bought by him at their face value.⁵¹ The complaint must show that the bonds were issued for a purpose for which the municipality has the power to issue bonds.⁵² An allegation that the defendant by its duly elected and qualified officers executed the bonds sued upon constitutes a sufficient averment of the proper execution of the bonds.⁵³ In an action on coupons made payable at a particular place it is not necessary to allege presentation for payment at such place.⁵⁴

C. RESTRAINING ISSUANCE OF WARRANTS OR BONDS. — 1. Generally. A taxpayer may on behalf of himself and others bring a suit in equity against a municipal corporation to enjoin the issuance of bonds for a purpose not authorized by law,⁵⁵ as being in excess of the debt

45. *Jefferson Co. v. Lewis & Sons*, 20 Fla. 980; *Catron v. La Fayette*, 106 Mo. 659, 17 S. W. 577.

46. *Underhill v. Sonora*, 17 Cal. 172.

47. *Lincoln v. Iron Co.*, 103 U. S. 412, 26 L. ed. 518; *Hughes v. Livingston*, 104 Fed. 306, 43 C. C. A. 541; *Catron v. La Fayette*, 106 Mo. 659, 17 S. W. 577.

[a] **Registration** (1) with the county clerk, where made by statute essential to the validity of the bonds, must be alleged. *Morrison v. Bernards*, 36 N. J. L. 219. (2) But where not essential to validity, it need not be alleged. *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48, 20 Atl. 756.

48. *Nininger v. Carver Co.*, 10 Minn. 133. See also: *Minn.—Wiley v. Board of Education*, 11 Minn. 371. **Mo.** *Catron v. La Fayette*, 106 Mo. 659, 17 S. W. 577. **W. Va.**—*Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

[a] **In action by bona fide holder** when bond recites issuance in accordance with law. *Shepard v. Tulare Irr. Dist.*, 94 Fed. 1.

[b] **But where a municipality has but a limited authority** (1) to issue bonds for certain purposes it is not enough for the plaintiff to aver in gen-

eral terms that the town was authorized to issue the bonds in suit, but he must state the facts which bring the case within the special authority (*Hopper v. Covington*, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. ed. 190), and (2) every essential element thereof must be pleaded. *Weil v. Greene County*, 69 Mo. 281.

49. *Catron v. La Fayette*, 106 Mo. 659, 17 S. W. 577.

50. *Mosher v. Steamboat Rock School Dist.*, 42 Iowa 632; *Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

51. *Wiley v. Board of Education*, 11 Minn. 371.

52. *Catron v. La Fayette*, 106 Mo. 659, 17 S. W. 577; *Donaldson v. Butler*, 98 Mo. 163, 11 S. W. 572.

53. *Wiley v. Board of Education*, 11 Minn. 371.

[a] **But where the bonds are issued by special agents of the municipality having limited powers**, the complaint must show that such agents possessed the power to execute the bonds. *Ridgefield Tp. v. Cliffside Park*, 63 N. J. L. 371, 43 Atl. 722.

54. *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526.

55. **Ala.**—*Colvin v. Ward*, 189 Ala. 198, 66 So. 98; *Coleman v. Eutaw*, 157

limit,⁵⁶ or upon the ground of invalidity of the election at which the issuance of such bonds was authorized.⁵⁷ And an action may be brought by a taxpayer to restrain municipal officers from issuing a warrant⁵⁸ upon an illegal contract.⁵⁹ An action may likewise be maintained by a taxpayer to restrain a municipality from guaranteeing⁶⁰ or indorsing bonds.⁶¹ But equity will not entertain a bill for an injunction to restrain the issuance of municipal bonds where it appears that the bonds have actually been issued and delivered.⁶² An action, however, may be brought by a taxpayer to cancel bonds unlawfully issued,⁶³ or to enjoin their delivery⁶⁴ or payment,⁶⁵ or the collection of taxes for the purpose of payment.⁶⁶ In actions by taxpayers the holders of the bonds are properly joined as defendants.⁶⁷

2. Pleading.—The complaint must show that plaintiff is a taxpayer who under the statute is authorized to bring the action,⁶⁸ and

Ala. 327, 47 So. 703. **Ind.**—Winamac v. Huddleston, 132 Ind. 217, 31 N. E. 561. **Kan.**—Emporia Tel. Co. v. Public Utilities Com., 97 Kan. 136, 154 Pac. 262. **Minn.**—Hamilton v. Detroit, 85 Minn. 83, 88 N. W. 419; Hodgman v. Chicago, etc., Ry. Co., 20 Minn. 48. **N. Y.**—Ayers v. Lawrence, 59 N. Y. 192. **Ohio.**—Elyria Gas & W. Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335. **S. C.**—Mauldin v. Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291. **Va.**—Lynchburg & R. St. Ry. Co. v. Dameron, 95 Va. 545, 28 S. E. 951. **Wis.**—Neacy v. Milwaukee, 151 Wis. 504, 139 N. W. 409.

56. Afton v. Gill (Okla.), 156 Pac. 658; Fowler v. Superior, 85 Wis. 411, 54 N. W. 800.

57. Coleman v. Eutaw, 157 Ala. 327, 47 So. 703; Montgomery County v. Henderson, 122 Md. 533, 89 Atl. 858.

58. **Ark.**—Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180. **La.**—Pleasants v. Shreveport, 110 La. 1046, 35 So. 283. **Mass.**—Clafin v. Hopkinton, 4 Gray 502. **N. Y.**—West v. Utica, 71 Hun 540, 24 N. Y. Supp. 1075, 54 N. Y. St. 911. **Pa.**—Bullitt v. Philadelphia, 19 Pa. Dist. 1091.

59. **Idaho.**—Moore v. Hupp, 17 Idaho 232, 105 Pac. 209; Nuckols v. Lyle, 8 Idaho 589, 70 Pac. 401. **N. Y.**—Beebe v. Sullivan Co., 64 Hun 377, 19 N. Y. Supp. 629, 46 N. Y. St. 222. **Okla.**—Bowles v. Neely, 28 Okla. 556, 115 Pac. 344. **Ore.**—Brownfield v. Houser, 30 Ore. 534, 49 Pac. 843. **R. I.**—Austin v. Coggeshall, 12 R. I. 329, 34 Am. Rep. 648. **Wis.**—Sayles v. Hartford, 161 Wis. 136, 152 N. W. 853.

[a] But where a municipality has received the benefits of a contract within its charter powers but irregularly entered into, a taxpayer cannot maintain an action for an injunction restraining the municipality from paying for the benefits received. Westbrook v. Middlecoff, 99 Ill. App. 327.

60. Lynchburg & R. St. Ry. Co. v. Dameron, 95 Va. 545, 28 S. E. 951.

61. Blake v. Mayor of Macon, 53 Ga. 172.

62. **Kan.**—Alma v. Loeher, 42 Kan. 308, 22 Pac. 424. **Tenn.**—Miller v. Park City, 126 Tenn. 427, 150 S. W. 90, Ann. Cas. 1913E, 83. **Tex.**—Simpson v. Nacodoches (Tex. Civ. App.), 152 S. W. 858.

63. Metzger v. Attica, etc. R. Co., 79 N. Y. 171; Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960.

64. Lynch v. Eastern, etc. Ry. Co., 57 Wis. 430, 15 N. W. 743.

65. **Cal.**—Modoc Co. v. Spencer, 103 Cal. 498, 37 Pac. 483. **Ga.**—Hope v. Gainesville, 72 Ga. 246. **Mich.**—Hopcock v. Chambers, 96 Mich. 509, 56 N. W. 86. **Wash.**—State v. Gormley, 40 Wash. 601, 82 Pac. 929, 3 L. R. A. (N. S.) 256. **Wis.**—Kircher v. Pederson, 117 Wis. 68, 93 N. W. 813.

66. Bradford v. Westbrook, 39 Tex. Civ. App. 638, 88 S. W. 382.

67. Bradley v. Gilbert, 155 Ill. 154, 39 N. E. 593.

68. Ayers v. Lawrence, 59 N. Y. 192.

[a] Under a statute authorizing the majority of the assessed taxpayers to prevent the payment of municipal bonds, the omission to allege that the plaintiffs constitute such majority ren-

must set forth the grounds upon which the suit is based.⁶⁹

IV. MANDAMUS AGAINST MUNICIPAL CORPORATIONS, THEIR OFFICERS AND BOARDS.—A. MANDAMUS AGAINST MUNICIPAL OFFICERS GENERALLY.—Municipal officers belong to the class of officers within the superintending control of the courts by mandamus.⁷⁰ Accordingly the writ may be issued against the members of town or city councils,⁷¹ boards of supervisors or commissioners,⁷² election boards,⁷³ and health boards,⁷⁴ as well as against the mayor of a city or town,⁷⁵ the treasurer,⁷⁶ clerk,⁷⁷ controller,⁷⁸ and police officers.⁷⁹

B. APPLICATION OF GENERAL RULES RELATING TO MANDAMUS.—1. **Rule as to Control of Discretionary Acts.**—The general rule that mandamus will not lie to control the exercise of a discretion applies to mandamus to municipal corporations.⁸⁰ But this rule does not prevent the issuance of the writ against a board as a body wherein the several members are entitled to vote and are equally divided as to performing acts required by law. While in such case the performance of acts enjoined by law may admit of the exercise of discretion, the board is required to exercise its discretion as such, and so long

as the complaint is fatally defective. *Strang v. Cook*, 47 Hun 46, 14 N. Y. St. 150.

69. See *infra*, this note.

[a] **The nature of the illegality** must appear. *Neacy v. Milwaukee*, 151 Wis. 504, 139 N. W. 409.

[b] **Illegality of indebtedness.** *Bradford v. Glasgow*, 143 Ky. 401, 136 S. W. 647.

[c] **The facts showing the fraud** claimed must be set forth. *Ind.*—*Laporte Co. v. Wolff*, 166 Ind. 325, 76 N. E. 247. *Tex.*—*Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960. *Wis.* *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800; *Noesen v. Port Washington*, 37 Wis. 168. See the title "Fraud and Deceit."

70. *Ga.*—*McCord v. Jackson*, 135 Ga. 176, 69 S. E. 23. *Miss.*—*Adams v. Clarksdale*, 95 Miss. 88, 48 So. 242. *Mo.*—*State ex rel. Hawes v. Mason*, 153 Mo. 23, 55, 54 S. W. 524. *N. J.*—*Morris & Cummings Dredging Co. v. Mayor of Bayonne*, 75 N. J. L. 59, 67 Atl. 20. *Ohio.*—*State ex rel. Clark v. Police Board*, 10 Ohio Dec. (Reprint) 256. *Pa.*—*Com. ex rel. McMichael v. Park*, 10 Phila. 445, 32 Leg. Int. 412.

71. *Cal.*—*People ex rel. Miller v. Common Council*, 85 Cal. 369, 24 Pac. 727. *Ind.*—*Board of Comrs. of Jackson County v. Branaman* (Ind. App.), 79 N. E. 923. *Kan.*—*State ex rel. Foster v. Faulkner*, 20 Kan. 541. *Pa.*

Com. ex rel. McMichael v. Park, 10 Phila. 445, 32 Leg. Int. 412; *Com. ex rel. Howard v. Town Council of Olyphant*, 2 Lack. Leg. N. 234.

72. *Cal.*—*People ex rel. Frank v. Board of Suprs. of San Francisco*, 21 Cal. 668. *Ind.*—*Board of Comrs. of Jackson County v. Branaman* (Ind. App.), 79 N. E. 923. *Ia.*—*Commercial Nat. Bank v. Board of Suprs. of Pottawattamie County*, 168 Iowa 501, 150 N. W. 704, Ann. Cas. 1916C, 227. *Kan.* *Eberhardt Const. Co. v. Board of Comrs. of Sedgwick County*, 100 Kan. 394, 164 Pac. 281.

73. **Mandamus to election boards**, see 8 STANDARD PROC. 2, and the title "Mandamus."

74. See 10 STANDARD PROC. 989.

75. See *People ex rel. Wooster v. Maher*, 141 N. Y. 330, 36 N. E. 396.

76. *State ex rel. Wiles v. Williams*, 232 Mo. 56, 133 S. W. 1, 34 L. R. A. (N. S.) 1060; *State ex rel. Wheeler v. Adams*, 161 Mo. 349, 364, 61 S. W. 894.

77. *Saguache County v. Tough*, 45 Colo. 395, 101 Pac. 411.

78. *Com. v. George*, 148 Pa. 463, 24 Atl. 59.

79. *Gowan v. Smith*, 157 Mich. 443, 452, 122 N. W. 286. See *infra*, IV, C, 17.

80. **As to general rule**, see the title "Mandamus."

as it has failed to perform the acts prescribed by law, it has failed to exercise its discretion.⁸¹

2. Effect of Other Adequate Remedies.—The existence of other adequate legal remedies prevents the issuance of mandamus with respect to municipal matters.⁸² There is a difference of opinion as to whether the remedy by action against the municipality is adequate so as to prevent relief by mandamus. In many states this remedy is not considered adequate.⁸³ Especially is this so when it is necessary to enforce any judgment recovered by obtaining a warrant on the treasurer.⁸⁴ On the other hand, many courts hold that the remedy by action against the municipality is adequate.⁸⁵ And this would seem to be unquestionable where the law allows the judgment creditor to enforce his judgment by levying on the property of the inhabitants of the municipality.⁸⁶

But a remedy by criminal proceedings against the officer refusing to perform his duty,⁸⁷ or by petition to remove him,⁸⁸ is not considered adequate, although it is sometimes considered by the court in exercising its discretion to deny the writ.⁸⁹

3. Parties.—The general rules as to parties in mandamus apply to a mandamus proceeding against a municipal corporation or its officers.⁹⁰ Under a statute authorizing the issuance of mandamus against a corporation, the writ may issue against a city in its corporate name.⁹¹ Generally to enforce the performance of duties upon a municipal corporation, the proceeding may be instituted against both the city and its common council, or other officers whose duty it is to act, or against either of them.⁹² But in a proceeding to compel municipal officers

81. *Com. v. Ayre*, 5 Pa. Dist. 575.

82. See generally the title "**Mandamus.**"

83. **Nev.**—*Humboldt Co. v. Board of Comrs. of Churchill County*, 6 Nev. 30. **N. J.**—*Jones Co. v. Guttenberg*, 66 N. J. L. 659, 670, 51 Atl. 274. **Wash.** *State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321.

As to claims against municipalities, see *infra*, IV, C, 12, a, (III).

84. *State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321.

85. See *infra*, IV, C, 12, a, (III).

86. *George S. Chatfield Co. v. Reeves*, 87 Conn. 63, 86 Atl. 750.

87. **Mich.**—*Gowan v. Smith*, 157 Mich. 443, 122 N. W. 286. **N. Y.** *People ex rel. Clapp v. Listman*, 40 Misc. 372, 82 N. Y. Supp. 263. **N. D.** *State ex rel. Braatelen v. Drakeley*, 26 N. D. 87, 143 N. W. 768.

See *infra*, IV, C, 12, a, (IV).

88. **N. H.**—*Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855. **N. Y.**—*Peo-*

ple ex rel. Clapp v. Listman, 40 Misc. 372, 82 N. Y. Supp. 263. **N. D.**—*State ex rel. Braatelen v. Drakeley*, 26 N. D. 87, 143 N. W. 768.

Contra, *State ex rel. Clark v. Murphy*, 3 Ohio Cir. Ct. 332.

89. *Alger v. Seaver*, 138 Mass. 331; *People ex rel. Clapp v. Listman*, 40 Misc. 372, 82 N. Y. Supp. 263.

90. See generally the title "**Mandamus.**"

Particular applications of the rules will be found in *infra*, IV, C.

As to parties in proceedings to enforce claims, see *infra*, IV, C, 12, c.

[a] All the members of a board should be made defendants, those willing as well as those unwilling to act. *Littlefield v. Newell*, 85 Me. 246, 27 Atl. 110. Compare *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259, 265.

91. *Wren v. City of Indianapolis*, 96 Ind. 206.

92. **U. S.**—*Board of Comrs. of Leavenworth v. Sewell*, 99 U. S. 624, 25 L. ed. 333. **Cal.**—*Barber v. Mulford*,

to perform their ministerial duties, the municipality is not a necessary party to the action.⁹³ A mandamus proceeding against a common council should be against them as a body and not individually.⁹⁴ The fact that there may be an entire change in the members composing the council will not affect the proceeding.⁹⁵

4. **Pleadings and Writ.** — a. *Generally.* — The pleadings and writ in this class of cases follow the rules elsewhere treated.⁹⁶

b. *Service.* — Although the proceeding may be brought against the municipal corporation or a board, the peremptory writ should be served upon those officers or members whose special duty it is to act.⁹⁷

C. **MANDAMUS IN PARTICULAR CASES.** — 1. **To Enforce Duties Imposed by Charter.** — Mandamus is a proper remedy to compel a municipal corporation to perform a duty imposed upon it by its charter.⁹⁸

2. **Boundaries.** — The duty of the governing body, upon petition, to fix boundaries disconnecting certain territory, will be compelled by mandamus,⁹⁹ even though the time within which the duty should have been performed has elapsed.¹ The fact that the tribunal erroneously determined the petition insufficient will not preclude relief.²

3. **Location and Removal of County Seat.** — It seems that mandamus is a proper remedy to compel a removal of a county seat.³

117 Cal. 356, 49 Pac. 206. **Ill.**—Glencoe v. People, 78 Ill. 382. **Ind.**—Wren v. City of Indianapolis, 96 Ind. 206, 213.

See the title "Mandamus."

[a] Where there is no municipal officer specially charged with the performance of the thing to be done, the writ may be directed to the city in its corporate capacity. Williams v. New Haven, 68 Conn. 263, 273, 36 Atl. 61.

93. State ex rel. Hawes v. Mason, 153 Mo. 23, 61, 54 S. W. 524.

94. Wren v. Indianapolis, 96 Ind. 206, 215.

95. **Ill.**—Glencoe v. People, 78 Ill. 382. **N. C.**—Pegram v. Comrs. of Cleveland County, 65 N. C. 114. **Wis.** State ex rel. Soutter v. Common Council, 15 Wis. 33.

96. See the title "Mandamus."

In action to enforce claims against municipalities, see *infra*, IV, C, 12, c.

[a] An alternative writ to compel an expenditure of public money, must show that there is a sufficient amount of the general or specific fund available for the purpose. Board of Comrs. of Shawnee Co. v. State ex rel. Welch, 42 Kan. 327, 22 Pac. 326.

97. Glencoe v. People, 78 Ill. 382; Wren v. City of Indianapolis, 96 Ind. 206, 215.

98. People ex rel. Keene v. Board of Suprs. of Queens County, 142 N. Y. 271, 36 N. E. 1062; *In re Wheeler*, 62 Misc. 37, 115 N. Y. Supp. 605, duty to maintain and operate a ferry may be enforced.

99. **Ill.**—Young v. Carey, 184 Ill. 613, 56 N. E. 960; Roberts v. People, 93 Ill. App. 645. **Ky.**—Lebanon v. Creel, 109 Ky. 363, 59 S. W. 16; Steele v. Willis, 23 Ky. L. Rep. 826, 64 S. W. 417. **Mont.**—State ex rel. Arthurs v. Board of Comrs. of Chouteau County, 44 Mont. 51, 118 Pac. 804.

1. State ex rel. Arthurs v. Board of Comrs. of Chouteau County, 44 Mont. 51, 118 Pac. 804.

2. State ex rel. Arthurs v. Board of Comrs. of Chouteau County, 44 Mont. 51, 118 Pac. 804.

3. Condit v. Board of Comrs. of Newton County, 25 Ind. 422; State ex rel. Hill v. Bonner, 44 N. C. 257.

[a] The fact that the site selected for a county seat is not that directed by the statute does not authorize a mandamus, as the board has acted. State ex rel. Hill v. Bonner, 44 N. C. 257.

As to matters relating to the election as to location of county seat, see the title "Mandamus."

As to mandamus to compel officers to hold office at the place an election

4. Meetings and Proceedings Therein.—The duty of city councils⁴ or of county boards⁵ to meet and perform certain duties may be enforced by mandamus. And if because of a deadlock they fail to act, mandamus is a proper remedy.⁶ But mandamus is not a proper remedy to compel aldermen⁷ or clerks,⁸ to attend meetings and perform their general official duties. The mayor or chairman of a municipal board may be compelled to reverse his decision on a resolution and to declare it lost or carried as the case may be.⁹

5. Minutes and Records of Municipal Officers.¹⁰—Mandamus will lie to compel county boards to enter their proceedings on the records, or to amend their records by incorporating proceedings omitted.¹¹ And if the clerk should refuse to enter the minutes of the meetings, mandamus is a proper remedy.¹² A duty of an officer to correct the

shows to be county seat, see the title "Officers."

4. Me.—*Littlefield v. Newell*, 85 Me. 246, 27 Atl. 110, duty of alderman and common council to meet and elect subordinate officers. **Mass.**—*Attorney General v. City Council of Lawrence*, 111 Mass. 90. **Pa.**—*Lamb v. Lynd*, 44 Pa. 336; *Com. ex rel. Howard v. Town Council of Olyphant*, 2 Lack. Leg. N. 234.

But see *Wilson v. Cleveland*, 157 Mich. 510, 122 N. W. N. W. 284, 133 Am. St. Rep. 352.

[a] The burgess is a proper relator to compel the city council to levy annual taxes. *Com. ex rel. Howard v. Town Council of Olyphant*, 2 Lack. Leg. N. (Pa.) 234.

[b] **Proper Defendants.**—Where two departments of the city council fail to hold a joint meeting because of the unwillingness of one department, the recusant department only need be made defendant. But as to that department it is proper to make all its members defendants, those who are willing to act as well as those who refused to do so. *Littlefield v. Newell*, 85 Me. 246, 27 Atl. 110.

5. *Kaufer v. Ford*, 100 Minn. 49, 110 N. W. 364; *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259, 266; *People ex rel. Scott v. Suprs. of Chenango*, 8 N. Y. 317.

[a] But a direction to convene without giving a statutory notice is unauthorized. *Kaufer v. Ford*, 100 Minn. 49, 110 N. W. 364.

6. *Com. v. Ayre*, 5 Pa. Dist. 575; *Com. ex rel. Howard v. Town Council of Olyphant*, 2 Lack. Leg. N. (Pa.) 234.

Effect of rule against controlling discretion, see *supra*, IV, B, 1.

7. *People ex rel. Fitzgerald v. Whipple*, 41 Mich. 548, 49 N. W. 922, to grant the writ would require general supervision of the aldermen. *Contra*, *Nome v. Rice*, 3 Alaska 602, compelling a councilman who tendered his resignation to attend all council meetings and faithfully discharge the functions of his office until appointment of his successor.

8. *People ex rel. Cady v. Ihnken*, 129 Mich. 466, 89 N. W. 72.

9. *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577; *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259, 266.

[a] But where no injury can result on account of the action complained of the writ will be denied. *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577.

[b] The writ will command a meeting of all the board to be called, since the erroneous decision of the chairman cannot be corrected without a meeting of the board. *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259, 266.

[c] The writ may go to the chairman and clerk or to the whole of the board. *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 259, 265.

10. As to records generally, see the title "Records."

Recordation of contracts, see *infra*, IV, C, 10, c.

Record of fees collected by an officer, see *infra*, IV, C, 9, g.

11. Board of Comrs. of Warren County v. State, 15 Ind. 250; *State ex rel. Andrews v. Boyden*, 18 S. D. 388, 100 N. W. 763.

12. **U. S.**—*In re Delgado*, 140 U. S.

minutes or record may be enforced by mandamus,¹³ if they are still under his control.¹⁴ But the expunging from the record of proceedings actually had, on the ground they were erroneous, will not be required.¹⁵

Inspection. — The right to inspect the records, books and papers of a municipal officer or of the municipality may be enforced by mandamus.¹⁶

6. Approving, Recording and Vacating Plats. — The duty to approve¹⁷ or record¹⁸ a plat of land may be enforced by mandamus. But where a board has no power to vacate plats, mandamus will not lie to compel it to do so.¹⁹

7. Surveys. — Where a duty to survey is not clear, mandamus to compel a survey will not issue.²⁰

8. Ordinances. — Where the duty of a city council to pass an ordinance is ministerial, mandamus will lie to compel it to enact such an ordinance,²¹ but it is otherwise if the matter rests in the council's

586, 11 Sup. Ct. 874, 35 L. ed. 578. Mich.—People *ex rel.* Cady v. Ihnken, 129 Mich. 466, 89 N. W. 72. N. H. Hill v. Goodwin, 56 N. H. 441. N. J. Warmolts v. Keegan, 69 N. J. L. 186, 54 Atl. 813.

[a] Compliance with a resolution of aldermen to strike out the name of an alderman from the roll of members and place another thereon may be compelled by mandamus. Warmolts v. Keegan, 69 N. J. L. 186, 54 Atl. 813.

[b] Recordation of proceedings of de facto commissioners will be compelled until their right to hold office is judicially determined against them in quo warranto proceedings. *In re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578. See generally the title "Officers."

13. Columbus Water-Wks. Co. v. Columbus, 46 Kan. 666, 26 Pac. 1046.

[a] To prevent abuse of the power of a clerk to amend his records, mandamus will lie. Boston Tp. Co. v. Pomfret, 20 Conn. 590, 596.

[b] An officer who has no duty to amend the records will not be compelled to make the amendment. White v. Burkett, 119 Ind. 431, 21 N. E. 1087.

14. Wigginton v. Markley, 52 Cal. 411.

15. Hartwig v. Watertown, 132 Wis. 83, 112 N. W. 21.

16. Ia.—Keokuk v. Merriam, 44 Iowa 432. Mich.—Field v. Board of Water Comrs. of Manistee, 156 Mich. 186, 120 N. W. 610. Mo.—State *ex rel.* Gay v. Jones, 158 Mo. App. 170, 138 S. W. 81.

As to enforcement of right to inspect records generally, see the title "Records."

17. Ill.—People *ex rel.* Tilden v. Massieon, 279 Ill. 312, 116 N. E. 639; People *ex rel.* Thistlewood v. Board of Trustees, 122 Ill. App. 449. Mich. Owen v. Moreland, 132 Mich. 477, 93 N. W. 1068; Van Husan v. Heames, 91 Mich. 519, 52 N. W. 18; Campau v. Board of Public Works, 86 Mich. 372, 49 N. W. 39. Mo.—State *ex rel.* Strother v. Chase, 42 Mo. App. 343.

[a] Where board imposes unlawful conditions precedent to the approval. Owen v. Moreland, 132 Mich. 477, 93 N. W. 1068; Van Husan v. Heames, 91 Mich. 519, 52 N. W. 18.

[b] The appearance of the attorney general is not required, even where the action is brought by the state, because the rights of the owner of the land only are affected. People *ex rel.* Tilden v. Massieon, 279 Ill. 312, 116 N. E. 639.

18. United States *ex rel.* Case v. Forsyth, 5 Mackey (D. C.) 483.

19. Campau v. Board of Public Works, 86 Mich. 372, 49 N. W. 39.

20. See *infra*, this note.

[a] Mandamus to compel a surveyor to survey beyond a line which the political powers of a state recognize as beyond its limits will not issue. This is a de facto boundary and the court in a proceeding of this nature has no jurisdiction to determine the true boundary. Wortham v. Sullivan (Tex. Civ. App.), 147 S. W. 702.

21. Ala.—Huey v. Waldrop, 141 Ala.

discretion.²² Likewise a legal duty of a mayor or burgess to sign an ordinance will be enforced by mandamus where he has no discretion,²³ unless the ordinance is void.²⁴ Possibly cases may arise in which the performance of a duty of the mayor to certify as a lawful ordinance one which he has vetoed, may be properly compelled by mandamus.²⁵

9. Municipal Finances.—a. *Funding Indebtedness.*—A mandatory duty of municipal authorities to fund the indebtedness of the municipality may be enforced by mandamus.²⁶

b. *Appropriations and Budget.*—Mandamus is a proper remedy to enforce a duty to make an appropriation of public money,²⁷ if there are funds on hand from which such an appropriation can be made.²⁸ But a discretion as to the making of an appropriation will not be

318, 37 So. 380. **Colo.**—*Hover v. People ex rel. Adams*, 17 Colo. App. 375, 392, 68 Pac. 679. **N. Y.**—*People ex rel. Comrs. of Public Market v. Common Council*, 45 Barb. 473.

22. *Com. ex rel. McMichael v. Park*, 32 Leg. Int. 412, 10 Phila. (Pa.) 445.

23. **Cal.**—*San Buenaventura v. McGuire*, 8 Cal. App. 497, 97 Pac. 526, 528. **Mo.**—*State ex rel. N. & S. Ry. Co. v. Meier*, 143 Mo. 439, 449, 45 S. W. 306; *Dreyfus v. Lonergan*, 73 Mo. App. 336. **Pa.**—*Com. ex rel. Shepp v. Kepner*, 30 Leg. Int. 312, 10 Phila. 510; *Com. ex rel. Provident Life & T. Co. v. Bullock*, 2 Montg. Co. 5. **Wash.**—*State ex rel. Bothell v. Woody*, 90 Wash. 501, 156 Pac. 534; *State ex rel. Prosser F. L. & I. Co. v. Taylor*, 36 Wash. 607, 79 Pac. 286.

[a] **Members of the Council Are Proper Relators.**—*Com. ex rel. Provident Life & T. Co. v. Bullock*, 2 Montg. Co. (Pa.) 5.

[b] **The city as a legal entity and the individuals composing the board of trustees are proper parties to institute the proceedings.** *San Buenaventura v. McGuire*, 8 Cal. App. 497, 97 Pac. 526, 528.

24. *State ex rel. Bothell v. Woody*, 90 Wash. 501, 156 Pac. 534.

25. *Com. v. Fitler*, 136 Pa. 129, 140, 20 Atl. 424.

[a] **Where a mayor by mistake returns an ordinance to the wrong chamber of the council after vetoing it, mandamus to compel him to certify it as a lawful ordinance on the ground his veto is thereby ineffective will not lie.** *Com. v. Fitler*, 136 Pa. 129, 140, 20 Atl. 424.

26. *Board of County Comrs. of Summit v. People ex rel. Hurburt*, 10 Colo. 14, 14 Pac. 47; *Robinson v.*

Rogers, 24 Gratt. (65 Va.) 319. See *Bravin v. Tombstone*, 6 Ariz. 212, 56 Pac. 719, holding petition to compel reporting of indebtedness insufficient which fails to allege a written demand of loan commissioners to make such report.

[a] **Relator.**—The holder of county warrants constituting part of the floating debt of a county is a proper person to compel the issuance of bonds under a statute authorizing the funding of the indebtedness by issuance of bonds. *Board of County Comrs. of Summit v. People ex rel. Hurlbut*, 10 Colo. 14, 14 Pac. 47; *State ex rel. Hope v. Board of Liquidation*, 42 La. Ann. 647, 7 So. 706, 8 So. 577; *State ex rel. Forstall v. Board of Liquidators*, 29 La. Ann. 690.

[b] **Funding of debts excluded from statute will not be compelled.** *United States ex rel. Siegel v. Board of Liquidation of New Orleans*, 74 Fed. 489, 20 C. C. A. 622. See also *United States ex rel. Fisher v. Board of Liquidation of New Orleans*, 60 Fed. 387, 9 C. C. A. 37.

27. **Ala.**—See *State ex rel. Mobile Co. v. Stone*, 69 Ala. 206. **Cal.**—*People ex rel. Frank v. Board of Suprs. of San Francisco*, 21 Cal. 668, 698. **Colo.**—*Hover v. People ex rel. Adams*, 17 Colo. App. 375, 392, 68 Pac. 679. **Ind.**—*State ex rel. Simpson v. Meeker*, 182 Ind. 240, 105 N. E. 906. **La.**—*State ex rel. De Leon v. New Orleans*, 34 La. Ann. 477. **Nev.**—*Humboldt Co. v. County Comrs. of Churchill*, 6 Nev. 30. **N. J.** *State ex rel. Free Public Library v. Jersey City*, 53 N. J. L. 62, 20 Atl. 755. **N. Y.**—*People ex rel. O'Loughlin v. Prendergast*, 219 N. Y. 377, 114 N. E. 860.

28. *Advisory Board of Harrison Tp.*

controlled,²⁹ and when the income of the municipality is not sufficient to satisfy the demands of all its departments, an appropriation of a just proportion is quasi-judicial in character and not subject to review on mandamus.³⁰ A person who claims that he is entitled to receive an appropriation should resort to assumpsit, not mandamus to enforce its payment.³¹

As the creation of the budget, the matters therein contained and their readjustment is within the discretion of the city officers, the courts cannot interfere with or supervise their action by mandamus.³²

c. *Creating Loans*.—A discretion of a municipal council as to the borrowing of money is not subject to control by mandamus.³³

d. *Issuance of Bonds*.—A discretion as to the issuance of municipal bonds will not be controlled by mandamus.³⁴ But mandamus is a proper remedy to enforce a clear ministerial duty to issue and approve,³⁵ to sign and seal,³⁶ and to register³⁷ bonds of a municipality, when the officer whose duty it is to do so is in default.³⁸ In such a proceeding the court may determine the legality of the proceedings authorizing the bonds.³⁹ And if the court finds that the purpose for

v. State ex rel. Smith, 166 Ind. 237, 76 N. E. 986; *State ex rel. Ames v. City Council of Minneapolis*, 87 Minn. 156, 91 N. W. 298. See also *Farris v. State ex rel. Murphy*, 46 Neb. 857, 65 N. W. 890.

29. *State ex rel. Johnston v. Wayne County Council*, 157 Ind. 356, 61 N. E. 715; *Com. ex rel. McMichael v. Park*, 32 Leg. Int. (Pa.) 412, 10 Phila. 445. See *People ex rel. O'Loughlin v. Board of Estimate & Apportionment*, 87 Misc. 601, 150 N. Y. Supp. 12.

30. *Hover v. People ex rel. Adams*, 17 Colo. App. 375, 392, 68 Pac. 679.

31. *Storer Post No. 1 v. Page*, 70 N. H. 280, 47 Atl. 264.

32. *People ex rel. Kelly v. Dooley*, 169 App. Div. 423, 155 N. Y. Supp. 326. See *State ex rel. N. O. Gaslight Co. v. New Orleans*, 32 La. Ann. 268.

33. *In re Town Board of Lloyd*, 7 N. Y. Supp. 165; *Com. ex rel. McMichael v. Park*, 32 Leg. Int. (Pa.) 412, 10 Phila. 445.

34. *Miss.*—*Robinson v. Board of Suprs. of Itawamba County*, 105 Miss. 90, 62 So. 3. *N. J.*—*Doremus v. Board of Chosen Freeholders*, 89 N. J. L. 197, 98 Atl. 390; *Interstate Tel. & Tel. Co. v. Board of Public Utility Comrs.*, 84 N. J. L. 184, 86 Atl. 363. *N. C.* *Fisher v. Comrs. of Cherokee*, 166 N. C. 238, 81 S. E. 1061. *Pa.*—*Ackerman v. Buchman*, 109 Pa. 254. *Va.*—*Suprs. of Botetourt Co. v. Cahoon*, 94 S. E. 340.

35. *Colo.*—*Board of County Comrs.*

of *Summit v. People ex rel. Hurlbut*, 10 Colo. 14, 14 Pac. 47. *Ill.*—*People ex rel. American Cent. Ry. v. Ohio Grove Tp.*, 51 Ill. 191. See also *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278. *Ind.*—*Templeton v. Board of Comrs. of Newton County*, 173 Ind. 226, 89 N. E. 880. *N. J.* *Christie v. Board of Chosen Freeholders of Bergen*, 75 N. J. L. 49, 66 Atl. 1073; *Jones Co. v. Guttentberg*, 66 N. J. L. 659, 670, 51 Atl. 274. *N. Y.* *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006; *People ex rel. Dunphy v. Chaney*, 171 App. Div. 303, 156 N. Y. Supp. 1035; *People ex rel. Sherrill v. Guggenheimer*, 47 App. Div. 9, 62 N. Y. Supp. 11. *Okla.* *State ex rel. Edwards v. Millar*, 21 Okla. 448, 96 Pac. 747. *Ohio.*—*Comrs. of Noble Co. v. Hunt & Co.*, 33 Ohio St. 169. *Ore.*—*Portland v. Albee*, 67 Ore. 221, 135 Pac. 897.

Issuance of bonds in payment of contract, see *infra*, IV, C, 10, e, (IV).

36. *Halsey v. Nowrey*, 71 N. J. L. 481, 59 Atl. 449; *People ex rel. Hathorn v. White*, 54 Barb. (N. Y.) 622. See *People v. Parmerter*, 158 N. Y. 385, 53 N. E. 40.

37. *State ex rel. Columbia v. Allen*, 183 Mo. 283, 293, 82 S. W. 103.

38. *People ex rel. Central Pac. R. Co. v. Board of Suprs. of San Francisco*, 27 Cal. 655.

39. *Cal.*—*McMahon v. Supervisors of San Mateo*, 46 Cal. 214. *Ill.*—*People*

which the bonds are to be issued is not lawful,⁴⁰ that the bonds were never authorized by the voters,⁴¹ or that the bonds themselves are not in compliance with the law,⁴² it will withhold its writ. And the court will not compel the issuance of bonds in payment of expenses not legally audited,⁴³ or if their issuance will make the municipality liable for an indebtedness in excess of the limit placed by law.⁴⁴ So also if the necessary prerequisites, such as the furnishing of an estimate, have not been complied with, the writ will not issue.⁴⁵

e. *Taxation*.—A duty to levy and assess a tax may be enforced by mandamus.⁴⁶

f. *Custody, Deposit and Investment of Municipal Funds*.—Mandamus is a proper remedy to enforce a duty of a treasurer to set apart money received by him, into different funds,⁴⁷ to transfer money from one fund or account to another,⁴⁸ and to deposit⁴⁹ or invest⁵⁰ public money received by him, but a discretion as to the form of the investment will not be controlled.⁵¹ Should fiscal authorities wrongfully reduce the interest on municipal funds loaned, the collection of the whole amount of the interest will be compelled by mandamus.⁵² If the depository refuses to pay drafts regularly drawn on the municipal funds held by it,⁵³ or if it refuses to credit interest that has accumulated on such funds,⁵⁴ mandamus will lie, at the instance

v. Cline, 63 Ill. 394; *People v. Ohio Grove Tp.*, 51 Ill. 191. **Mich.**—*Daniels v. Long*, 111 Mich. 562, 69 N. W. 1112. **N. Y.**—*People ex rel. Hetfield v. Trustees of Ft. Edward*, 70 N. Y. 28.

40. *United States ex rel. Siegel v. Board of Liquidation of New Orleans*, 74 Fed. 489, 20 C. C. A. 622; *United States ex rel. Fisher v. Board of Liquidation of New Orleans*, 60 Fed. 387, 9 C. C. A. 37; *In re Bonds of Guthrie*, 35 Okla. 494, 130 Pac. 265.

41. *Los Angeles v. Hance*, 130 Cal. 278, 62 Pac. 484, where there was a mistake in the ordinance and the proposition of incurring the bonded indebtedness in question was defeated.

42. *State ex rel. Henderson Banking Co. v. McBride*, 31 Nev. 57, 99 Pac. 705.

43. *People ex rel. Dunphy v. Wiggins*, 143 App. Div. 760, 128 N. Y. Supp. 344.

44. *Chalk v. White*, 4 Wash. 156.

45. *Ackerman v. Buchman (Pa.)*, 6 Atl. 218.

46. See the title "*Taxation*."

47. *Bates v. Porter*, 74 Cal. 224, 243, 15 Pac. 732.

[a] **The constitutionality of a statute directing a particular disposition of funds will not be determined in a proceeding to compel the treasurer to**

make another disposition of them. *State ex rel. Spindler v. Scheiman*, 179 Ind. 502, 101 N. E. 713.

48. *State ex rel. Mobile Co. v. Stone*, 69 Ala. 206. See *Potter v. Fowler*, 78 Cal. 493, 21 Pac. 118, holding the supervisors had no authority to make the order in question and denying the writ.

49. **Ill.**—*People v. Gibler*, 78 Ill. App. 193. **Mich.**—*First Nat. Bank v. Runnells*, 21 N. W. 911. **Neb.**—*State ex rel. First Nat. Bank v. Cronin*, 72 Neb. 642, 101 N. W. 327; *State ex rel. First Nat. Bank v. Cronin*, 72 Neb. 636, 101 N. W. 325. See *State ex rel. First Nat. Bank v. Owen*, 41 Neb. 651, 59 N. W. 886, holding the designation of a bank to be in discretion of commissioners. **W. Va.**—*Bunch v. Short*, 78 W. Va. 764, 90 S. E. 810.

50. *State v. Marron*, 18 N. M. 426, 137 Pac. 845, 50 L. R. A. (N. S.) 274.

51. *State v. Marron*, 18 N. M. 426, 137 Pac. 845, 50 L. R. A. (N. S.) 274.

52. *Veal v. Chariton County Court*, 15 Mo. 412.

53. *Belcher v. First Nat. Bank of Pineville (W. Va.)*, 94 S. E. 380.

54. *Belcher v. First Nat. Bank of Pineville (W. Va.)*, 94 S. E. 380.

of the county treasurer⁵⁵ to compel the payment or credit.

g. *Record and Recovery of Money Received by an Officer.*—Mandamus is a proper remedy to compel county commissioners to institute proper proceedings to recover funds in the possession of an officer belonging to the municipality,⁵⁶ and to compel municipal officers to perform a duty to pay over money and fees, where the amount is not in controversy.⁵⁷ But it is not a proper remedy to compel the payment of money received by the officer in his individual capacity for services which are no part of the duties of his office.⁵⁸ And where the return raises disputed questions of law or fact which ought not to be tried in a mandamus proceeding, the court will deny its writ.⁵⁹

Record.—Mandamus lies to enforce the duty of an officer to enter of record fees received by him,⁶⁰ and submit his books to officers authorized to inspect them.⁶¹

h. *Payment of Debts Owed by Other Municipalities.*—Where one municipality has money belonging to another, mandamus is a proper remedy to compel the passing of a resolution directing payment of a fund raised,⁶² and the issuance⁶³ and payment⁶⁴ of a warrant.

55. *Belcher v. First Nat. Bank of Pineville* (W. Va.), 94 S. E. 380.

56. *State ex rel. Braatelen v. Drakeley*, 26 N. D. 87, 143 N. W. 768.

[a] A taxpayer may maintain the mandamus proceeding. *State ex rel. Braatelen v. Drakeley*, 26 N. D. 87, 143 N. W. 768.

[b] A determination of the particular sum due the municipality will not be compelled. *State ex rel. Braatelen v. Drakeley*, 26 N. D. 87, 143 N. W. 768.

57. *Alaska.*—*Nome v. Reed*, 1 Alaska 395, money collected as costs in criminal proceedings. *Cal.*—*San Mateo v. Oullahan*, 69 Cal. 647, 11 Pac. 386. *Ga.*—*Polk v. James*, 68 Ga. 128. *Mich.* *People ex rel. McPharlen v. Mahoney*, 30 Mich. 100. *Neb.*—*State ex rel. Hartigan v. Uerling*, 94 Neb. 694, 144 N. W. 252. *Utah.*—*State ex rel. Richards v. Stanton*, 14 Utah 180, 46 Pac. 1109.

Mandamus to compel payment of taxes collected, see the title "*Taxation*."

[a] *On Expiration of Term of Office.*—Mandamus may be issued after the expiration of the term of a public officer to compel him to make report of the public money coming into his hands during his incumbency and to pay into the treasury moneys unlawfully retained by him (*Maurer v. State ex rel. Gage County*, 71 Neb. 24, 98 N. W. 426; *State ex rel. Wayne County v. Russell*, 51 Neb. 774, 71 N. W.

785), but (2) it is otherwise if the money is retained under a claim of right. *Maurer v. State ex rel. Gage Co.*, 71 Neb. 24, 98 N. W. 426.

[b] *Parties.*—The treasurer to whom the clerk unlawfully paid the fees is not a proper party to a petition to compel the latter to pay over fees collected. *State ex rel. Richards v. Stanton*, 14 Utah 180, 46 Pac. 1109.

58. *State ex rel. Loucks v. Hale*, 166 Ind. 413, 77 N. E. 802; *State ex rel. Board of Comrs. v. Holm*, 70 Neb. 606, 97 N. W. 821, 64 L. R. A. 131.

[a] *City officers who have received money to defray expenses while lobbying*, act in their private, not official, capacities and owe no duty to repay it, so mandamus is not the proper remedy. *State ex rel. Loucks v. Hale*, 166 Ind. 413, 77 N. E. 802.

59. *Territory ex rel. Crosby v. Crum*, 13 Okla. 9, 73 Pac. 297.

60. *State ex rel. Bd. of Suprs. of Holt County v. Hazelet*, 41 Neb. 257, 59 N. W. 891; *State ex rel. Bd. of Suprs. v. Allen*, 23 Neb. 451, 36 N. W. 756.

61. *Keokuk v. Merriam*, 44 Iowa 432.

62. *Blakely v. Singletary*, 138 Ga. 632, 75 S. E. 1054.

63. See *State ex rel. Board of Education v. Haben*, 22 Wis. 101, denying writ as circuit court has concurrent jurisdiction with supreme court.

64. *Manor v. State ex rel. Stoltz*, 149 Ind. 310, 49 N. E. 160.

On Division or Annexation. — Mandamus will lie to compel an adjustment of accounts on division of a municipality or on annexation of territory thereto;⁶⁵ but as the adjustment is an act requiring the exercise of judgment, the action of the board will not be controlled.⁶⁶ A ministerial duty to pay the amount reported,⁶⁷ or to levy a tax for its payment,⁶⁸ may be enforced, unless the board failed to determine the debt in the manner prescribed by law.⁶⁹

i. *Compelling Replacing of Money Paid Out.* — Mandamus is not a proper remedy to compel a treasurer to replace money paid out on a warrant regular on its face but voidable by reason of extraneous circumstances.⁷⁰

j. *Compelling Suit To Recover Money Wrongfully Paid.* — A statute providing that it is the duty of the district attorney to institute suits against persons to whom money has been paid on order of the board of supervisors made without authority of law, vests a discretion in him not controllable by mandamus.⁷¹ Furthermore the court cannot oversee his action to see that he takes all proper steps and proceedings in the case.⁷²

k. *Compelling Receipt of Warrants as Legal Tender.* — Mandamus will lie to compel a municipality to receive its warrants in payment of obligations for which they are legal tender.⁷³

10. Municipal Contracts.⁷⁴ — a. *Letting and Awarding of Contract.* — (I.) **Generally.** — Mandamus is a proper remedy to compel

[a] **Recovery of Two Funds.** — A trustee of a civil township is ex officio trustee of a school township and entitled to the funds of both. And he may, in one mandamus proceeding, compel the county auditor to issue a warrant for money wrongfully withheld although it partly belongs to each fund. *Manor v. State ex rel. Stoltz*, 149 Ind. 310, 49 N. E. 160; *Roscommon Tp. v. Board of Suprs.*, 49 Mich. 454, 13 N. W. 814.

65. *Hempstead Co. v. Grave*, 44 Ark. 317; *State ex rel. Furnish v. Mullendore*, 53 Mont. 109, 161 Pac. 949.

66. *County of Riverside v. San Bernardino*, 134 Cal. 517, 66 Pac. 788; *State ex rel. Abbeville Co. v. McMillan*, 52 S. C. 60, 29 S. E. 540.

67. See *State ex rel. Seale v. Durant*, 71 S. C. 311, 51 S. E. 146, denying writ as based failed to complete duties in apportionment and duty to pay was not clear.

68. *People ex rel. Contra Costa v. Board of Suprs.*, 26 Cal. 641; *Comrs. of Sedgwick County v. Bunker*, 16 Kan. 498.

[a] **The county who is to receive**

the money is the "party beneficially interested" and the proper relator. *People ex rel. Contra Costa v. Bd. of Suprs. of Alameda County*, 26 Cal. 641.

69. *Portsmouth Tp. v. Bay City*, 57 Mich. 420, 24 N. W. 127.

70. *State ex rel. Burgess v. Bowman*, 66 S. C. 140, 44 S. E. 569.

[a] **Even though he makes the payment after a warning not to do so.** *State ex rel. Burgess v. Bowman*, 66 S. C. 140, 44 S. E. 569.

71. *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707.

72. *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707.

73. *State ex rel. Klein & Co. v. Pilsbury*, 29 La. Ann. 787.

[a] **Determination of Genuineness.** And in such proceeding, the court has power to determine an issue as to their genuineness. *State ex rel. Klein & Co. v. Pilsbury*, 29 La. Ann. 787.

74. As to state contracts see the title "States and Territories."

As to contracts of school districts, see the title "Schools and School Districts."

action on bids submitted in response to an advertisement therefor.⁷⁵ But the award of a contract cannot be compelled by mandamus if the matter rests in the discretion of the municipal authorities;⁷⁶ and even though the authorities have no discretion, mandamus is not a proper remedy if the relator's right is not clear,⁷⁷ if the provisions of the statute and the precise nature of the duty is not clear and distinct,⁷⁸ or if the municipality failed to comply with statutory prerequisites to the making of the contract.⁷⁹ And if the relator was guilty of fraud, the court will not compel the award of the contract to him.⁸⁰ If the person to whom the contract was wrongfully let has completely executed it, the relator will be left to his remedy by action.⁸¹

(II.) To Compel Letting of Contract to Lowest Bidder. — The weight of authority is to the effect that a person who has submitted the lowest bid in response to an advertisement for bids on a contract cannot compel the award of a contract to him after it has been let to another.⁸² Especially is this so when the board is empowered to reject any and all bids.⁸³ Reasons sometimes given for the general rule are that the relator has an adequate remedy in damages,⁸⁴ and that the

75. *Findley v. Pittsburgh*, 82 Pa. 351; *Senior v. Dougless*, 14 Wkly. N. Cas. (Pa.) 454.

[a] Recognition of a bid of a person who would perform the contract outside the state contrary to statute will not be required. *Knight v. Barnes*, 7 N. D. 591, 75 N. W. 904.

76. *Fairchild v. Wall*, 93 Cal. 401, 29 Pac. 60; *Com. ex rel. Vandyke v. Henry*, 49 Pa. 530. *Com. ex rel. National B. & D. Co. v. Lebanon City*, 7 Pa. Dist. 163.

[a] If the municipal authorities should revoke their selection of a person to whom to award a contract while the proceedings are in fieri, mandamus to compel an award to the person first chosen will not lie. *Dickerson v. Peters*, 71 Pa. 53.

77. *Milwaukee v. State ex rel. News Pub. Co.*, 97 Wis. 437, 73 N. W. 23, mandamus to compel action on bids for printing.

78. *State ex rel. Lord v. Board of Suprs. of Washington County*, 2 Pinn. (Wis.) 552.

79. *State ex rel. O'Donnell v. Benzenberg*, 108 Wis. 435, 84 N. W. 858, where council placed no plan or profile on file at time of advertising for proposals, the board cannot be compelled to enter into a contract for the work.

80. *People ex rel. Lighton v. McGuire*, 31 Misc. 324, 65 N. Y. Supp. 463; *Com. ex rel. Vandyke v. Henry*, 49 Pa. 530.

81. *Talbot Pav. Co. v. Common Council of Detroit*, 91 Mich. 262, 51 N. W. 933; *Akron v. France*, 4 Ohio Cir. Ct. (N. S.) 496; *Deckman v. Oak Harbor*, 10 Ohio Cir. Ct. 409.

82. See *infra*, this section.

83. Ia. — *Hanlin v. Independent Dist. of Charles City*, 66 Iowa 69, 23 N. W. 263. Ky. — *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 1109. N. Y. — *People ex rel. Hilton Bridge Const. Co. v. Aldridge*, 13 App. Div. 24, 43 N. Y. Supp. 99. Pa. — *Com. ex rel. Hackett v. Guardians of the Poor*, 13 Wkly. N. Cas. 61.

[a] If the board exercises its discretion and rejects all bids and advertises for proposals, the award of the contract to the lowest bidder will not be directed. *State ex rel. Cleveland Trinidad Pav. Co. v. Board of Public Service of Columbus*, 81 Ohio St., 218, 225, 90 N. E. 389.

[b] Even though the board acts under a mistake when it rejects all bids and advertises for new bids the writ will not lie. *State ex rel. Hussey v. Cincinnati*, 3 Ohio Cir. Ct. 542.

[c] Under a statute authorizing the board to reject all bids, it must either reject all bids or award the contract to the lowest responsible bidder. Should it award the contract to another, the writ will lie. *State ex rel. Ross v. Board of Education*, 42 Ohio St. 374.

84. Ia. — *Vincent v. Ellis*, 116 Iowa 609, 616, 88 N. W. 836. La. — *State ex*

statute requiring the letting of the contract to the lowest bidder is for the protection of the public, not of the bidder.⁸⁵ But the reason most generally given is that the duties of the municipal tribunal are discretionary. This is obvious where the statute requires the award of the contract to the lowest and best or lowest responsible bidder.⁸⁶ The rule has also been applied under a statute requiring the letting of the contract to the lowest bidder,⁸⁷ although some courts have held that such a statute leaves the board no discretion and that mandamus will lie to compel the award of a contract to the lowest bidder although it has been awarded to another,⁸⁸ if the relator shows a clear legal right in himself.⁸⁹

Where Discretion Is Abused. — It has been held that if the discretion of the board is palpably abused or if fraud, collusion, bad faith or

rel. Prince v. Police Jury, 108 La. 311, 32 So. 363. **Mich.**—*Talbot Paving Co. v. Common Council of Detroit*, 91 Mich. 262, 51 N. W. 933. **N. Y.** *People ex rel. Lunney v. Campbell*, 72 N. Y. 496.

85. **Ia.**—*Vincent v. Ellis*, 116 Iowa 609, 617, 88 N. W. 836. **Mont.**—*State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485. **N. Y.**—*People ex rel. Dinsmore v. Croton Aqueduct Board*, 26 Barb. 240. **Pa.**—*Com. ex rel. Snyder v. Mitchell*, 82 Pa. 343.

86. **U. S.**—*Colorado Pav. Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630. **Cal.**—*Stanley-Taylor Co. v. Bd. of Supervisors of San Francisco*, 135 Cal. 486, 67 Pac. 783. **Ill.** *Johnson v. Sanitary District*, 163 Ill. 285, 45 N. E. 213; *People v. Kent*, 160 Ill. 655, 43 N. E. 760; *Stubbs v. Aurora*, 160 Ill. App. 351, 360. **Ia.**—*Vincent v. Ellis*, 116 Iowa 609, 88 N. W. 836. **Ky.**—*Trapp v. Newport*, 115 Ky. 840, 846, 74 S. W. 1109. **Md.**—*Maryland Pavement Co. v. Mahool*, 110 Md. 397, 72 Atl. 833. **Mo.**—*State ex rel. Journal Printing Co. v. Dreyer*, 183 Mo. App. 463, 484, 167 S. W. 1123 (reviewing authorities). **Neb.**—*State ex rel. Union Fuel Co. v. Lincoln*, 68 Neb. 597, 94 N. W. 719. **N. Y.**—*People ex rel. Belden v. Contracting Board*, 27 N. Y. 378; *People ex rel. Carlin v. Supervisors*, 42 Hun 456. **Ohio.**—*State ex rel. Cleveland Trinidad Pav. Co. v. Board of Public Service of Columbus*, 81 Ohio St. 218, 225, 90 N. E. 389; *State ex rel. Walton v. Hermann*, 63 Ohio St. 440, 59 N. E. 104. *Compare State ex rel. Ross v. Board of Education*, 42 Ohio St. 374. **Pa.**—*Douglass v. Com. ex rel. Senior*, 108 Pa. 559; *Findley v. Pittsburgh*, 82

Pa. 351; *Com. ex rel. Snyder v. Mitchell*, 82 Pa. 343. **S. D.**—*In re McCain*, 9 S. D. 57, 68 N. W. 163. **Tex.** *Brown v. Houston* (Tex. Civ. App.), 48 S. W. 760. **Wis.**—*State ex rel. Pheasant v. Board of Education*, 24 Wis. 683.

As to state contracts, see the title "States and Territories."

87. *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865. *State ex rel. De Rackin v. Allen*, 8 Wash. 168, 35 Pac. 609.

[a] Under the rule that the statute is for the benefit of the public, the lowest bidder cannot compel the award of the contract to him even where the board is required to award it to the lowest bidder. *People ex rel. Dinsmore v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240. See also *People ex rel. Bullard v. The Contracting Board*, 33 N. Y. 382.

88. *Boren v. Comrs. of Darke County*, 21 Ohio St. 311; *State ex rel. Mills & Co. v. Comrs. of Hamilton County*, 20 Ohio St. 425; *State ex rel. Leonard v. Comrs. of Crawford County*, 17 Ohio Cir. Ct. 370; *State ex rel. Bryce Furn. Co. v. Board of Education*, 14 Ohio Cir. Ct. 15.

89. *State ex rel. Ross v. Board of Education*, 42 Ohio St. 374; *American Clock Co. v. Comrs. of Licking County*, 31 Ohio St. 415; *State ex rel. Leonard v. Comrs. of Crawford County*, 17 Ohio Cir. Ct. 370; *State ex rel. as relator failed to give requisite bond*.

[a] **Irregularities in Other Bids.**—The relator cannot rely on the weaknesses, informalities or irregularities in the bids of others. *State ex rel. Bryce Furn. Co. v. Board of Education*, 14 Ohio Cir. Ct. 15.

improper motives enter into the awarding of the contract, the writ will issue.⁹⁰ even though the board has the right to reject any or all bids.⁹¹ The lowest bidder, according to some authorities, is a proper relator,⁹² whereas other authorities hold the proceeding can be instituted only by a taxpayer.⁹³

(III.) **To Compel Award to Next Lowest Bidder.** — Where the lowest bidder fails to comply with some essential prerequisite, mandamus will lie on the relation of the next lowest bidder to set aside the award to the lowest bidder and compel an award of the contract to himself, under a statute requiring letting of the contract to the lowest bidder.⁹⁴ But under such circumstances if the statute gives the board discretion to reject all bids and it does so, the next lowest bidder has no remedy.⁹⁵

b. *Execution of Contract.* — The performance of ministerial acts with respect to the execution of municipal contracts may be compelled.⁹⁶ Accordingly mandamus is an appropriate remedy to enforce a ministerial duty to sign,⁹⁷ and to certify⁹⁸ a municipal contract,

90. *State ex rel. Journal Printing Co. v. Dreyer*, 183 Mo. App. 463, 484, 167 S. W. 1123; *State ex rel. First Nat. Bank v. Bourne*, 151 Mo. App. 104, 131 S. W. 896; *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485. See also the following cases: Ill.—*People v. Kent*, 160 Ill. 655, 43 N. E. 760; *Stubbs v. Aurora*, 160 Ill. App. 351. Md.—*Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337. Pa.—*Douglas v. Com.*, 108 Pa. 559; *Com. ex rel. Hackett v. Guardians of the Poor*, 16 Phila. 3, 40 Leg. Int. 46, 13 Wkly. N. Cas. 61.

91. *State ex rel. Journal Printing Co. v. Dreyer*, 183 Mo. App. 463, 167 S. W. 1123.

92. *State ex rel. Journal Printing Co. v. Dreyer*, 183 Mo. App. 463, 167 S. W. 1123.

93. *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485.

[a] The lowest bidder cannot institute proceedings, unless he sues as a taxpayer. *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485.

[b] The court will not and cannot coerce the board to let the contract to the lowest bidder, but will require the board to cancel all proceedings taken and then proceed according to law. *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485.

94. *Boren v. Comrs. of Darke Co.*, 21 Ohio St. 311; *Herrmann v. State*, 11 Ohio Cir. Ct., 504, 5 Ohio Cir. Dec. 266. *Contra, Strack v. Ratterman*, 18 Ohio Cir. Ct. 36.

95. *State ex rel. H. P. Clough &*

Co. v. Comrs. of Shelby County, 36 Ohio St. 326.

96. See *infra* this section.

[a] The duty of the city attorney to prepare contracts cannot be compelled by mandamus, where in his capacity as adviser to the city officers he is of the opinion that the proposed contract is in conflict with another contract already made with other persons. *Day v. Ryan*, 245 Pa. 154, 91 Atl. 633.

97. Ark.—*McClendon v. Hot Springs*, 195 S. W. 686. Cal.—*Thoits v. Byxbee* (Cal. App.), 167 Pac. 166. Del.—*State ex rel. McCormick v. Fisher*, 5 Penne. 273, 64 Atl. 68. Ky. Home Const. Co. v. *Duncan*, 23 Ky. L. Rep. 1225, 64 S. W. 997. N. J.—*State ex rel. Nicholson Pavement Co. v. Ricord*, 35 N. J. L. 396. N. Y.—*People ex rel. Lighton v. McGuire*, 31 Misc. 324, 65 N. Y. Supp. 463; *People ex rel. Wood v. Connolly*, 2 Abb. Pr. N. S. 315, duty of clerk to execute contract.

[a] Where the mayor's veto is not sustained, he may be compelled to sign the contract. *McClendon v. Hot Springs* (Ark.), 195 S. W. 686; *People ex rel. Lighton v. McGuire*, 31 Misc. 324, 65 N. Y. Supp. 463.

98. *Com. v. George*, 148 Pa. 463, 24 Atl. 59. See *New York State Const. Co. v. New York*, 163 App. Div. 227, 232, 148 N. Y. Supp. 129, 132; *People ex rel. F. J. Carlin Const. Co. v. Prendergast*, 163 N. Y. Supp. 583.

[a] If there are no funds available, certification that there are funds

unless it was awarded in violation of the charter and ordinances,⁹⁹ although it is sometimes held that the injured party has an adequate remedy in damages.¹ Mandamus is not a proper remedy, if after awarding a contract, the council or board votes to reconsider its action and postpones further consideration,² or awards the contract to another.³ On refusal to sign a contract not in conformity to ordinance, a peremptory writ to sign a contract to be prepared is erroneous.⁴

c. *Entry on Minutes or Record.*—A statutory duty to enter all contracts on behalf of municipal corporations on the minutes of the officer making them, may be enforced by mandamus.⁵

d. *As to Bond and Deposit of Contractor.*—The duty to approve the contractor's bond may be enforced by mandamus.⁶ But mandamus will not lie to compel the return of a deposit made for security for the satisfactory performance of the contract.⁷

e. *Enforcement of Contract.*—(I.) Generally. —As mandamus is not an appropriate remedy for enforcement of contract rights of a private nature not involving questions of public trust or official duty, it will not lie to enforce duties of a municipal corporation which arise wholly out of contract and are not imposed by law, and which the municipality owes to a person as a private person,⁸ although some cases seem to hold otherwise.⁹ And if the governing body of the public corporation sees fit to refuse to proceed with its contract, it cannot be compelled by mandamus to specifically perform its agreement.¹⁰ But the duties of the agents of the municipality growing out

will not be required. *People ex rel. Gibbons v. Coler*, 41 App. Div. 463, 53 N. Y. Supp. 988.

99. *State ex rel. Nicolson Pavement Co. v. Ricord*, 35 N. J. L. 396.

1. *People ex rel. Lunney v. Campbell*, 72 N. Y. 496.

2. *People ex rel. Ryan v. Aldridge*, 83 Hun 279, 31 N. Y. Supp. 920.

3. *Paddock v. State ex rel. Fitzmaurice* (Ind.), 114 N. E. 217; *State ex rel. De Rackin v. Allen*, 8 Wash. 168, 35 Pac. 609.

4. *State ex rel. Comerford v. Fitzpatrick*, 45 La. Ann. 269, 12 So. 353.

5. *Milburn v. Comrs. of Glynn Co.*, 112 Ga. 160, 37 S. E. 178.

6. *People ex rel. John Single Paper Co. v. Edgecomb*, 112 App. Div. 604, 98 N. Y. Supp. 965.

As to approval of bonds of officers see the title "Officers."

7. *Com. ex rel. Curran v. Philadelphia*, 211 Pa. 85, 60 Atl. 549.

8. *Conn.*—*Parrott v. City of Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439, where city laying a street across relator's dam agreed to construct special approaches to preserve plaintiff's

pond. *Ia.*—*Littell v. Webster County*, 152 Iowa 206, 131 N. W. 691, 700, 132 N. W. 426. *La.*—*Badger v. New Orleans*, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540. *Mich.*—*Waterman-Waterbury Co. v. School Dist. No. 4*, 183 Mich. 168, 150 N. W. 104. *Mo.*—*State ex rel. Bohannon v. County Court of Howard Co.*, 39 Mo. 375. *N. J.*—*State ex rel. Elmhendorf v. Board of Finance*, 41 N. J. L. 135; *State ex rel. Little v. Township Committee*, 37 N. J. L. 84. *Ohio.*—*State ex rel. Board of Co. Comrs. v. Zanesville & Maysville Tp. Rd. Co.*, 16 Ohio St. 308. *Wis.* *State ex rel. Fire & R. P. Const. Co. v. Icke*, 136 Wis. 583, 118 N. W. 196, 20 L. R. A. (N. S.) 800, making of certificates required by contract but not imposed as a duty by law will not be compelled.

9. *Weston v. Newburgh*, 67 Hun 127, 22 N. Y. Supp. 22, 51 N. Y. St. 414, mandamus is a proper remedy to compel a city to perform a contract for purchase of property.

10. *Kan.*—*Eberhardt Const. Co. v. Board of Comrs. of Sedgwick County*, 106 Kan. 394, 164 Pac. 231. *Mich.*—

of a contract of the corporation are considered as imposed by law and may be enforced by mandamus.¹¹

(II.) **Inspection and Acceptance of the Work.** — If the municipality refuses to test the completed work to see if it complies with the contract it will be compelled to do so.¹² And the municipal engineer may be compelled to inspect the work and issue a certificate to the contractor if he finds the work done in accordance with the contract;¹³ so mandamus will lie to enforce the imperative duty of the municipal board to receive the completed work, upon the contract being fully complied with, and to order a warrant for its payment.¹⁴ But the discretion as to the approval of the work will not be controlled by mandamus,¹⁵ even though the officer may have erred¹⁶ in the exercise

Grant v. Common Council of Detroit, 91 Mich. 274, 51 N. W. 997. **N. Y.** *People ex rel. Ryan v. Aldridge*, 83 Hun. 279, 31 N. Y. Supp. 920.

11. **Ind.**—*Board of Comrs. of Jackson County v. Branaman* (Ind. App.), 79 N. E. 923. **Kan.**—*Eberhardt Const. Co. v. Board of Comrs. of Sedgwick County*, 100 Kan. 394, 164 Pac. 281. **Okla.**—*Commercial Nat. Bank v. Robinson*, 168 Pac. 810. **Wash.**—*State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321.

[a] **Rule Stated.**—Mandamus "will lie against public officers and against municipal corporations to enforce rights of private citizens growing out of contracts where those rights depend upon the performance of duties enjoined upon the officer or corporation by law." *Board of Comrs. of Jackson County v. Branaman* (Ind. App.), 79 N. E. 923.

12. *State ex rel. Tarr v. Crete*, 32 Neb. 568, 601, 49 N. W. 272.

13. **Ill.**—*Price v. Board of Local Improvements*, 266 Ill. 299, 107 N. E. 611. **Ind.**—*Conn v. Board of Comrs. of Cass County*, 151 Ind. 517, 51 N. E. 1062; *State ex rel. Roberts v. Bever*, 343 Ind. 488, 41 N. E. 802. **N. Y.**—*People ex rel. Cranford County v. Willcox*, 153 App. Div. 759, 138 N. Y. Supp. 1055; *People ex rel. Peck v. Buffalo State Asylum*, 55 Hun. 603, 8 N. Y. Supp. 395. See also *John H. Parker Co. v. New York*, 110 App. Div. 360, 97 N. Y. Supp. 200, holding building commissioner may be required to return precept after tearing down of an unsafe building. **Pa.**—*Com. v. Larkin*, 216 Pa. 128, 64 Atl. 908. **Wash.**—*State ex rel. Warehouse &*

Realty Co. v. Spokane, 65 Wash. 385, 118 Pac. 321.

[a] Even though there may be a dispute as to the amount due under the contract. *State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321.

[b] **But Not Where Contractor Failed To Fulfill His Contract.**—*Seymour v. Ely*, 37 Conn. 103.

14. *Board of Comrs. of Jackson County v. Branaman* (Ind. App.), 79 N. E. 923; *King v. Board of Comrs. of Martin County*, 34 Ind. App. 231, 72 N. E. 616; *People ex rel. Pierce Jr. Co. v. Sohmer*, 88 Misc. 250, 151 N. Y. Supp. 802. See *State ex rel. Tarr v. Crete*, 32 Neb. 568, 601, 49 N. W. 272.

[a] **Circumstances Necessary to Issuance of Writ.**—(1) Before the writ will issue to compel an acceptance of work, there must exist a clear and imperative duty to accept it. The relator must be without fault on his part, and must be without other adequate legal remedy. *Clifton v. State ex rel. Dickson*, 176 Ind. 33, 95 N. E. 305. (2) He must have fully complied with the contract, and must have made a demand upon the board to accept the work as completed. *Board of Comrs. of Jackson County v. Branaman* (Ind. App.), 79 N. E. 923.

15. *Federal Contract. Co. v. Board of Suprs. of Webster County*, 153 Iowa 362, 133 N. W. 765; *Littell v. Webster County*, 152 Iowa 206, 131 N. W. 691, 699, 132 N. W. 426; *State ex rel. Haney v. Clarke*, 112 Minn. 516, 128 N. W. 1008. But see *Nicely v. Raker*, 250 Pa. 392, 95 Atl. 558, requiring controller to approve certificate.

16. *Federal Contract. Co. v. Board of Suprs. of Webster County*, 153 Iowa 362, 133 N. W. 765; *Littell v. Webster*

of his judgment, unless fraud or bad faith is shown.¹⁷ And if there is a dispute as to the construction of the contract, the court will withhold its writ.¹⁸

(III.) **Estimates.** — Where work has been done under a contract with a municipality, the duty of the council to order an estimate,¹⁹ and to act on the estimate of the municipal engineer, and either approve or disapprove it,²⁰ may be enforced by mandamus, but its action on the estimate cannot be controlled.²¹

(IV.) **Payment.** — If a municipality has legally entered into a contract for the construction of certain improvements, mandamus will lie to enforce payment,²² or the levying of taxes therefor,²³ on completion of the work in compliance with the contract, if the party has no other adequate remedy.²⁴ And where pursuant to statute, the municipality has agreed to pay for improvements in bonds, mandamus is a proper remedy to compel execution and delivery of the bonds.²⁵ But the writ

County, 152 Iowa 206, 131 N. W. 691, 132 N. W. 426.

17. Federal Contract. Co. v. Board of Suprs. of Webster County, 153 Iowa 362, 133 N. W. 765.

18. Kensington Elec. Co. v. Philadelphia, 187 Pa. 446, 41 Atl. 309.

19. Greenfield v. State *ex rel.* Morse, 113 Ind. 597, 15 N. E. 241; Greencastle v. Allen, 43 Ind. 347. But see State *ex rel.* Fire and R. P. Const. Co. v. Icke, 136 Wis. 583, 118 N. W. 196, 20 L. R. A. (N. S.) 800, holding duty to make estimate is purely contractual, and writ will not lie.

20. Indianapolis v. Patterson, 33 Ind. 157.

21. Indianapolis v. Patterson, 33 Ind. 157.

22. Ind.—Wise v. McKeever, 184 Ind. 686, 112 N. E. 765; Ingberman v. State *ex rel.* Conroy, 128 Ind. 225, 27 N. E. 499; King v. Board of Comrs. of Martin County, 34 Ind. App. 231, 72 N. E. 616. La.—State *ex rel.* Henry v. New Orleans, 29 La. Ann. 863. N. Y. People *ex rel.* Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464 (*reversing* 96 App. Div. 607, 89 N. Y. Supp. 1113); People *ex rel.* Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 (*affirming* 56 App. Div. 98, 67 N. Y. Supp. 701). Ohio.—Mt. Vernon v. State *ex rel.* Berry, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. Rep. 783; Comrs. of Noble County v. Hunt & Co., 33 Ohio St. 169. Okla. Commercial Nat. Bank v. Robinson, 168 Pac. 810, compelling delivery of bonds in payment.

But see State *ex rel.* Elmendorf v.

Board of Finance, 41 N. J. L. 135; State *ex rel.* Little v. Township Committee, 37 N. J. L. 84.

[a] Failure of the contractor to comply with an unconstitutional labor law which he had agreed to comply with, will not preclude relief by mandamus. People *ex rel.* Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464 (*reversing*, 96 App. Div. 607, 89 N. Y. Supp. 1113, where contractor worked his men more than eight hours daily); People *ex rel.* Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814. Compare People *ex rel.* Lentillon v. Coler, 61 App. Div. 223, 70 N. Y. Supp. 482.

[b] Parties.—The landowners who paid the assessments creating the fund need not be parties. Ingberman v. State *ex rel.* Conroy, 128 Ind. 225, 27 N. E. 499.

23. See the title "Taxation."

24. State *ex rel.* Little v. Township Committee, 37 N. J. L. 84.

25. Ind.—Board of Comrs. of Jackson County v. Branaman (Ind. App.), 79 N. E. 923. Kan.—Chicago K. & W. R. R. Co. v. Board of Comrs. of Chase County, 49 Kan. 399, 30 Pac. 456; Smalley v. Yates, 36 Kan. 519, 13 Pac. 845. Neb.—State *ex rel.* Parks Co. v. Dahlman, 100 Neb. 416, 160 N. W. 117. Ohio.—Comms. of Noble Co. v. Hunt & Co., 33 Ohio St. 169. Okla. Commercial Nat. Bank v. Robinson, 168 Pac. 810.

As to issuance of bonds generally, see *supra*, IV, C, 9, d.

[a] On the relation of the city or the promisee, the officer will be re-

will not issue if the municipality had no authority to make the contract in question,²⁶ or if the contract is otherwise void.²⁷ Nor will payment be compelled if the contractor has not complied with the contract,²⁸ or if there is a fair ground of contest over the performance,²⁹ or the amount due.³⁰

11. **Public Works and Improvements and Utilities.**³¹—a. *Construction and Purchase.*—A mandatory duty as to construction of public improvements will be enforced by mandamus,³² unless there is no money or fund appropriated or available for the improvement,³³ or unless debt beyond what can be raised by taxation would be created thereby.³⁴ But a discretion as to the construction³⁵ or purchase³⁶ will not be controlled unless the officers acted fraudulently or corruptly.³⁷

b. *Payment of Damages.*—Mandamus is a proper remedy to compel the payment of damages awarded for property taken for public use.³⁸ But the action of the board in rejecting a claim for damages cannot be thus reviewed.³⁹

c. *Maintenance and Operation.*—A duty imposed upon a municipality by its charter to maintain and operate a public utility such as a ferry may be enforced by mandamus.⁴⁰ And if the city violates the law as to the manner of operation, mandamus is a proper remedy.⁴¹

quired to perform his duty and execute bonds. *People ex rel. Taylor v. Brennan*, 39 Barb. (N. Y.) 522.

26. *State v. Halsted*, 39 N. J. L. 402.

27. *State ex rel. Romaine v. West*, 26 La. Ann. 322.

28. *Dameron v. Justices of Cleveland*, 46 N. C. 484.

29. *People ex rel. Rolf v. Coler*, 58 App. Div. 347, 68 N. Y. Supp. 1101; *Mt. Vernon v. State ex rel. Berry*, 71 Ohio St. 428, 453, 73 N. E. 515, 104 Am. St. Rep. 783.

30. *People ex rel. Rolf v. Coler*, 58 App. Div. 347, 68 N. Y. Supp. 1101.

31. As to drains, see the title "Waters and Watercourses."

32. *Williams v. New Haven*, 65 Conn. 263, 36 Atl. 61; *People v. Welch*, 252 Ill. 167, 96 N. E. 991; *Langan v. Milk's Grove Special Drainage Dist.*, 239 Ill. 430, 85 N. E. 182.

As to construction of public buildings, see *infra*, IV, C, 11, e.

33. *Com. ex rel. Miller v. McFadden*, 14 Phila. (Pa.) 161; *State ex rel. Van Lyssel v. Scheuring*, 154 Wis. 93, 141 N. W. 1001.

34. *Mich.*—*People ex rel. Goodsell v. Post*, 30 Mich. 353. *N. J.*—*Justice v. Logan Twp.*, 71 N. J. L. 107, 58 Atl. 74. *W. Va.*—*State ex rel. Matheny v. County Court*, 47 W. Va. 672, 35 S. E. 959.

35. *Ill.*—*People ex rel. Moody v. Henry*, 236 Ill. 124, 86 N. E. 195, as to substituting tile for open ditches. *Ky.*—*Moore v. Harrodsburg*, 32 Ky. L. Rep. 395, 105 S. W. 925, as to extension of water mains. *Me.*—*Lawrence v. Richards*, 111 Me. 95, 88 Atl. 92, 47 L. R. A. (N. S.) 654, as to extension of water mains. *Mass.*—*Smith v. Comr. of Public Wks.*, 215 Mass. 353, 102 N. E. 362. *N. Y.*—*In re Wheeler*, 62 Misc. 37, 115 N. Y. Supp. 605, as to establishment of new ferries.

36. *State ex rel. Dayton G. Road Co. v. Board of Comrs.*, 131 Ind. 90, 30 N. E. 892, in regard to purchase of road.

37. *People ex rel. Moody v. Henry*, 236 Ill. 124, 86 N. E. 195.

38. *Furbish v. County Comrs.*, 93 Me. 117, 44 Atl. 364 (to compel issuance of distress warrant against water company to enforce payment of damages awarded by commissioners); *In re Macholdt*, 144 App. Div. 1069, 123 N. Y. Supp. 1069.

As to land taken for highways see 11 STANDARD PROC. 112.

39. *Collins v. Board of Suprs. of Pottawattamie County*, 158 Iowa 322, 138 N. W. 1095.

40. *In re Wheeler*, 62 Misc. 37, 115 N. Y. Supp. 605.

41. *Attorney General v. Boston*,

d. *Fixing Rates*.—In fixing rates as to public utilities, a board acts judicially and mandamus is not a proper remedy to review the exercise of the board's judgment.⁴²

e. *Public Buildings*.—Whether mandamus is a proper remedy to compel the construction of public buildings depends on whether the duty is discretionary or whether it is one imposed by law.⁴³ The discretion of municipal authorities as to kind and character of public buildings will not be interfered with by mandamus.⁴⁴

f. *Highways, Streets and Bridges*.—Mandamus is a proper remedy to compel the opening of highways,⁴⁵ or construction of bridges,⁴⁶ to compel the payment of damages allowed for land taken,⁴⁷ as well as to compel the performance of duties as to repair of highways⁴⁸ and bridges,⁴⁹ and of duties as to removal of obstructions on highways.⁵⁰ And if a railroad fails to perform its duty to restore a highway to its former state of usefulness, mandamus will lie.⁵¹

g. *Sewers and Refuse*.—The duty to allow persons to tap a public sewer may be enforced by mandamus,⁵² unless the matter rests in the discretion of the board.⁵³ While a city may assume a duty to remove refuse from buildings, it cannot be compelled by mandamus to do so.⁵⁴

h. *Wharves*.—The performance of duties as to wharves, by municipal officers, may be compelled by mandamus,⁵⁵ if there is no other

123 Mass. 460, 478, where the city maintained a free ferry when the law authorized a toll ferry only.

42. *Jacobs v. Board of Suprs. of San Francisco*, 100 Cal. 121, 34 Pac. 630. See generally the title "*Public Service Corporations*."

43. *Fla.*—*Gamble v. State ex rel. Cassady*, 61 Fla. 233, 54 So. 370; *State ex rel. McClenny v. County Comrs. of Baker County*, 22 Fla. 29. *Ill.*—*People ex rel. Bull v. Board of Suprs. of La Salle County*, 84 Ill. 303, 25 Am. Rep. 461. *Mass.*—*Com. v. Justices of the Court of Sessions*, 2 Pick. 414. *Mich.*—*Attorney General ex rel. Greenfield v. Board of Suprs. of Alcona County*, 167 Mich. 666, 133 N. W. 825. *Mo.*—*State ex rel. Howard Co. v. Justices*, 58 Mo. 583. *Ohio.*—*Ex parte Black*, 1 Ohio St. 30, in determining when public buildings shall be erected, the board has a discretion. *Va.*—*Broadbuss v. Essex County Suprs.*, 99 Va. 370, 38 S. E. 177.

[a] *When Writ Will Lie*.—The performance of a duty to construct public buildings may be compelled where the board refuses to provide a building at all, or provides one which is not intended to be a compliance with the duty enjoined. But where the board has erected what they in good faith believe to be a compliance, the

writ will not issue. *Broadbuss v. Essex County Suprs.*, 99 Va. 370, 38 S. E. 177, fireproof clerk's office.

44. *State ex rel. McClenny v. County Comrs. of Baker County*, 22 Fla. 29; *People ex rel. Bull v. Board of Suprs. of La Salle County*, 84 Ill. 303, 25 Am. Rep. 461. See also *Broadbuss v. Essex County Suprs.*, 99 Va. 370, 38 S. E. 177.

45. See 11 STANDARD PROC. 105.

46. See 11 STANDARD PROC. 271.

47. See 11 STANDARD PROC. 112.

48. See 11 STANDARD PROC. 123.

49. See 11 STANDARD PROC. 271.

50. See 11 STANDARD PROC. 170.

51. See 11 STANDARD PROC. 124.

52. *Springmyer v. State ex rel. Bowler*, 1 Ohio Cir. Ct. 501, 1 Ohio Cir. Dec. 279.

[a] *On refusal to allow tapping a sewer until payment of a void assessment, mandamus will lie.* *Meyler v. Meadville*, 23 Pa. Co. Ct. 119.

53. *State ex rel. Thoms v. Board of Public Wks.*, 6 Ohio Dec. (Reprint) 769.

54. *People ex rel. Webster v. Chicago*, 277 Ill. 394, 115 N. E. 570.

55. *Wool v. Edenton*, 115 N. C. 10, 20 S. E. 165 (duty to designate wharf line); *Wool & Edenton*, 113 N. C. 33, 18 S. E. 76; *Tatham v. Wardens of*

adequate remedy;⁵⁶ but discretionary matters will not be interfered with.⁵⁷

12. Claims Against Municipalities. — a. When Mandamus Will Lie.

(I.) To Compel Adjustment and Allowance of Claim. — (A.) COMPELLING ACTION. — Mandamus is a proper remedy to require the auditing officers to take action on a claim properly presented where they decline to act upon it at all when it is their duty to do so,⁵⁸ unless another remedy is available,⁵⁹ or the claim has been already passed on and rejected by the board.⁶⁰ And if the board allow a gross sum when it is their duty to pass on each item of a claim, mandamus will lie.⁶¹

(B.) CONTROLLING ALLOWANCE AND REJECTION. — (1.) Unliquidated Claims. It is a general rule that in the adjustment of unliquidated claims and claims of a general nature, the municipal corporation acts judicially and mandamus will not lie to control its action⁶² even though errone-

Philadelphia, 2 Phila. (Pa.) 246, to define line of low water mark.

56. *Com. v. Clark*, 6 Phila. (Pa.) 498, where the statute allows an appeal from a refusal to allow building of a wharf.

57. *Kennedy v. Washington*, 3 Cranch C. C. 595, 14 Fed. Cas. No. 7, 708 (as to making regulations in regard to erection of private wharves); *State ex rel. Louisiana Const. Imp. Co. v. Fitzpatrick*, 47 La. Ann. 1329, 17 So. 328, enforcing an ordinance relating to removing produce landed on wharves in specified time.

58. *Ala.—State ex rel. Ellis v. Board of Revenue of Jefferson County*, 172 Ala. 190, 55 So. 179. *Ark. Rolfe v. Spybuck Drainage Dist. No. 1*, 101 Ark. 29, 140 S. W. 988; *Shaver v. Lawrence Co.*, 44 Ark. 225. *Colo. People v. Auditor*, 2 Colo. 97. *Fla. County Comrs. of De Soto Co. v. Howell*, 51 Fla. 160, 40 So. 192. *Ga. Allen v. Pool*, 131 Ga. 116, 62 S. E. 31. *Ind.—Board of Comrs. of Lake County v. State*, 179 Ind. 644, 102 N. E. 97. *La.—State ex rel. Luminais v. Judges*, 34 La. Ann. 1114. *Mich.—People ex rel. Kuhn v. Board of Auditors*, 10 Mich. 307; *People ex rel. Bristow v. Supervisors of Macomb Co.*, 3 Mich. 475. *N. Y.—People ex rel. Dady v. Prendergast*, 203 N. Y. 1, 96 N. E. 103; *Martin v. Board of Suprs.*, 29 N. Y. 645; *Huff v. Knapp*, 5 N. Y. 65; *People ex rel. Kings County G. & I. Co. v. Schieren*, 89 Hun 220, 35 N. Y. Supp. 64. *N. C.—Koonce v. Board of Comrs. of Jones Count*, 106 N. C. 192, 10 S. E. 1038. *Ohio.—State ex rel.*

Gerke v. Board of Comrs., 26 Ohio St. 364. *S. C.—State ex rel. McGahan v. Morris*, 67 S. C. 153, 45 S. E. 178. *Tex.—Auditorial Board v. Arles*, 15 Tex. 72. *Wis.—Kraft v. Madison*, 98 Wis. 252, 73 N. W. 775.

[a] Where solely on the ground of lack of jurisdiction, the board refuses to consider a claim, mandamus is the proper remedy. *Deuel v. Gaynor*, 141 App. Div. 630, 126 N. Y. Supp. 112.

[b] Presentation of an itemized account must be alleged, when the presentation of such an account is required. *Chatters v. Coahoma Co.*, 73 Miss. 351, 19 So. 107.

59. See *infra*, IV, C, 12, b.

60. *State ex rel. Kendall v. County Comrs.*, 28 S. C. 258, 5 S. E. 622.

[a] Although the personnel of board has changed since rejection. *State ex rel. Kendall v. County Comrs.*, 28 S. C. 258, 5 S. E. 622.

61. *People ex rel. Thurston v. Board of Town Auditors*, 82 N. Y. 80; *Taylor v. Salt Lake County Court*, 2 Utah 405.

62. *Ala.—State ex rel. Ellis v. Board of Revenue of Jefferson County*, 172 Ala. 190, 55 So. 179; *Scarborough v. Watson*, 140 Ala. 349, 37 So. 281, he has remedy by action. *Cal. Tilden v. Board of Suprs. of Sacramento County*, 41 Cal. 68. *Conn. State ex rel. New York & N. E. R. R. Co. v. Asylum St. Bridge Com.*, 63 Conn. 91, 26 Atl. 580. *Fla.—County Comrs. of De Soto County v. Howell*, 51 Fla. 160, 40 So. 192. *Me.—Bangor v. County Comrs.*, 87 Me. 294, 32 Atl. 903. *Mass.—Smith v. Boston*, 1 Gray

ous, unless they act improperly or fraudulently.⁶³ It is a duty of the board, which may be enforced by mandamus, to audit and allow a claim at some amount where it is legally chargeable against the municipality and where there is no dispute as to its existence,⁶⁴ provided there are sufficient funds in the treasury to pay it, or the claim may be included in the next tax levy.⁶⁵ Some courts deny the writ in this case because there is an adequate remedy by action at law on rejection of the claim,⁶⁶ or by appeal from the rejection.⁶⁷ But in determining whether or not services were rendered,⁶⁸ or in determining the time the relator performed the services in question,⁶⁹ the board acts judicially and mandamus will not lie to review their action even though they may have committed errors. Likewise the discretion of the board as to the amount for which the claim shall be allowed will not be controlled, in the absence of its abuse,⁷⁰ and where the board

72. **Mo.**—*State ex rel. Heman v. Fiad*, 108 Mo. 614, 18 S. W. 1128; *State ex rel. Watkins v. Macon County Court*, 68 Mo. 29, 49. **Neb.**—*State ex rel. Ensey v. Churchill*, 37 Neb. 702, 56 N. W. 484. **N. Y.**—*People ex rel. Brown v. Board of Apportionment*, 52 N. Y. 224. **Ohio.**—*State ex rel. Gerke v. Board of Comrs.*, 26 Ohio St. 364, 369. **S. C.**—*State ex rel. McGahan v. Morris*, 67 S. C. 153, 167, 45 S. E. 178. **S. D.**—*Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141. **Tenn.**—*Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245. **Tex.**—*Auditorial Board v. Arles*, 15 Tex. 72.

63. *Huff v. Knapp*, 5 N. Y. 65.

64. **Ala.**—*Marengo Co. v. Lyles*, 101 Ala. 423, 12 So. 412, claim for hire of servant. **Ark.**—*Brem v. Arkansas County Court*, 9 Ark. 240, under statute requiring allowance to be made for medical aid for paupers dying in a county. **Fla.**—*Board of Comrs. of Escambia County v. Board of Pilot Comrs.*, 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196. **Ga.**—*Cheney v. Newton*, 67 Ga. 477. **Mich.**—*People ex rel. Bristow v. Suprs. of Macomb County*, 3 Mich. 475, claim for expenses in removing persons with infectious diseases. **Neb.**—*State ex rel. Butler Co. Agr. Soc. v. Coufal*, 1 Neb. (Unof.) 128, 95 N. W. 362. **N. Y.**—*People ex rel. Gardenier v. Bd. of Suprs. of Columbia County*, 134 N. Y. 1, 31 N. E. 322; *People ex rel. Otsego Co. Bank v. Board of Suprs.*, 51 N. Y. 401, 407; *People ex rel. Smart v. Board of Suprs. of Washington Co.*, 66 App. Div. 66, 72 N. Y. Supp. 568 (claim for expenses before governor

in proceedings for removal of county officer); *Ramsdale v. Board of Suprs. of Orleans County*, 8 App. Div. 550, 40 N. Y. Supp. 840 (where board rejected claim for services because an "improper charge"). But see *People ex rel. Myers v. Town Auditors*, 44 Hun 574, 8 N. Y. St. 531, holding the rejection of a legal claim is an error of law reviewable by certiorari. **S. C.**—*Padgett v. McAlhany*, 53 S. C. 139, 31 S. E. 58. **Utah.**—*Taylor v. Salt Lake County Court*, 2 Utah 405.

[a] The allowance of certificates for jury service which are properly issued may be required. In the matter of *Woffenden*, 1 Ariz. 237, 25 Pac. 647.

65. **Cal.**—*Smith v. Broderick*, 107 Cal. 644, 655, 40 Pac. 1033, 48 Am. St. Rep. 167, where indebtedness of preceding year could not be paid out of revenue of following year. **Neb.**—*Board of County Comrs. of Lancaster v. State ex rel. Miller*, 13 Neb. 523, 14 N. W. 517. **N. Y.**—*People ex rel. Mulholland Co. v. Nowak*, 163 N. Y. Supp. 374. **Okla.**—*Huddleston v. Boards of Comrs. of Noble County*, 8 Okla. 614, 58 Pac. 749.

66. See *infra*, IV, C, 12, b, (III).

67. See *infra*, IV, C, 12, b (II).

68. *People ex rel. Kuhn v. Board of Anditors*, 10 Mich. 307.

69. *People ex rel. Baldwin v. Board of Suprs. of Livingston County*, 26 Barb. (N. Y.) 118.

70. *People ex rel. Johnson v. Bd. of Suprs. of Delaware County*, 45 N. Y. 196; *Denel v. Gaynor*, 141 App. Div. 630, 126 N. Y. Supp. 112; *People ex rel. Kings Co. G. & I. Co. v. Schieren*, 89 Hun 220, 35 N. Y. Supp. 64.

has once in good faith exercised its judgment as to the amount for which a claim shall be allowed, mandamus will not lie to compel it to audit anew and allow a greater amount,⁷¹ as where they are required to and do fix a reasonable compensation,⁷² unless they allow such a sum only as furnishes evidence of dishonesty and abuse of official power.⁷³

(2.) *Liquidated Claims*. — If the municipal board refuses to allow a claim that is liquidated by another tribunal,⁷⁴ or by judgment,⁷⁵ or one whose amount is fixed by statute,⁷⁶ mandamus will issue to compel its allowance. And should the board allow the claim for a less than the liquidated amount, the writ will lie.⁷⁷ If the claim consists of several items, some of which are properly rejected, it has been held that the writ may issue as to those items which should have been allowed.⁷⁸

When the board allows a sum in excess of that authorized by law, a tax payer may compel a revocation of the allowance as to the excess.⁷⁹

(3.) *Invalid Claims*. — Of course when a claim is not a proper charge against the corporation, mandamus will not lie to compel its allowance.⁸⁰

(C.) ALLOWING AMENDMENT OF CLAIM. — Mandamus will lie to compel the auditing officers to allow a claimant to amend an informal bill or claim.⁸¹

(II.) *Audit*. — The auditor's duty to audit an allowed claim may be enforced by mandamus.⁸² But to the extent that it is judicial his action will not be controlled,⁸³ unless he acts through caprice or with-

71. *People ex rel. Johnson v. Suprs. of Delaware County*, 45 N. Y. 196.

72. *Hull v. Suprs. of Oneida Co.*, 19 Johns. (N. Y.) 259, 10 Am. Dec. 223. See *People ex rel. Dunn v. Metz*, 115 App. Div. 269, 100 N. Y. Supp. 913.

73. *People ex rel. Bristow v. Supervisors of Macomb County*, 3 Mich. 475.

74. Mich.—*Marathon v. Oregon*, 8 Mich. 372, where township indebtedness is settled by town boards on division, the claim is liquidated and the new board must allow it. Miss.—*Chatters v. Coahoma Co.*, 73 Miss. 351, 19 So. 107. Wis.—*State ex rel. Van Vliet v. Wilson*, 17 Wis. 687, audit of claim for damages for land taken which were assessed by appraisers.

75. *Lyons v. Cooledge*, 89 Ill. 529. See *infra*, IV, C, 12, a, (VIII), (A).

76. Cal.—*Price v. Sacramento Co.*, 6 Cal. 254. N. Y.—*People ex rel. Kinney v. Bd. of Suprs. of Cortland County*, 58 Barb. 139, 146, 40 How Pr. 53. Vt.—*Peck v. Powell*, 62 Vt. 296, 19 Atl. 227.

Mandamus to compel audit of claims for salaries fixed by law, see the title "Officers."

77. *State ex rel. Starry v. Board of Comrs.*, 136 Ind. 207, 35 N. E. 1100; *People ex rel. Bristow v. Suprs. of Macomb County*, 3 Mich. 475.

78. *Chatters v. Coahoma Co.*, 73 Miss. 351, 19 So. 107.

79. *People ex rel. Lawrence v. Board of Suprs. of Westchester*, 73 N. Y. 173.

80. *Birch v. Phelan*, 127 Cal. 49, 59 Pac. 209, where claim for jury services was not payable out of city treasury.

81. *People ex rel. Mason v. Bd. of Suprs. of Wayne County*, 45 Hun 62, 9 N. Y. St. 437.

82. *City of Columbia v. Spigener* (S. C.), 67 S. E. 552.

83. Cal.—*Rooney v. Snow*, 131 Cal. 51, 63 Pac. 155. N. J.—*Ahrens v. Fiedler*, 43 N. J. L. 400, the duty of the auditor in examining and comparing the warrant with his records and in determining whether there are errors is to a certain extent judicial. N. Y.—*People ex rel. Duff v. Booth*, 49 Barb. 31, 32 How. Pr. 17. Pa.—*Dech-*

out regard to the facts before him.⁸⁴ His discretionary power is exhausted where his action on the claim is appealed to the proper board and is reversed, and then if he refuses to audit the claim and draw his warrant, mandamus will issue.⁸⁵ Similarly where the engineer or other officer issues a certificate for labor performed under a valid contract, the auditor has no discretion and the writ will issue against him.⁸⁶

(III.) Recordation, Advertisement and Certification of Audited Claims.

Mandamus lies to compel the performance of a duty to number and record,⁸⁷ and advertise⁸⁸ claims which are audited, and to file a certificate in conformity with the statute.⁸⁹

(IV.) Issuance of Warrants. — (A.) GENERALLY. — If the issuance and signing of a municipal warrant rests in the discretion of the officer, mandamus will not issue to control his action,⁹⁰ unless the discretion is abused.⁹¹ But where the duty is ministerial, mandamus is a proper remedy to compel the drawing and issuing,⁹² the signing and counter-

ert v. Com. ex rel. Smart, 113 Pa. 229, 6 Atl. 229; *Runkle v. Com. ex rel. Keppelman*, 97 Pa. 328.

[a] **Discretion of Auditor.** — As the auditor must satisfy himself that the money is legally due before he audits a claim and draws his warrant, he cannot be required to draw his warrant for a claim he is authorized to reject. *Rooney v. Snow*, 131 Cal. 51, 63 Pac. 155. (2) But if the claim is in fact legal, he will be required to issue his warrant where he erroneously decides otherwise under a statute requiring him to satisfy himself the proceedings are legal. *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249.

84. *City of Columbia v. Spigener* (S. C.), 67 S. E. 552.

85. *Contra, Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Falk v. Strother*, 84 Cal. 544, 22 Pac. 676, 24 Pac. 110. See also *American La France F. E. Co. v. Seymour*, 79 N. J. L. 92, 74 Atl. 439; *Salmon v. Haynes*, 50 N. J. L. 97, 11 Atl. 151, where the council passed a resolution over the mayor's veto, it is his duty to sign the warrant.

86. In the matter of *Freel*, 148 N. Y. 165, 42 N. E. 586.

87. *Kelso v. Teale*, 106 Cal. 477, 39 Pac. 948; *State ex rel. Barrow v. Fisher*, 30 La. Ann. 514. See also *Gray v. Abbott*, 130 Ala. 222, 30 So. 346, filing and registry of witness certificates will be compelled.

88. *State ex rel. Foose v. Burley*,

80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266.

[a] That there are funds in the treasury applicable to the payment of the expenses of advertising need not be alleged in the petition. *State ex rel. Foose v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266.

89. *People ex rel. Boyce v. Page*, 105 App. Div. 212, 94 N. Y. Supp. 660; *People ex rel. Hamm v. Bd. of Auditors*, 43 App. Div. 22, 59 N. Y. Supp. 615; *People ex rel. Remington v. Manning*, 37 App. Div. 141, 55 N. Y. Supp. 781; *People ex rel. Ripp v. Town Board*, 27 Misc. 469, 59 N. Y. Supp. 248.

[a] **Relator.**—Any citizen of the municipality or the person having an account or claim which is not audited in the manner provided by the statute may institute mandamus proceedings to enforce the statute. *People ex rel. Remington v. Manning*, 37 App. Div. 141, 55 N. Y. Supp. 781.

90. *Ala.*—*Lovelady v. Copeland*, 73 So. 948. *N. Y.*—*People ex rel. Green v. Wood*, 13 Abb. Pr. 374, 35 Barb. 653, 22 How. Pr. 286. *Wis.*—*State ex rel. Rudolph v. Hutchinson*, 134 Wis. 283, 114 N. W. 453.

[a] **A discretion as to what fund a warrant shall be drawn on** is not controllable by mandamus. *Lovelady v. Copeland* (Ala.), 73 So. 948.

91. *Com. ex rel. City Sewage Co. v. Hancock*, 9 Phila. (Pa.) 535, 29 Leg. Int. 108; *City of Columbia v. Spigener* (S. C.), 67 S. E. 552.

92. *Ala.* — *Lovelady v. Copeland*

signing,⁹³ and sealing,⁹⁴ of a municipal warrant, unless the relator has an adequate remedy by appeal,⁹⁵ or, according to some authorities, by action.⁹⁶

In accordance with the general rules, the issuance of a warrant will not be compelled if the relator has not a clear legal right to it,⁹⁷ although it has been held that the officer will be required to issue his warrant, despite his refusal to do so on grounds outside his province.⁹⁸ If the necessary prerequisites have not been complied with,⁹⁹ and the claim has not been presented to the proper authorities and allowed

(Ala.), 73 So. 948; *State ex rel. Ellis v. Board of Revenue of Jefferson County*, 172 Ala. 190, 55 So. 179. Cal. *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941; *Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684; *Burr v. Board of Suprs.*, 30 Cal. App. 755, 159 Pac. 458. Del.—*State ex rel. Jacobs v. Herdman*, 5 Boyce 555, 95 Atl. 549. Idaho. *Wycoff v. Strong*, 26 Idaho 502, 144 Pac. 341. Ind.—*Watkins v. State ex rel. Van Auken*, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79. La.—*State ex rel. Pinac v. Mount*, 21 La. Ann. 352; *Shaw v. Howell*, 18 La. Ann. 195. Mich. *Joliet Bridge & Iron Co. v. Freeman*, 149 Mich. 274, 112 N. W. 928; *People ex rel. Martin v. Board of Auditors*, 5 Mich. 223. Minn.—*State ex rel. Kron v. Hodapp*, 104 Minn. 309, 116 N. W. 589. Mo.—*State ex rel. Baker v. Fraker*, 166 Mo. 130, 140, 65 S. W. 720 (issuance of warrant for bill of costs); *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S. W. 524; *Steffen v. Long*, 165 Mo. App. 254, 147 S. W. 191. N. J.—*Crane v. Shoenthal*, 76 N. J. L. 378, 69 Atl. 972; *State ex rel. Compton v. Anderson*, 52 N. J. L. 150, 18 Atl. 584. N. Y.—*People ex rel. Smith v. Clarke*, 174 N. Y. 259, 66 N. E. 819; *People ex rel. Scott v. Suprs. of Chenango*, 8 N. Y. 317, 330. Ohio.—*State v. Hoffman*, 35 Ohio St. 435; *Ryan v. Hoffman*, 26 Ohio St. 109; *Burnet v. Auditor of Portage County*, 12 Ohio 54. S. C.—*State ex rel. Cummings v. Kirby*, 17 S. C. 563. Tex.—*Altgelt v. Campbell* (Tex. Civ. App.), 78 S. W. 967. Wash.—*State ex rel. Beach v. Olsen*, 91 Wash. 56, 157 Pac. 34; *State ex rel. Barto v. Board of Comrs. of Drainage Dist.*, 46 Wash. 474, 90 Pac. 660. Wis.—*Sharp v. Mauston*, 92 Wis. 629, 66 N. W. 803; *Frey v. Fond du Lac*, 24 Wis. 204.

[a] Where the court directs another officer to pay the allowance out of another fund, the respondent will

not be compelled to draw his warrant on the treasury. *State ex rel. Morrison v. Morris*, 103 Ind. 161, 2 N. E. 355.

93. Cal.—*McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249, the refusal of the auditor to counter-sign the warrant is not a final determination so as to preclude mandamus. Idaho.—*Rice v. Gwinn*, 5 Idaho 394, 49 Pac. 412. Ill.—*People v. Hastings*, 5 Ill. App. 436. Minn.—*State ex rel. Trebby v. Vasaly*, 98 Minn. 46, 107 N. W. 818; *State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 440, 18 N. W. 277. N. J.—*American La France F. E. Co. v. Seymour*, 79 N. J. L. 92, 74 Atl. 439; *Salmon v. Haynes*, 50 N. J. L. 97, 11 Atl. 151. Pa.—*Breslin v. Earley*, 36 Pa. Super. 49; *Com. ex rel. Walton v. Lyndall*, 2 Brewst. 425. Wash.—*State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, 134 Pac. 492. Wis.—See *State ex rel. Jordan v. Bechtner*, 132 Wis. 632, 113 N. W. 42.

94. *Prescott v. Gonser*, 34 Iowa 175.

95. See *infra*, IV, C, 12, b, (II).

96. See *infra*, IV, C, 12, b, (III).

97. Ill.—*Scanlan v. Schwab*, 103 Ill. App. 93. N. J.—*O'Hara v. Fagan*, 56 N. J. L. 279, 27 Atl. 1089. N. Y. *People ex rel. Rolf v. Coler*, 58 App. Div. 131, 68 N. Y. Supp. 448; *People ex rel. Duff v. Booth*, 49 Barb. 31, 32 How. Pr. 17, where another person is suing for amount of claim.

98. *Com. ex rel. Century Co. v. Philadelphia*, 176 Pa. 588, 35 Atl. 195; *Breslin v. Early*, 36 Pa. Super. 49.

99. See *infra*, this note.

[a] In the absence of the mayor's sanction (1) to the council's resolution of a warrant in accordance therewith will not lie (*Padavano v. Fagan*, 66 N. J. L. 167, 48 Atl. 998), (2) unless in

by them, when required by law,¹ or if there are informalities in the presentation of the account which are the basis of the refusal of the officer to issue his warrant,² the peremptory writ will not issue. And although the relator's claim may have been audited and allowed, the writ will not be granted where the order of allowance is wholly unauthorized, or was made by mistake or otherwise.³ This is the case where the claim is not a legal claim against the municipality,⁴ or where the contract with it is illegal.⁵ So also if a warrant does not comply with the statute, the court will not compel the officer to sign it.⁶ If the auditor is directed to draw a warrant in favor of a particular person he cannot be compelled by mandamus to draw a warrant in favor of another even though he has notice of an assignment to the latter.⁷

Where Board Directs Auditor Not To Issue Warrant. — If the board has power to rescind its resolution or order for issuance of a warrant, mandamus will not lie if it has rescinded its action,⁸ but it is otherwise if the board has no such authority.⁹

Where Statute Is Invalid. — If the statute requiring a controller to draw a warrant is invalid on its face, the court will deny the writ.¹⁰

a case where the council passes the resolution over his veto. *Salmon v. Haynes*, 50 N. J. L. 97, 11 Atl. 151.

1. *Ala.*—*State ex rel. Ellis v. Board of Revenue of Jefferson County*, 172 Ala. 190, 55 So. 179. *Ind.*—*State ex rel. Board of Comrs. v. Jamison*, 142 Ind. 679, 42 N. E. 350; *Trant v. State*, 140 Ind. 414, 39 N. E. 513. *N. Y.* *People ex rel. Smith v. Flagg*, 17 N. Y. 584, 16 How. Pr. 36. *Ohio.*—*State ex rel. Flanagan v. McConnell*, 28 Ohio St. 589. *Pa.*—*Stegmaier v. Goeringer*, 218 Pa. 499, 67 Atl. 782.

2. *Clapp v. Titus*, 138 Mich. 41, 100 N. W. 1005 (granting writ as mayor did not put his refusal to sign the orders on the ground of informalities); *State v. Daly*, 50 N. J. L. 356, 13 Atl. 6.

3. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *State ex rel. Manix v. Auditor of Drake County*, 43 Ohio St. 311, 1 N. E. 209.

4. *Cal.*—*Hilton v. Curry*, 124 Cal. 84, 56 Pac. 784, where jury services were not proper claim against public treasury. *Ga.*—See *Robert v. Wilkinson County*, 137 Ga. 601, 73 S. E. 838; *Barksdale v. Hayes*, 134 Ga. 348, 67 S. E. 852; *Brunson v. Caskie*, 127 Ga. 501, 56 S. E. 621, 9 L. R. A. (N. S.) 1002. *Ill.*—*People v. Hastings*, 5 Ill. App. 436. *N. Y.*—*People ex rel. Kelly v. Haws*, 12 Abb. Pr. 192, 21 How. Pr. 117. *Ohio.*—*State ex rel. Pollock*

v. Cappeller, 6 Ohio Dec. (Reprint) 863. *Vt.*—*Farr v. St. Johnsbury*, 73 Vt. 42, 50 Atl. 548.

[a] But when the claim is submitted to the electors and taxpayers, and a tax is voted and raised to pay it, mandamus will compel issuance of a warrant even though originally the claimant could not have judicially enforced his claim. *State ex rel. Wunderlich v. Kalkofen*, 134 Wis. 74, 113 N. W. 1091.

5. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4.

[a] A contract arbitrarily let to a high bidder without any showing that the lower bidders are not responsible is void. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4.

[b] Where an appropriation is necessary for valid existence of a contract, and none has been made. *Com. v. Foster*, 215 Pa. 177, 64 Atl. 367.

6. *Patterson v. State ex rel. Dusenbery*, 2 Neb. (Unof.) 765, 89 N. W. 989.

7. *Sheerer v. Edgar*, 76 Cal. 569, 18 Pac. 681. See also *Watkins v. State ex rel. Van Auken*, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79.

8. *People ex rel. Harms v. Klokke*, 92 Ill. 134.

9. *State ex rel. Manix v. Auditor of Drake County*, 43 Ohio St. 311, 1 N. E. 209.

10. *Patty v. Colgan*, 97 Cal. 251, 31

(B.) EFFECT OF LACK OF FUNDS.—Mandamus to compel the issuance of a warrant is not prevented by the lack of funds in the treasury,¹¹ unless, under the statute, the board is under no duty to issue warrants in the absence of funds in the treasury.¹² In such a case, however, the relator may compel the proper officers to include his claim if valid and subsisting, in the estimate for the ensuing year.¹³

(C.) ISSUANCE OF NEW WARRANTS.—Where an auditor has complied with an order of the board and drawn a proper warrant, the court will not mandamus him to draw another.¹⁴ But if the warrants issued are irregular, a duty to issue proper warrants will be enforced by mandamus.¹⁵ And if the warrant drawn is wrongfully collected by the officer drawing it, the issuance of a proper warrant to the claimant will be compelled, as the case is the same as though the warrant was destroyed before delivery.¹⁶ The same is true if the warrant is paid to an officer levying an execution against the claimant, since the warrant is not subject to levy.¹⁷

(V.) Payment of Claims Generally.—(A.) GENERAL RULE.—The payment of claims against a municipality which are not ascertained to be due and are not liquidated by some competent officer or tribunal will not be compelled by mandamus.¹⁸ To justify the issuance of the writ, the fiscal officer of the municipality must have no duty except the mere ministerial act of making payment.¹⁹ If the claim is liquidated

Pac. 1133, 18 L. R. A. 744. See the title "Officers."

11. Del.—State *ex rel.* Jacobs v. Herdman, 5 Boyce 555, 95 Atl. 549. Mo.—Wallendorf v. County Justices, 45 Mo. 228. Ohio.—State v. Hoffman, 35 Ohio St. 435.

12. Ark.—Board of Improvement v. McManus, 54 Ark. 446, 15 S. W. 897. Cal.—Cramer v. Suprs. of Sacramento, 18 Cal. 384. But compare Robertson v. Board of Library Trustees, 136 Cal. 403, 69 Pac. 88. Miss.—State *ex rel.* Barron v. Cole, 81 Miss. 174, 32 So. 314. Neb.—Patterson v. State *ex rel.* Dusenbery, 2 Neb. (Unof.) 765, 89 N. W. 989. Pa.—Com. *ex rel.* Price v. Comrs. of Philadelphia, 1 Whart. 1. S. C.—State *ex rel.* People's Bank v. Goodwin, 59 S. E. 35; s. c., 81 S. C. 419, 62 S. E. 1100; McCaslan v. Major, 64 S. C. 188, 41 S. E. 893.

[a] Although the board has set apart a special fund for the payment of certain claims payable out of the general fund, the exhaustion of the special fund will not prevent the issuance of mandamus if the general fund is ample. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167.

13. State *ex rel.* Custer Co. Agr. Soc. v. Robinson, 35 Neb. 401, 53 N. W. 213.

14. Sheerer v. Edgar, 76 Cal. 569, 18 Pac. 681; State *ex rel.* Boston Woven Hose Co. v. Lewis, 4 Ohio, Nisi Prius 176, 6 Ohio Dec. 221.

15. Abernethy v. Medical Lake, 9 Wash. 112, 37 Pac. 306.

16. Robertson v. Board of Library Trustees, 136 Cal. 403, 69 Pac. 88.

17. People *ex rel.* Martin v. Board of Auditors, 5 Mich. 223.

18. Fla.—Howell v. State *ex rel.* Edwards, 54 Fla. 199, 45 So. 453. Ga.—Cox v. Board of Comrs. of Whitfield County, 65 Ga. 741. Ill.—People *ex rel.* Northup v. Cook County, 274 Ill. 158, 113 N. E. 58; People *ex rel.* Mason v. Reddick, 181 Ill. 334, 54 N. E. 963. Ind.—State *ex rel.* Brookshire v. Snodgrass, 98 Ind. 546. Ky. Garrard County Court v. McKee, 11 Bush 234. Mich.—People *ex rel.* Michigan Pav. Co. v. Common Council of Detroit, 34 Mich. 201. Ohio.—State *ex rel.* Gerke v. Board of Comrs. of Hamilton Co., 26 Ohio St. 364, 370. Wash.—Chambers v. Territory *ex rel.* Ballard, 3 Wash. Ter. 280, 13 Pac. 236.

[a] Payment of a Claim on a Quantum Meruit.—People *ex rel.* Michigan Pav. Co. v. Common Council of Detroit, 34 Mich. 201.

19. State *ex rel.* Brookshire v. Snod-

and is payable out of a specific fund appropriated and set apart for that purpose, the authorities agree that mandamus is a proper remedy to compel payment on refusal of the treasurer of a demand therefor, because in such case an ordinary action at law is not an adequate remedy.²⁰ And on refusal of the treasurer or other disbursing officer to pay a liquidated claim payable out of the general fund, it is generally held that mandamus is a proper remedy, if the relator's right is clear and there are funds on hand applicable to payment of the claim,²¹ although some courts deny relief on the ground that the party has an adequate remedy at law by action,²² or by summary statutory proceedings.²³ If the claim has not been audited and allowed,²⁴ or if the required warrant or order has not issued,²⁵ payment of the claim will not be compelled.

grass, 98 Ind. 546; *Clayton v. McWilliams*, 49 Miss. 311.

20. **Ala.**—*Farson, Son & Co. v. Bird*, 72 So. 550; *Wyker v. Francis*, 120 Ala. 509, 24 So. 895. **Cal.**—*Day v. Callow*, 39 Cal. 593; *Connor v. Morris*, 23 Cal. 447. **Colo.**—*Beeney v. Irwin*, 6 Colo. App. 66, 39 Pac. 900. **Ind.**—*Potts v. State ex rel. Ogg*, 75 Ind. 336. **Mich.** *School Dist. No. 8 v. Root*, 61 Mich. 373, 28 N. W. 132. **Miss.**—*Hendricks v. Johnson*, 45 Miss. 644. **Mo.**—*State ex rel. Wheeler v. Adams*, 161 Mo. 349, 364, 61 S. W. 894. **N. Y.**—*People ex rel. Kingsland v. Palmer*, 52 N. Y. 83, 89; *People ex rel. Baker v. Haws*, 36 Barb. 59. **N. C.**—*Wright v. Kinney*, 123 N. C. 618, 31 S. E. 874. **Pa.** *Treasurer of Jefferson Co. v. Shannon*, 51 Pa. 221. **R. I.**—*Times Pub. Co. v. White*, 23 R. I. 334, 50 Atl. 383. **Tex.** *Fairbanks, Morse & Co. v. Tilson* (Tex. Civ. App.), 146 S. W. 363; *Elser v. Ft. Worth* (Tex. Civ. App.), 27 S. W. 739. **Wis.**—*Frey v. Fond du Lac*, 24 Wis. 204.

[a] But where the assessment is adjudged invalid in another proceeding, a writ to compel payment thereof will be denied. *People ex rel. Gebhart v. East Saginaw*, 40 Mich. 336.

21. **Ala.**—*State ex rel. Farnham v. Mims*, 174 Ala. 233, 57 So. 466; *Wyker v. Francis*, 120 Ala. 509, 24 So. 895. But compare *Brown v. Gay-Padgett Hdw. Co.*, 186 Ala. 561, 65 So. 333. **Fla.**—*Ray v. Wilson*, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773, 778. **Ga.** *Cox v. Board of Comrs. of Whitfield*, 65 Ga. 741; *Kent v. Wheeler Co.* (Ga. App.), 94 S. E. 271. **Ind.**—*Ex parte Loy*, 59 Ind. 235. Compare cases cited *supra*, III, C, 12, a, (III). **Ia.**—*Ire-*

land v. Hunnel, 90 Iowa 98, 57 N. W. 715. **Me.**—*Baker v. Johnson*, 41 Me. 15, 23. **Mich.**—*Beach v. St. Joseph*, 192 Mich. 296, 158 N. W. 1045; *Elliott v. Kalkaska Suprs.*, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706. **Mont.** *Thomas v. Smith*, 1 Mont. 21. **N. J.** *Harvey v. Philbrick*, 49 N. J. L. 374, 8 Atl. 122. **N. Y.**—*People ex rel. Smith v. Clarke*, 174 N. Y. 259, 66 N. E. 819; *People ex rel. Beck v. Coler*, 34 App. Div. 167, 54 N. Y. Supp. 639; *McGuire v. Prendergast*, 159 N. Y. Supp. 658. Compare cases cited *supra*, III, C, 12, a, (III). **Ore.**—*Bush v. Geisey*, 16 Ore. 355, 19 Pac. 123. **Pa.** *Com. v. Johnson*, 2 Binn. 275. **S. C.** *Carolina Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687. **Tex.**—*Johnson v. Campbell*, 39 Tex. 83. **Wash.**—*Bacon v. Tacoma*, 19 Wash. 674, 54 Pac. 609.

As to necessity that treasurer have funds on hand, see *infra*, IV, C, 12, a, (V), (c).

22. See *infra*, IV, C, 12, b, (III).

23. *Brown v. Gay-Padgett Hdw. Co.*, 186 Ala. 561, 65 So. 333. Compare Alabama cases cited *supra*, this section.

24. **Mo.**—*State ex rel. Hutton v. Scott County Court*, 197 S. W. 347. **N. Y.**—*People ex rel. Brown v. Board of Apportionment*, 52 N. Y. 224. **R. I.** *Foster v. Angell*, 19 R. I. 285, 33 Atl. 406.

25. **La.**—*State ex rel. Pinac v. Mount*, 21 La. Ann. 352. **Me.**—*Weston v. Dane*, 51 Me. 461. **N. Y.**—*People ex rel. Security Trust Co. v. Treasurer of Monroe County*, 121 App. Div. 84, 105 N. Y. Supp. 576.

(B.) WHEN CLAIMS ARE LIQUIDATED. — The term "liquidated" when used in this connection, signifies claims on which the amount due is fixed by law,²⁶ or by some competent tribunal,²⁷ or by agreement of the parties.²⁸ The claim may be ascertained by the action of the municipal authorities by auditing and allowing it,²⁹ or by way of judgment,³⁰ or by the imposition by law of a charge without the action of the municipal authorities, as in the case of fixed salaries of officers and like charges.³¹ Under some statutes, the treasurer is required to pay certain claims on the certificate of specified officers. In such case, the writ will issue without an audit.³²

(C.) NECESSITY OF FUNDS. — (1.) *Generally.* — A mandamus to compel the payment of claims against municipalities will not issue unless it clearly appears there is money in the treasury appropriated to that purpose, for otherwise the writ would be useless.³³ The court will

26. *Waterman-Waterbury Co. v. School Dist. No. 4*, 183 Mich. 168, 150 N. W. 104.

27. See *infra*, this section.

28. *Waterman-Waterbury Co. v. School Dist. No. 4*, 183 Mich. 168, 150 N. W. 104.

As to mandamus to enforce contracts with municipal corporations, see *supra*, IV, C, 10, e.

29. *Ala.*—*Wyker v. Francis*, 120 Ala. 509, 522, 24 So. 895. *Ill.*—*People ex rel. Northup v. Cook County*, 274 Ill. 158, 113 N. E. 58; *People ex rel. Mason v. Reddick*, 181 Ill. 334, 54 N. E. 963. *Miss.*—*Honea v. Board of Suprs. of Monroe County*, 63 Miss. 171; *Board of Suprs. of Jefferson County v. Arrighi*, 54 Miss. 668. *N. Y.*—*People ex rel. Ryan v. Green*, 58 N. Y. 295, 306; *People ex rel. Brown v. Board of Apportionment*, 52 N. Y. 224. *S. C.* *State ex rel. Conant v. Fuller*, 18 S. C. 246.

30. *Ala.*—*Wyker v. Francis*, 120 Ala. 509, 522, 24 So. 895. *Ill.*—*People ex rel. Northup v. Cook County*, 274 Ill. 158, 113 N. E. 58; *People ex rel. Mason v. Reddick*, 181 Ill. 334, 54 N. E. 963. *Ky.*—*Garrard County Court v. McKee*, 11 Bush 234. *Mo.*—*Mansfield v. Fuller*, 50 Mo. 338. *N. Y.*—See *In re Morris & Cumings Dredg. Co.*, 116 App. Div. 257, 101 N. Y. Supp. 726.

31. *People ex rel. Northup v. Cook County*, 274 Ill. 158, 113 N. E. 58; *State ex rel. Grable v. Roderick*, 23 Neb. 505, 37 N. W. 77, duty of county treasurer under statute to pay city taxes collected.

32. *People ex rel. Kingsland v. Palmer*, 52 N. Y. 83, 88.

33. *Ala.*—*Farson Son & Co. v. Bird*, 72 So. 550; *Mims v. State ex rel. Stallworth*, 180 Ala. 511, 61 So. 811. *Colo.* *Beeney v. Irwin*, 6 Colo. App. 66, 39 Pac. 900. *Ill.*—*Martin v. Union Drain Dist. No. 5*, 150 Ill. App. 402. *Ind.* *Wood v. State ex rel. Seiler*, 155 Ind. 1, 55 N. E. 959. *La.*—*State ex rel. Willoz v. Burbank*, 22 La. Ann. 318. *Mich.*—*Murphy v. Treasurer of Reeder Tp.*, 56 Mich. 505, 23 N. W. 197. *N. Y.*—*People ex rel. Dannat v. Comptroller*, 77 N. Y. 45; *People ex rel. Downing v. Stout*, 23 Barb. 338; *People ex rel. Wood v. Connolly*, 2 Abb. Pr. N. S. 315. See *Saratoga Lake Bridge Co. v. Walbridge*, 140 App. Div. 817, 126 N. Y. Supp. 468. *S. C.*—*City of Columbia v. Spigener*, 67 S. E. 552; *State ex rel. Fooshe v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266.

[a] *Disposition of money pending action* is no defense, however. *State ex rel. Crawford v. Bisping*, 89 Neb. 100, 130 N. W. 1034.

[b] *The return should show* (1) the lack of funds at the time of the demand for payment (*Hendricks v. Johnson*, 45 Miss. 644), (2) and state facts not conclusions. *Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn*, 62 Hun 265, 16 N. Y. Supp. 768. (3) A return that the respondent has no money on hand "applicable to pay the warrant" is evasive. *Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn*, 62 Hun 265, 16 N. Y. Supp. 768. See to similar effect, *State ex rel. Wheeler v. Adams*, 161 Mo. 349, 363, 61 S. W. 894.

not direct a payment out of other funds on hand not liable to petitioner's demand,³⁴ even where he has reduced his claim to judgment.³⁵ Nor will the writ direct payment out of funds to be received thereafter.³⁶ The same rule applies where there are other orders or warrants outstanding which will have precedence and will exhaust the funds on hand.³⁷ But even though there were no funds on hand at the time of the presentation of the warrant and at the time of the service of the rule nisi, the writ will issue, it has been held, if the evidence shows sufficient funds came into the hands of the treasurer subsequently.³⁸

(2.) *Where Funds Are Misapplied.* — In some states, it is held that the inability of the treasurer to pay the warrant or claim will prevent the issuance of the writ of mandamus, even where he has wrongfully paid out the funds, which were appropriated exclusively for the claim in question, on other demands or claims.³⁹ But in other jurisdictions the contrary is held.⁴⁰

(3.) *Other Remedies When There Are No Funds.* — The lack of funds does not leave the claimant wholly without relief, however. He may maintain an ordinary action at law,⁴¹ or institute mandamus proceedings to compel the levying of a tax,⁴² or the issuance of bonds⁴³ to pay his claim.

(D.) NECESSITY OF DEMAND. — A demand on the treasurer for pay-

34. *Ala.*—*Farson, Son & Co. v. Bird*, 72 So. 550. *Cal.*—*Priet v. Reis*, 93 Cal. 85, 28 Pac. 798. *Tex.*—*Austin v. Cahill* (Tex. Civ. App.), 88 S. W. 536. *Wash.*—*Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710.

35. *Goldsmith v. Board of Suprs. of San Francisco*, 115 Cal. 36, 46 Pac. 816 (the reduction of the claim to judgment does not authorize payment from any fund not subject to the primary demand); *Ward v. Piper*, 69 Kan. 773, 77 Pac. 699.

36. *Day v. Callow*, 39 Cal. 593; *State ex rel. Howard v. Burbank*, 22 La. Ann. 298.

[a] A judgment commanding payment of money that may come into the fund is to that extent erroneous. *Day v. Callow*, 39 Cal. 593.

37. *Mitchell v. Speer*, 39 Ga. 56.

38. *Somerville v. Wood*, 115 Ala. 534, 22 So. 476.

39. *Ala.*—*Farson, Son & Co. v. Bird*, 72 So. 550. *Cal.*—*Priet v. Reis*, 93 Cal. 85, 28 Pac. 798. *Wash.*—*Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710.

[a] Although money in one fund is illegally paid out in discharge of obligations of another fund, the court will not mandamus the treasurer to

pay obligations of the first exhausted fund from money in the other fund. *Priet v. Reis*, 93 Cal. 85, 28 Pac. 798; *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732.

40. *Colo.*—*First Nat. Bank v. Arthur*, 12 Colo. App. 90, 54 Pac. 1107. *Ga.*—*Hutcheson v. Manson*, 131 Ga. 264, 62 S. E. 189; *Aaron v. German*, 114 Ga. 587, 40 S. E. 713. *Ill.*—*County Comrs. of Pike Co. v. People ex rel. Metz*, 11 Ill. 202. *N. Y.*—*People ex rel. Dannat v. Comptroller*, 77 N. Y. 45; *People ex rel. Pennell v. Treanor*, 15 App. Div. 508, 44 N. Y. Supp. 528. But compare *People ex rel. Robinson v. O'Keefe*, 100 N. Y. 572, 3 N. E. 592. *S. C.*—*City of Columbia v. Spigener*, 67 S. E. 552.

[a] Since it is the duty of the treasurer to have the money, it is conclusively presumed he still has it. *First Nat. Bank v. Arthur*, 12 Colo. App. 90, 54 Pac. 1107.

41. *People ex rel. Wood v. Connolly*, 2 Abb. Pr. N. S. (N. Y.) 315, 321.

42. See the title "Taxation."

43. *People ex rel. Tenth Nat. Bank v. Board of Apportionment*, 3 Hun 11, 5 Thomp. & C. 382.

As to issuance of bonds generally, see *supra*, IV, C, 9, d.

ment of the claim must be alleged,⁴⁴ as he cannot be compelled to pay any claim unless presented in the form required by law.⁴⁵

(VI.) **Payment of Warrants.**—(A.) **GENERALLY.**—If a claim against a municipality has been duly allowed and audited and a proper warrant has issued therefor, and if on presentation for payment, the treasurer refuses to pay it, mandamus will lie, in accordance with the general rules, to enforce the ministerial duty of paying the warrant, if he has funds on hand applicable thereto.⁴⁶ And if the treasurer refuses to pay the warrants in the prescribed order, mandamus is a proper remedy.⁴⁷

Payment of Interest.—The payment of interest will not be compelled except in accordance with the provisions of the warrant.⁴⁸

(B.) **NECESSITY FOR JUDGMENT.**—If the treasurer declines to pay the warrant, the claimant need not obtain a judgment on the warrant but may bring mandamus,⁴⁹ although the contrary has been held.⁵⁰

44. *Wood v. State ex rel. Seiler*, 155 Ind. 1, 55 N. E. 959.

[a] A demand on the successor in office of the treasurer who is substituted as defendant in the mandamus proceeding need not be alleged, where a demand on the former treasurer is stated. *Wood v. State ex rel. Seiler*, 155 Ind. 1, 55 N. E. 959.

45. *State v. Fuller*, 18 S. C. 246.

46. *Ala.*—Wyker v. Francis, 120 Ala. 509, 24 So. 895, characterizing contrary statement in *Sessions v. Boykin*, 78 Ala. 328, as dictum. *Colo.*—*Denver v. Bottom*, 44 Colo. 308, 98 Pac. 13; *Forbes v. Bd. of County Comrs. of Grand County*, 23 Colo. 344, 47 Pac. 388. *Fla.*—*Ray v. Wilson*, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773. *Ill.*—*People ex rel. Hurd v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63. *Ind.*—*Ellis v. State ex rel. Myers*, 183 Ind. 641, 109 N. E. 910. *Minn.*—*State ex rel. Morris v. Clark*, 116 Minn. 500, 134 N. W. 129, 39 L. R. A. (N. S.) 43. *Neb.*—*State v. Scott's Bluff*, 64 Neb. 419, 89 N. W. 1063. *N. J.*—*State ex rel. Clarke v. Earle*, 42 N. J. L. 94. *Wash.*—*State ex rel. Titlow v. Centralia*, 93 Wash. 401, 161 Pac. 74. *W. Va.*—*Thomas v. Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

47. *First Nat. Bank v. Arthur*, 10 Colo. App. 283, 50 Pac. 738; *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306.

48. *State ex rel. Clark v. Scott*, 15 Neb. 147, 17 N. W. 263.

[a] If the warrant or order contains no promise to pay interest, mandamus to compel payment of interest

will not lie. *Talbot v. Mayor of Bay City*, 71 Mich. 118, 38 N. W. 890.

[b] Even though issued upon a judgment bearing a higher rate of interest than that provided for in the warrant. *State ex rel. Clark v. Scott*, 15 Neb. 147, 17 N. W. 263.

49. *Colo.*—*Board of Co. Comrs. of Gunnison Co. v. Sims*, 31 Colo. 483, 74 Pac. 457. *Miss.*—*Kelly v. Wimberly*, 61 Miss. 548. *Wash.*—*Bacon v. Tacoma*, 19 Wash. 674, 54 Pac. 609. *W. Va.*—*Thomas v. Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727.

[a] The audit and allowance of a claim is equivalent to a judgment at law. *Kelly v. Wimberly*, 61 Miss. 548; *Klein v. Board of Suprs. of Smith County*, 54 Miss. 254. See also *Board of Suprs. of Jefferson County v. Arighi*, 54 Miss. 668.

50. *State ex rel. Zimmerman v. Justices of Bollinger County Court*, 48 Mo. 475; *State ex rel. White v. Clay County*, 46 Mo. 231.

As to other remedies preventing relief, see also *infra*, IV, C, 12, b.

[a] If the treasurer has reasonable grounds to question the legality of the warrant or the power of the county officers to draw it, he is justified in refusing to pay it until its validity is established by judgment. *Evans v. Bradley*, 4 S. D. 83, 55 N. W. 721.

[b] In the federal courts, it is the practice to require the owner of the warrant to first reduce his demand to a judgment before he can sue out the writ because the writ can be granted only in aid of existing jurisdiction. *Jerome v. Comrs. Rio Grande County*,

(C.) CIRCUMSTANCES AUTHORIZING AND PREVENTING ISSUANCE OF THE WRIT.

The relator must have a clear legal right to the payment of the warrant.⁵¹ Although in some states, it is held that the treasurer cannot dispute the warrants or vouchers, unless to show fraud or mistake,⁵² generally if the treasurer refuses to pay a warrant on the ground that the claim was allowed by a board not legally constituted,⁵³ or on the ground the warrant is a forgery, or is illegal,⁵⁴ the court will determine such issue and grant its writ if it finds against the respondent. If the allowance of the claim,⁵⁵ or the issuance of the warrant,⁵⁶ was procured by fraud, the writ of mandamus will not issue. Nor will it issue if the allowance of the claim was without authority of law,⁵⁷ as where the claim is not legally chargeable against the municipal corporation,⁵⁸ or where the contract on which it is based is illegally made,⁵⁹ or where the indebtedness is void.⁶⁰ The same is true if the city disputes the claim,⁶¹ for it has been held the court will not decide this issue in a mandamus proceeding.⁶² Similarly if the warrant

5 McCrary 639, 18 Fed. 873, *citing* Chickaming v. Carpenter, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. ed. 307.

51. People *ex rel.* Hurd v. Johnson, 100 Ill. 537, 39 Am. Rep. 63; State *ex rel.* First Nat. Bank v. Cook, 43 Neb. 318, 61 N. W. 693.

[a] **Cancelled Warrant.**—State *ex rel.* Boston Woven Hose Co. v. Lewis, 4 Ohio N. P. 176.

[b] **Where a duplicate of a lost warrant has been procured and paid,** a bona fide holder of the original cannot compel its payment. People *ex rel.* Hurd v. Johnson, 100 Ill. 537, 39 Am. Rep. 63, the order is not negotiable and becomes void on issuance of a duplicate.

52. Ala.—Somerville v. Wood, 115 Ala. 534, 22 So. 476. Colo.—Beeney v. Irwin, 6 Colo. App. 66, 39 Pac. 900. Ga.—Shannon v. Reynolds, 78 Ga. 760, 3 S. E. 653. Ia.—Ireland v. Hunnel, 90 Iowa 98, 57 N. W. 715. Tex.—See Johnson v. Campbell, 39 Tex. 83.

53. Md.—School Comrs. v. Goldsborough, 90 Md. 193, 200, 44 Atl. 1055. N. J.—Hugg v. Ivins, 59 N. J. L. 139, 36 Atl. 685, where claim was allowed by usurpers of office. S. C.—Carolina Grocery Co. v. Burnet, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687.

54. Bacon v. Tacoma, 19 Wash. 674, 54 Pac. 609 (*overruling* Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499); Cloud v. Sumas, 9 Wash. 399, 37 Pac. 305.

55. People *ex rel.* Slavin v. Wendell,

71 N. Y. 171. But see Hendricks v. Johnson, 45 Miss. 644.

56. Ga.—Shannon v. Reynolds, 78 Ga. 760, 3 S. E. 653. Mich.—Noble v. Paris, 56 Mich. 219, 22 N. W. 321. Mo.—State *ex rel.* Zimmerman v. Justices of Bollinger County Court, 48 Mo. 475.

57. Crawley v. Mereshon, 61 Ga. 284, where the board allowed a claim for counsel fees in an action against themselves.

58. Cal.—Connor v. Morris, 23 Cal. 447; Keller v. Hyde, 20 Cal. 593. Mo.—State *ex rel.* Zimmerman v. Justices of Bollinger County Court, 48 Mo. 475. Mont.—State *ex rel.* Cascade Co. v. Lewis, 34 Mont. 351, 86 Pac. 419. N. Y.—People *ex rel.* Merritt v. Lawrence, 6 Hill 244. Vt.—Cook v. Treasurer of Peacham, 50 Vt. 231.

But compare Ireland v. Hunnel, 90 Iowa 98, 57 N. W. 715.

59. People *ex rel.* Guidet v. Green, 66 Barb. (N. Y.) 630; People *ex rel.* Uvalde Asphalt Pav. Co. v. Grout, 111 App. Div. 924, 98 N. Y. Supp. 185.

60. McNutt v. Lemhi Co., 12 Idaho 63, 84 Pac. 1054.

61. N. Y.—People *ex rel.* Beck v. Coler, 34 App. Div. 167, 54 N. Y. Supp. 639. Pa.—Hester's Case, 2 Watts & S. 416; Com. *ex rel.* Inspectors v. Comrs. of Allegheny County, 16 Serg. & R. 317. R. I.—Foster v. Angell, 19 R. I. 285, 33 Atl. 406; Simmons v. Davis, 18 R. I. 46, 25 Atl. 691.

62. Simmons v. Davis, 18 R. I. 46, 25 Atl. 691.

was unlawfully issued without an audit by the proper officers,⁶³ or without a direction that the allowed claim be paid,⁶⁴ when these things are necessary, or if the warrant was issued for more than the amount of plaintiff's claim,⁶⁵ or if the warrant itself is defective,⁶⁶ the court will deny its writ to compel payment.

Where Prohibited From Paying Warrant. — Where the officers allowing the claim have authority to rescind their action and direct the treasurer not to pay a warrant, a writ directing payment will not issue,⁶⁷ but it is otherwise if their order is held to be without authority.⁶⁸ So also if an injunction from a court of competent authority restrains the treasurer, a mandamus to compel him to violate the injunction will not issue.⁶⁹

Where Offset Is Set Up. — If the relator owes the municipality money for taxes which is an offset, mandamus to compel payment of full amount of warrant will not issue.⁷⁰

Where Payment Is Made to Wrong Person. — Even though the disbursing officer through inadvertence or misapprehension has paid the order or warrant to another who had no claim or pretense of right to the fund paid out, he may be required to pay the warrant to its rightful owner.⁷¹

(VII.) **Indorsement of Warrants Not Paid.** — If there are no funds with which to pay the warrant, the treasurer may be required to indorse the warrant "not paid for want of funds."⁷²

(VIII.) **Particular Claims.** — (A.) **JUDGMENTS.** — As to judgments against municipal corporations, mandamus will lie to compel their allowance where required,⁷³ to compel the issuance of warrant there-

63. *White v. Wolffe*, 54 Ala. 110; *State ex rel. United States Ballot Box Co. v. Ratterman*, 3 Ohio Cir. Ct. 626.

64. *Connor v. Morris*, 23 Cal. 447.

65. *Shannon v. Reynolds*, 78 Ga. 760, 3 S. E. 653; *State ex rel. United States Ballot Box Co. v. Ratterman*, 3 Ohio Cir. Ct. 626.

66. *Thomas v. Owens*, 4 Md. 189; *Treasurer of Jefferson County v. Shannon*, 51 Pa. 221.

[a] Where it is requisite that warrants be signed or countersigned by a designated official, payment of warrants not so countersigned will not be compelled. *State ex rel. Mizelle v. Graham*, 67 Fla. 321, 64 So. 945; *City of Columbia v. Spigener* (S. C.), 67 S. E. 552.

67. *Mich.*—*Murphy v. Treasurer of Reeder Tp.*, 56 Mich. 505, 23 N. W. 197. *Neb.*—*State ex rel. First Nat. Bank v. Cook*, 43 Neb. 318, 61 N. W. 693. *Ore.*—*Frankl v. Bailey*, 31 Ore. 285, 50 Pac. 186.

68. *Thomas v. Smith*, 1 Mont. 21.

69. *Wilmarth v. Ritschlag*, 9 S. D. 172, 68 N. W. 312.

70. *Funk v. State ex rel. Baker*, 166 Ind. 455, 77 N. E. 854.

71. *People ex rel. Hurd v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63; *People ex rel. Clemens v. Smith*, 43 Ill. 219, 92 Am. Dec. 109. But see *State ex rel. Boston Woven Hose Co. v. Lewis*, 4 Ohio N. P. 176, the party should bring an action for damages.

72. *Territory ex rel. Largey v. Gilbert*, 1 Mont. 371.

73. *U. S.*—*Lower v. United States*, 91 U. S. 536, 23 L. ed. 420. *Cal.* *Johnson v. Board of Suprs. of Sacramento County*, 65 Cal. 481, 4 Pac. 463; *Alden v. Alameda*, 43 Cal. 270. *Ill.* *Lyons v. Cooledge*, 89 Ill. 529. See *Board of Auditors v. People*, 38 Ill. App. 239. *Nev.*—*State ex rel. Humboldt County v. Board of County Comrs.*, 22 Nev. 71, 35 Pac. 300.

[a] The auditing of a judgment is a mere ministerial act not involving the exercise of official discretion.

for,⁷⁴ and to compel their recordation,⁷⁵ and payment.⁷⁶ If there is not sufficient money to pay the judgment, the court will require the proper authorities to levy a tax for that purpose.⁷⁷

(B.) BONDS. — The mere ministerial duty of paying bonds of a municipal corporation may be compelled by mandamus,⁷⁸ unless it is an open question whether the bonds are valid and the relator is a bona fide holder.⁷⁹ But holders of non-negotiable municipal bonds issued in payment of a public improvement cannot compel payment where the contract therefor was not complied with by reason of the fraud or wrong of the contractor.⁸⁰ Payment in a particular medium will not be required if there is no statute or contract requiring it,⁸¹ or if there is none of that particular medium in the treasury.⁸² A previous auditing, allowance, and issuance of a warrant is not necessary in some states,⁸³ but where they are necessary, the writ will not issue without them.⁸⁴ In the federal courts a judgment is an essential prerequisite to the writ.⁸⁵

Payment of Interest. — Unless the legality of municipal bonds and coupons is controverted,⁸⁶ mandamus will lie to compel payment of the interest or interest coupons,⁸⁷ if there are funds on hand appropriated

Lower v. United States, 91 U. S. 536, 23 L. ed. 420.

74. Ark.—Rolfé v. Spybuck Drainage Dist. No. 1, 101 Ark. 29, 140 S. W. 988. Cal.—First Nat. Bank v. Tyler, 21 Cal. App. 791, 132 Pac. 1053. Wash. See Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117, denying writ as statutory prerequisites were not complied with.

[a] But not if the county is without power to levy a tax to pay the cause of action on which the judgment is founded. Barksdale v. Hayes, 134 Ga. 348, 67 S. E. 852; Brunson v. Caskie, 127 Ga. 501, 56 S. E. 621, 9 L. R. A. (N. S.) 1002.

75. State ex rel. Carondelet C. & N. Co. v. Brown, 28 La. Ann. 103.

76. See *supra*, II, A, 10, b.

77. See the title "Taxation."

78. Ala.—Comrs. Court of Limestone County v. Rather, 48 Ala. 433. Kan. State ex rel. Meier v. McCrillus, 4 Kan. 250, 260, 96 Am. Dec. 169. Ky.—Elliot Co. v. Kitchen, 14 Bush 289. Mich. Dayton Tp. v. Rounds, 27 Mich. 82. N. Y.—People ex rel. Fiedler v. Mead, 24 N. Y. 114.

[a] Despite instructions of county board not to pay bonds, the treasurer may be required to pay them. State ex rel. Meier v. McCrillus, 4 Kan. 250, 260, 96 Am. Dec. 169.

79. Loomis v. Tp. Board of Rogers, 53 Mich. 135, 18 N. W. 596.

80. Northern Trust Co. v. Wilmette, 220 Ill. 417, 77 N. E. 169.

81. People ex rel. Chrystal v. Cook, 39 Cal. 658.

82. People ex rel. Chrystal v. Cook, 39 Cal. 658.

83. Comrs. of Limestone County v. Rather, 48 Ala. 433, 446; State ex rel. Meier v. McCrillus, 4 Kan. 250, 260, 96 Am. Dec. 169.

84. State ex rel. Osborne v. Thorne, 9 Neb. 458, 4 N. W. 63.

85. Chickaming v. Carpenter, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. ed. 307, mandamus can only be granted in aid of existing jurisdiction.

86. Bailey v. Lawrence, 2 S. D. 533, 51 N. W. 331.

87. Cal.—Livingston v. Widber, 115 Cal. xvii, 47 Pac. 247; Meyer v. Porter, 65 Cal. 67, 2 Pac. 884. Compare People ex rel. Tallant v. Fogg, 11 Cal. 351, under statute providing for warrants of supervisors when funds are inadequate to pay interest. Colo. Board of County Comrs. of Gunnison County v. Sims, 31 Colo. 483, 74 Pac. 457. Mo.—State ex rel. Lane v. Craig, 69 Mo. 565. Pa.—Williamsport v. Com. ex rel. Bair, 90 Pa. 498. W. Va. State to Use of Rathbone v. County Court of Wirt County, 37 W. Va. 808, 17 S. E. 379.

[a] The coupons need not be filed in the case. State ex rel. Lane v. Craig, 69 Mo. 565.

to that purpose.⁸⁸ Or if there are no funds, the writ will lie to compel the municipality to make provision for payment of interest and levy taxes therefor.⁸⁹ The relator need not obtain a warrant on the treasurer before he can resort to mandamus,⁹⁰ and the fact that he reduced his claim to judgment does not prevent him from compelling payment from the fund raised to pay interest.⁹¹

(C.) SALARIES.—Mandamus is an appropriate remedy to enforce claims for salaries of municipal officers.⁹²

b. *Effect of Other Remedies.*—(I.) Generally. —The general rule that mandamus will not lie if there exists an adequate remedy at law applies to mandamus proceedings with respect to claims against municipal corporations.⁹³

(II.) Remedy by Appeal. —The remedy by appeal from the action of the board on a claim prevents relief by mandamus.⁹⁴

(III.) Remedy by Action Against Municipal Corporation. —It is generally held that a right of action against the municipality on a claim, will not prevent mandamus to compel the performance of ministerial acts with respect to claims against it⁹⁵ such as the auditing and allowance of the claim,⁹⁶ or the issuance⁹⁷ or payment⁹⁸ of the warrant. This is particularly true where the action would not advance the claim beyond its present status,⁹⁹ and where on recovery, the judgment must be presented for audit and allowance and the party may have to pro-

[b] But payment of interest on unpaid interest will not be required. *Bates v. Gerber*, 82 Cal. 550, 22 Pac. 1115; *Davis v. Porter*, 66 Cal. 658, 6 Pac. 746.

88. *Bailey v. Lawrence*, 2 S. D. 533, 51 N. W. 331. Compare *Williamsport v. Com. ex rel. Bair*, 90 Pa. 498, directing payment out of funds appropriated to other uses.

89. Mandamus to compel levy of tax to pay bonds, see the title "Taxation."

90. *State ex rel. Lane v. Craig*, 69 Mo. 565.

91. *Ward v. Piper*, 69 Kan. 773, 77 Pac. 699.

92. See generally the title "Officers."

93. See *infra*, this section.

As to the general rule, see the title "Mandamus."

94. Mo.—*State ex rel. Carroll v. Cape Girardeau County Court*, 109 Mo. 248, 19 S. W. 23. Neb.—*Lobeck v. State ex rel. Nebraska Bitulithic Co.*, 72 Neb. 595, 101 N. W. 247. Wash.—*State ex rel. Banks v. Board of County Comrs.*, 18 Wash. 160, 51 Pac. 368.

95. *State ex rel. School Directors v. Nelson*, 105 Wis. 111, 80 N. W. 1105; *Kraft v. Madison*, 98 Wis. 252, 73 N.

W. 775; *Sharp v. Mauston*, 92 Wis. 629, 66 N. W. 803.

96. *Marathon v. Oregon*, 8 Mich. 372 (holding the party should proceed by mandamus, not by action, on rejection of the claim); *Kraft v. Madison*, 98 Wis. 252, 73 N. W. 775 (the party may maintain mandamus or bring an action at law on the claim); *State ex rel. Van Vliet v. Wilson*, 17 Wis. 687, where statute gave a right of action on rejection of claim.

97. Minn.—*State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 440, 18 N. W. 277. N. J.—*State ex rel. Ahrens v. Fiedler*, 43 N. J. L. 400; *Apgar v. School Dist. No. 4*, 34 N. J. L. 308. Wash.—*Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306. Wis.—*State ex rel. Wunderlich v. Kalkofen*, 134 Wis. 74, 113 N. W. 1091; *State ex rel. School Directors v. Nelson*, 105 Wis. 111, 80 N. W. 1105.

98. Ala.—*Wyker v. Francis*, 120 Ala. 509, 24 So. 895. Fla.—*Ray v. Wilson*, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773. Ind.—See *Connorsville v. Connorsville Hydraulic Co.*, 86 Ind. 184, party is not obliged to resort to mandamus.

99. See *infra*, this note.

[a] Illustration.—Where any judg-

ceed by mandamus to compel its payment.¹ And indeed, it has been held that an action on the warrants which the treasurer refuses to pay cannot be maintained, as mandamus is the proper remedy.² But on the other hand, some courts hold that the remedy by an ordinary action at law against the municipal corporation is an adequate remedy preventing mandamus to compel either the auditing or allowance of the claim,³ or the issuance⁴ or payment⁵ of a warrant issued therefor, particularly where the judgment may be satisfied by a levy upon the estate of any inhabitant.⁶

(IV.) **Remedy Against Officer and Bondsmen.**—The remedy by action on the case against the officer for neglect of duty,⁷ or by action on his official bond if he is a bonded officer,⁸ is not an adequate remedy precluding relief by mandamus to compel the auditing or payment of a claim, although it has been held that a summary statutory remedy against the treasurer and his bondsmen precludes relief.⁹ Nor, it has been held, is the remedy by attachment an adequate remedy.¹⁰

c. *Parties.*—A mandamus proceeding to compel the performance

ment which would be obtained in an action would merely fix the liability of the city and determine the amount due, which matters are already fixed by the resolution of appropriation, mandamus to require mayor to sign the warrant will issue. *State ex rel. Ahrens v. Fiedler*, 43 N. J. L. 400.

1. *Minn.*—*State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 440, 18 N. W. 277. *Wash.*—*State ex rel. Warehouse & Realty Co. v. Spokane*, 65 Wash. 385, 118 Pac. 321; *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207. *Wis.*—*State ex rel. Van Vliet v. Wilson*, 17 Wis. 687.

2. *Bacon v. Tacoma*, 19 Wash. 674, 54 Pac. 609. See also *Kent v. Wheeler Co.* (Ga. App.), 94 S. E. 271.

3. *Ala.*—*State ex rel. Ellis v. Board of Revenue of Jefferson County*, 172 Ala. 190, 55 So. 179. *Cal.*—*Crandall v. Amador County*, 20 Cal. 72, on rejection of a claim the party is authorized to bring suit. *Ia.*—*State ex rel. Brackett v. County Judge*, 5 Iowa 380. *Mass.*—*Wheelock v. Auditor of Suffolk County*, 130 Mass. 486, on rejection of claim for fees the amount of which is fixed by statute. *N. Y.* *People ex rel. Johnson v. Suprs. of Delaware County*, 45 N. Y. 196.

4. *Conn.*—*George S. Chatfield Co. v. Reeves*, 87 Conn. 63, 86 Atl. 750. *N. Y.* *People ex rel. Green v. Wood*, 13 Abb. Pr. 374, 35 Barb. 653, 22 How. Pr. 286. *Vt.*—*Farr v. St. Johnsbury*, 73 Vt. 42, 50 Atl. 548.

5. *Conn.*—*Colley v. Webster*, 59

Conn. 361, 20 Atl. 334. *Ind.*—*Shelby Tp. v. Randles*, 57 Ind. 390. *N. Y.* *People ex rel. Ryan v. Green*, 58 N. Y. 295, 306; *People ex rel. Baker v. Haws*, 36 Barb. 59; *People ex rel. Perry v. Thompson*, 25 Barb. 73.

As to actions against municipal corporations generally, see *supra*, II, A. 6. *George S. Chatfield Co. v. Reeves*, 87 Conn. 63, 86 Atl. 750.

7. *Ala.*—*Farson, Son & Co. v. Bird*, 72 So. 550; *Wyker v. Francis*, 120 Ala. 509, 522, 24 So. 895. *N. Y.*—*McCullough v. Mayor of Brooklyn*, 23 Wend. 458. *Pa.*—*Com. v. Johnson*, 2 Binn. 275. *S. C.*—*Hunter v. Mobley*, 26 S. C. 192, 1 S. E. 670, nonsuited plaintiff in action against officer as mandamus was proper remedy.

8. *Ala.*—*Wyker v. Francis*, 120 Ala. 509, 522, 24 So. 895, limiting and construing *Sessions v. Boykin*, 78 Ala. 328. *Kan.*—*State ex rel. Meier v. McCrillus*, 4 Kan. 250, 260, 96 Am. Dec. 169. *Ky.*—*Elliott Co. v. Kitchen*, 14 Bush 289. *Neb.*—*State ex rel. Grable v. Roderick*, 23 Neb. 505, 37 N. W. 77. *N. Y.*—*People ex rel. Ryan v. Green*, 58 N. Y. 295, 305.

9. *Farson, Son & Co. v. Bird* (Ala.), 72 So. 550.

10. *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117, holding remedy by attachment is criminal in nature, and a criminal prosecution does not supersede mandamus. *Contra*, *People ex rel. Pond v. Wood*, 2 Abb. Pr. (N. Y.) 90, where a court ordered payment of judgment.

of the acts necessary to obtain payment of a claim should be brought on the relation of the owner of the claim.¹¹ The tribunal or officer who issues the order or warrant is not a proper person to compel its payment,¹² although it has been held that the municipality is a proper relator under certain circumstances.¹³ In mandamus to compel the examination of a claim, the joinder of the officer whose duty it is to sign the warrant is improper as he is not in default.¹⁴

d. *Pleadings*.¹⁵—A petition for mandamus to enforce claims against municipalities must conform to the rules regulating such petitions generally,¹⁶ and must describe the claim¹⁷ in such terms as to identify it and distinguish it from all other claims of a similar kind.¹⁸ If the issuance of a warrant is alleged in a proceeding to compel payment, it has been held that the due examination and allowance of the claim need not be alleged.¹⁹

13. *Franchises*.—When an application for a franchise is denied and the officials refuse to take further action in a case where it is the duty of the board to grant the franchise petitioned for, mandamus will issue.²⁰ But a discretion of the board as to the granting of a

11. **R. I.**—Portland Stone Ware Co. v. Taylor, 17 R. I. 33, 19 Atl. 1086. **Tex.**—Elser v. Fort Worth (Tex. Civ. App.), 27 S. W. 739. **Vt.**—Cook v. Treasurer of Peacham, 50 Vt. 231.

Parties generally, see the titles "Parties;" "Mandamus;" and *supra*, IV, B, 3.

12. Portland Stone Ware Co. v. Taylor, 17 R. I. 33, 19 Atl. 1086; Cook v. Treasurer of Peacham, 50 Vt. 231.

13. See *infra*, this note.

[a] Where the municipality draws warrants against a fund for the purpose of investing it in bonds of another series, it is interested in the fund and a proper party to maintain mandamus. Elser v. Ft. Worth (Tex. Civ. App.), 27 S. W. 739.

14. People *ex rel.* Kings Co. G. & I. Co. v. Schieren, 89 Hun 220, 35 N. Y. Supp. 64.

15. *Pleadings generally*, see *supra*, IV, B, 4, and see the title "Mandamus."

16. See the title "Mandamus."

Form of petition for writ to draw warrant, see 9 STANDARD PROC. 807.

[a] A petition is sufficient which alleges (1) the existence of a contract with the municipality, a performance thereof, the presentation and allowance of a claim, the drawing of a warrant therefor and a refusal of the mayor to sign it without any valid or reasonable excuse, and the inability

to obtain payment of the claim which still remains unpaid. People v. Hastings, 5 Ill. App. 436. (2) That the contract was entered on the minutes of the ordinary must be stated in the petition for mandamus to compel issuance of a warrant. Jones v. Bank of Cumming, 131 Ga. 191, 62 S. E. 68.

Form of petition for writ requiring payment to schools, see 9 STANDARD PROC. 808.

17. Isenberg v. Black, 53 Pa. Super. 300.

18. Isenberg v. Black, 53 Pa. Super. 300.

[a] *Description of Claim for Bounty*.—Isenberg v. Black, 53 Pa. Super. 300.

19. Connor v. Morris, 23 Cal. 447. But see White v. Wolfe, 54 Ala. 110, holding a petition fatally defective which fails to allege the warrants were authorized by the board.

[a] An alternative writ states a cause of action which alleges that certain warrants were regularly issued for value received, that the defendant has in his hands the necessary funds to pay them, and that they have been presented to him as such treasurer for payment, and have never been paid, and that defendant is such treasurer. Ray v. Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773.

20. Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61.

franchise cannot be controlled in this way by mandamus.²¹

14. Building Permits.—Mandamus is a proper remedy to compel the municipal officers to act on building plans submitted to them,²² and to compel them to perform a mere ministerial duty to grant a building permit,²³ unless the municipal charter gives the building owner a remedy by appeal to a higher board.²⁴ But where a board in the exercise of its discretion has denied a building permit, mandamus to compel its issuance will not lie,²⁵ except when plans affording no legitimate ground of objection have been arbitrarily or unreasonably condemned.²⁶ The court will not compel the granting of a permit if the plans submitted violate the ordinance, charter or statute.²⁷ Nor will an officer be compelled to grant a permit where an appeal board directs him to withhold it.²⁸ Mandamus will not compel action by the building department in advance of the preparation and adoption of proper plans.²⁹

Revocation.—A court will not compel a building inspector to revoke a building permit unless the construction authorized clearly violates the building regulations in such respects as to endanger the public health, safety, or welfare.³⁰ And it will not compel a revocation because of defects which have been corrected or which the parties are ready and willing to correct.³¹

Mandamus To Refrain From Granting.—It has been held that mandamus will not lie to compel an officer to refrain from granting a permit.³²

15. Licenses.—Mandamus will sometimes lie to compel the issuance of a license.³³

16. Removing Dangerous Structures or Buildings.—Mandamus will lie at the instance of any citizen to compel a superintendent of buildings or similar officer to perform his duty in removing a building

21. *Ouachita Power Co. v. Donaghey*, 106 Ark. 48, 152 S. W. 1012, Ann. Cas. 1915A, 447; *Bastin Tel. Co. v. Davidson*, 176 Ky. 23, 195 S. W. 148.

22. *People ex rel. Cantoni v. Moore* (App. Div.), 165 N. Y. Supp. 840.

23. *Macfarland v. United States ex rel. Miller*, 18 App. Cas. (D. C.) 554; *Bostock v. Sams*, 95 Md. 400, 410, 52 Atl. 665, 93 Am. St. Rep. 394, 59 L. R. A. 282.

24. *People ex rel. Cantoni v. Moore* (App. Div.), 165 N. Y. Supp. 840.

25. *L. C.—United States ex rel. Smithson v. Ashford*, 29 App. Cas. 350. **N. Y.**—*Kiesel v. Crain*, 166 N. Y. Supp. 456. **Wash.**—*Hester v. Thompson*, 35 Wash. 119, 125, 76 Pac. 734.

26. *United States ex rel. Smithson v. Ashford*, 29 App. Cas. (D. C.) 350; *Hartman v. Collins*, 106 App. Div. 11, 94 N. Y. Supp. 63.

27. **Conn.**—*State ex rel. Berger v. Hurley*, 73 Conn. 536, 48 Atl. 215. **Ind.**

State ex rel. Hunter v. Winterrowd, 174 Ind. 592, 91 N. E. 956, 92 N. E. 650, 30 L. R. A. (N. S.) 886. **N. Y.**—*People ex rel. Auwell v. Calder*, 85 App. Div. 31, 82 N. Y. Supp. 822.

28. *Greene v. Damrell*, 175 Mass. 394, 56 N. E. 707.

29. *Hartman v. Collins*, 106 App. Div. 11, 94 N. Y. Supp. 63.

[a] An order requiring the issuance of a permit without prejudice to the officer's pointing out additional changes to be made is erroneous. *Hartman v. Collins*, 106 App. Div. 11, 94 N. Y. Supp. 63.

30. *State ex rel. Grenville v. Nash*, 134 Minn. 73, 158 N. W. 730.

31. *State ex rel. Grenville v. Nash*; 134 Minn. 73, 158 N. W. 730.

32. *Southern Leasing Co. v. Williams*, 96 Misc. 358, 160 N. Y. Supp. 440.

33. See the title "Licenses."

or other structure which is a menace to public welfare.³⁴

17. Mandamus Against Police.—a. *Generally.*—In accordance with the general rules, ministerial duties of the members of the police force may be enforced by the writ of mandamus,³⁵ but the writ will not issue to compel the discharge of a course of duty.³⁶

b. *Enforcement of Laws.*—Some courts hold that mandamus is a proper remedy to compel the police officials to perform their duty of prosecuting violations of the municipal penal laws, on their refusal to do so,³⁷ notwithstanding the remedy against the officer, by indictment, by petition for removal, or by other statutory penalty.³⁸ But the writ has been denied by some courts because mandamus will not lie to compel a general course of conduct,³⁹ especially where it is sought to compel the enforcement of the law generally against all violators.⁴⁰ Other courts have denied the writ because to issue it

34. *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470. See generally the title "Nuisance."

As to compelling removal of obstructions on highways, see 11 STANDARD PROC. 170.

As to enforcing duties to repair highways and bridges, see 11 STANDARD PROC. 120 and 271.

35. See *infra*, this section and see generally the title "Mandamus."

Enforcing duty of city marshal to report names of persons engaged in liquor traffic, see 14 STANDARD PROC. 473.

36. *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855; *State ex rel. Clark v. Murphy*, 2 Ohio Cir. Dec. 190, 3 Ohio Cir. Ct. 332.

[a] A writ to compel a marshal to station a police officer at a particular place in compliance with an ordinance will not lie unless the court is competent to control the execution of the order and is satisfied that injury will or may result if it is not issued. *Alger v. Seaver*, 138 Mass. 331.

37. Neb.—*Moore v. State ex rel. Dunn*, 71 Neb. 522, 99 N. W. 249, 115 Am. St. Rep. 605. **N. H.**—*Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855, under statute providing he shall cause all offenders against the city laws to be promptly prosecuted. **N. Y.**—*People ex rel. Clapp v. Listman*, 40 Misc. 372, 82 N. Y. Supp. 263; *In re Whitney*, 3 N. Y. Supp. 838, 24 N. Y. St. 968. **Ore.**—*State v. Williams*, 45 Ore. 314, 77 Pac. 965, 67 L. R. A. 166.

As to intoxicating liquors, see also 14 STANDARD PROC. 473.

[a] **Writ Should Issue Only in Ex-**

treme Cases.—*People ex rel. Clapp v. Listman*, 40 Misc. 372, 82 N. Y. Supp. 263, affirmed in 84 App. Div. 633, 82 N. Y. Supp. 784.

[b] The fact that it is also the duty of the county solicitor to prosecute the offenses, does not prevent issuance of the writ. *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855.

[c] The right of the relator to swear out a warrant of arrest is not an adequate remedy where it is shown that a number of prosecutions have proved wholly ineffective to eradicate the evil of open and flagrant violations of the law. *Moore v. State ex rel. Dunn*, 71 Neb. 522, 99 N. W. 249, 115 Am. St. Rep. 605.

[d] **Private Citizens Are Proper Relators.**—*State ex rel. Wear v. Francis*, 95 Mo. 44, 48, 8 S. W. 1; *In re Whitney*, 3 N. Y. Supp. 838, 24 N. Y. St. 968.

38. *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855; *People ex rel. Clapp v. Listman*, 40 Misc. 372, 82 N. Y. Supp. 263. *Contra*, *State ex rel. Clark v. Murphy*, 2 Ohio Cir. Dec. 190, 3 Ohio Cir. Ct. 332; *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858.

39. *People ex rel. Bartlett v. Busse*, 238 Ill. 593, 87 N. E. 840, 28 L. R. A. (N. S.) 246; *People ex rel. Bartlett v. Dunne*, 219 Ill. 346, 76 N. E. 570; *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858. But compare *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855.

40. Ill.—*People ex rel. Bartlett v. Dunne*, 219 Ill. 346, 76 N. E. 570. **Mich.**—*Gowan v. Smith*, 157 Mich. 443,

would be wrongfully assuming the management of the municipal affairs of a city,⁴¹ and interfere with a discretionary executive power,⁴² because the duty is not so specific in its nature or of such a character that the court can prescribe a definite act or series of acts which will constitute a performance,⁴³ and because the grievance is purely a public one which cannot be enforced by private citizens.⁴⁴

Directions to Police by Executive. — A statutory duty of the mayor or executive board to direct the police to enter certain places and arrest certain offenders, will not be enforced by mandamus where it is the duty of the police, without such an order, to prosecute all such offenders.⁴⁵ But the vacation of an order by municipal authorities directing the police not to enforce certain laws may be compelled by mandamus, it has been held.⁴⁶

Arrest. — An officer will not be compelled to make arrests where it would be unlawful to do so.⁴⁷

18. Action on Petitions of Voters.⁴⁸ — Mandamus is a proper remedy to compel the performance of the duties of municipal officers and boards to consider petitions properly submitted,⁴⁹ and to examine and certify them.⁵⁰ If the board errs in determining that there are not sufficient signatures attached to the petition, mandamus is a proper remedy to correct the error and compel the board to give it full legal effect.⁵¹ And whether or not mandamus will lie to compel action in

471, 122 N. W. 286. **Ohio.**—State *ex rel.* Clark *v.* Murphy, 2 Ohio Cir. Dec. 190, 3 Ohio Cir. Ct. 332. Compare State *ex rel.* Clark *v.* Police Board, 10 Ohio Dec. (Reprint) 256. **Wash.**—State *ex rel.* Hawes *v.* Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858.

[a] **Enforcement Against Single Violator.**—This is the rule regardless of whether the writ is sought in the particular case to enforce the law against all violators or against a single violator. People *ex rel.* Bartlett *v.* Busse, 238 Ill. 593, 87 N. E. 840, 28 L. R. A. (N. S.) 246. See Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452 (denying writ to compel judge to issue a search warrant); Gowan *v.* Smith, 157 Mich. 443, 473, 122 N. W. 286. Compare Yerkes *v.* Smith, 157 Mich. 557, 122 N. W. 223.

41. People *ex rel.* Bartlett *v.* Dunne, 219 Ill. 346, 76 N. E. 570.

42. Gowan *v.* Smith, 157 Mich. 443, 452, 470, 122 N. W. 286.

43. People *ex rel.* Bartlett *v.* Dunne, 219 Ill. 346, 76 N. E. 570. See also State *ex rel.* Wear *v.* Francis, 95 Mo. 44, 57, 8 S. W. 1.

44. Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452; Sweet *v.* Smith, 153 Mich. 674, 117 N. W. 59, where it was

sought to compel enforcement of Sabbath laws. *Contra*, State *ex rel.* Wear *v.* Francis, 95 Mo. 44, 48, 8 S. W. 1; *In re* Whitney, 3 N. Y. Supp. 838, 24 N. Y. St. 968.

45. State *v.* Williams, 45 Ore. 314, 77 Pac. 965, 67 L. R. A. 166.

46. State *ex rel.* Wear *v.* Francis, 95 Mo. 44, 58, 8 S. W. 1. *Contra*, Gowan *v.* Smith, 157 Mich. 443, 467, 122 N. W. 286.

47. State *v.* Francis, 95 Mo. 44, 8 S. W. 1 (to compel arrest without a complaint or warrant when necessary); State *v.* Williams, 45 Ore. 314, 324, 77 Pac. 965, 67 L. R. A. 166.

48. As to submitting a proposition to a vote of the people on a proper petition, see the title "Mandamus."

49. State *ex rel.* Schilling *v.* Menzie, 17 S. D. 535, 97 N. W. 745 (petition to increase number of commissioners); State *ex rel.* Hawley *v.* Board of Suprs. of Polk County, 88 Wis. 355, 60 N. W. 266.

50. O'Connell *v.* Behan, 19 Cal. App. 111, 124 Pac. 1038, denying writ as petition was irregular.

51. State *ex rel.* Stringfellow *v.* Board of Comrs. of Chouteau County, 42 Mont. 62, 111 Pac. 144.

accordance with the terms of the petition depends upon whether the action is mandatory or discretionary.⁵²

19. **Designation of Newspaper.**—A duty to designate a newspaper may be enforced by mandamus in accordance with rules elsewhere discussed.⁵³

V. INJUNCTION AGAINST MUNICIPALITIES AND THEIR OFFICERS.⁵⁴—A. **AGAINST EXCEEDING POWERS.**—Equity has jurisdiction to enjoin municipal corporations from performing ultra vires acts and unlawfully exercising or abusing their powers,⁵⁵ or from exercising their powers in an informal or illegal manner.⁵⁶ To support the exercise of this jurisdiction there must be some established equitable ground sufficient to justify a resort to equity, such as the want of an adequate remedy at law, multiplicity of suits, irreparable injury, breach of trust, or the like.⁵⁷

B. **AGAINST AUTHORIZED ACTS.**—Equity will not enjoin the action of a municipal corporation or its officers while proceeding within the limits of their well-defined powers.⁵⁸ The mere fact that the acts com-

52. *Inglin v. Snider*, 163 Cal. 747, 127 Pac. 60; *Perry v. Comrs. of Chatham County*, 130 N. C. 558, 41 S. E. 787, petition to establish stock law.

53. See the title "Newspapers."

54. See also the titles "Health;" "Highways, Streets and Bridges;" "Injunctions;" "Officers;" "Public Service Corporations;" "Schools and School Districts;" "Special Assessment;" "States and Territories;" "Taxation;" "Towns."

Injunction against sealer of weights and measures, see the title "Weights and Measures."

55. **U. S.**—*Torpedo Co. v. Clarendon*, 19 Fed. 231. **D. C.**—*Dewey Hotel Co. v. United States Elec. L. Co.*, 17 App. Cas. 356; *Downing v. Ross*, 1 App. Cas. 251, 259. **Ga.**—*Mayor of Americus v. Perry*, 114 Ga. 871, 884, 40 S. E. 1004, 57 L. R. A. 230. **Ill.**—*Sherlock v. Winnetka*, 59 Ill. 389. **Ind.**—*Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416. **Kan.**—*Fairehild v. Holton*, 166 Pac. 503. **Ky.**—*Brown v. Catlettsburg*, 11 Bush 435. **Md.**—*Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278, Ann. Cas. 1913D, 73. **Mo.**—*Hays v. Poplar Bluff*, 263 Mo. 516, 173 S. W. 676, L. R. A. 1915D, 595. **Mont.**—*Davenport v. Kleinschmidt*, 6 Mont. 502, 552, 13 Pac. 249. **Neb.**—*Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128. **N. Y.**—*People ex rel. Negus v. Dwyer*, 90 N. Y. 402, 409, 2 Civ. Proc. 379. **Ohio.**—*Guckenberger v. Dexter*, 5 Ohio N. P. 429, 8 Ohio Dec. 530 (under statute allowing injunction to prevent abuse of cor-

porate powers); *Shaw v. Jones*, 4 Ohio N. P. 372, 6 Ohio Dec. 453. **R. I.** *Place v. Providence*, 12 R. I. 1. **Eng.** *Frewin v. Lewis*, 4 Myl. & C. 249, 41 Eng. Reprint 98.

[a] The foundation of the jurisdiction to restrain municipal authorities is generally placed upon the ground of a breach or abuse of trust by the officials. *Downing v. Ross*, 1 App. Cas. (D. C.) 251. See also *Schumm v. Seymour*, 24 N. J. Eq. 143, 147; *Milhau v. Sharp*, 15 Barb. (N. Y.) 193, 218.

[b] A clear case must be shown. *Tappen v. Crissey*, 64 How. Pr. (N. Y.) 496. As to general rule, see 13 **STANDARD PROC.** 135.

56. *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666; *Westbrook v. Middlecoff*, 99 Ill. App. 327.

57. *Dewey Hotel Co. v. United States Elec. L. Co.*, 17 App. Cas. (D. C.) 356, 364. See generally the titles "Equity Jurisdiction and Procedure;" "Injunctions;" "Multiplicity of Suits."

[a] **Reason.**—The question whether a municipal corporation is acting or has acted within the limits of its lawful powers involves a question of purely legal principles unmixed with equity which may be determined in courts of law. *Dewey Hotel Co. v. United States Elec. L. Co.*, 17 App. Cas. (D. C.) 356, 364.

58. **D. C.**—*Downing v. Ross*, 1 App. Cas. 251, 259. **Ga.**—*Mayor of Americus v. Perry*, 114 Ga. 871, 884, 40 S. E. 1004, 57 L. R. A. 230; *Macon v.*

plained of may be unwise, improvident or extravagant,⁵⁹ or that there may be errors or irregularities in the proceedings,⁶⁰ does not make a case for relief by injunction.

C. AGAINST DISCRETIONARY ACTS.—It is a well settled rule in equity that an injunction will not issue to restrain the exercise of the discretionary powers of municipal officers,⁶¹ in the absence of fraud, or some manifest or gross injustice which would constitute an abuse of discretion.⁶² The fact that the court would have exercised the discretion in a different manner,⁶³ or that the majority of the taxpayers are of a different opinion⁶⁴ does not warrant an injunction.

D. AGAINST WHAT OFFICERS.—Equity may enjoin any city functionary who is engaged in carrying out the illegal purpose complained of.⁶⁵

Hughes, 110 Ga. 795, 804, 36 S. E. 247. **Ill.**—Chatham v. Davis, 183 Ill. App. 506. **Ind.**—Prevo v. Hammond, 116 N. E. 584; Muhler v. Hedekin, 119 Ind. 481, 20 N. E. 700. **Kan.**—Fairchild v. Holton, 166 Pac. 503; Comrs. of Harper County v. State *ex rel.* Beebe, 47 Kan. 283, 27 Pac. 997. **Mich.**—Detroit v. Wayne County Circ. Judge, 79 Mich. 384, 44 N. W. 622. **Neb.**—Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128. **N. J.**—Tucker v. Freeholders of Burlington, 1 N. J. Eq. 282. **Eng.**—Frewin v. Lewis, 4 Myl. & C. 249, 41 Eng. Reprint 98.

59. **N. Y.**—Ziegler v. Chapin, 126 N. Y. 342, 348, 27 N. E. 471; Talcott v. Buffalo, 125 N. Y. 280, 26 N. E. 263 (to restrain substitution of electric for gas lighting); Hopper v. Wilcox, 151 App. Div. 113, 135 N. Y. Supp. 384. **R. I.**—Sherman v. Carr, 8 R. I. 431. **Utah.**—Brummitt v. Ogden Waterworks Co., 33 Utah 285, 93 Pac. 828.

60. McCormick v. New Brunswick, 83 N. J. Eq. 1, 89 Atl. 1034.

61. **Ala.**—O'Rear v. Sartain, 193 Ala. 275, 69 So. 554. **Conn.**—Whitney v. New Haven, 58 Conn. 450, 20 Atl. 666. **Ga.**—Gainesville v. Dunlap, 94 S. E. 247. **Ill.**—Marteeny v. Louth, 197 Ill. App. 106. **Ind.**—Seward v. Liberty, 142 Ind. 551, 42 N. E. 39; Board of Comrs. of Benton County v. Templeton, 51 Ind. 266. **Kan.**—Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252; Hessin v. Manhattan, 81 Kan. 153, 105 Pac. 44, 25 L. R. A. (N. S.) 228. **Ky.**—Wickliffe v. Greenville, 170 Ky. 528, 186 S. W. 476. **Neb.**—Vogel v. Rawley, 85 Neb. 600, 123 N. W. 1037. **N. J.**—Schumm v. Seymour, 24 N. J. Eq. 143. **N. Y.**—People *ex rel.* Negus v. Dwyer, 90 N. Y. 402, 2 Civ. Proc. 379; Wil-

kins v. New York, 9 Misc. 610, 30 N. Y. Supp. 424, 62 N. Y. St. 89. **N. C.**—Newton v. School Committee of Charlotte, 158 N. C. 186, 73 S. E. 886. **Ohio.**—Plessner v. Pray, 6 Ohio N. P. 444. **Ore.**—Avery v. Job, 25 Ore. 512, 525, 36 Pac. 293. **Pa.**—Conrad v. O'Boyle, 51 Pa. Super. 467. **Utah.**—Brummitt v. Ogden Waterworks Co., 33 Utah 285, 93 Pac. 828. **Va.**—Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665.

62. **Ga.**—Gainesville v. Dunlap, 94 S. E. 247. **Ind.**—Seward v. Liberty, 142 Ind. 551, 42 N. E. 39, citing cases. **Kan.**—Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252. **Ohio.**—Plessner v. Pray, 6 Ohio N. P. 444. **Ore.**—Avery v. Job, 25 Ore. 512, 36 Pac. 293. **Pa.**—Conrad v. O'Boyle, 51 Pa. Super. 467. **Tex.**—Williams v. Carroll (Tex. Civ. App.), 182 S. W. 29, 36.

63. **Conn.**—Whitney v. New Haven, 58 Conn. 450, 20 Atl. 666. **Ind.**—Seward v. Liberty, 142 Ind. 551, 42 N. E. 39. **N. J.**—Berdan v. Passaic Valley Sewerage Comrs., 82 N. J. Eq. 235, 88 Atl. 202. **Ore.**—Avery v. Job, 25 Ore. 512, 525, 36 Pac. 293.

64. Comrs. of Court of Floyd County v. Nichols (Tex. Civ. App.), 142 S. W. 37.

65. Detroit v. Wayne County Circ. Judge, 79 Mich. 384, 44 N. W. 622.

[a] County commissioners may be enjoined from proceeding illegally under a claim of right. Board of Comrs. of Benton County v. Templeton, 51 Ind. 266; Follmer v. Nuckolls, 6 Neb. 204.

[b] Police officers may be enjoined. Devlin v. McAdoo, 116 App. Div. 224, 101 N. Y. Supp. 546; McGorie v. McAdoo, 113 App. Div. 271, 99 N. Y. Supp. 47; Burns v. McAdoo, 113 App.

E. JURISDICTION.⁶⁶—The federal courts have jurisdiction of a suit to enjoin the enforcement of an ordinance which is repugnant to the due process clause of the fourteenth amendment,⁶⁷ or which impairs the obligation of a prior contract with the city.⁶⁸

Jurisdictional Amount.—In a taxpayer's suit for an injunction, the test of jurisdiction is not the amount of his tax,⁶⁹ or the probable increase in his tax burden,⁷⁰ but the moneyed amount in the corporate action sought to be enjoined.⁷¹

F. PARTIES.⁷²—**1. Who May Sue.**—**a. State.**—The state acting through its appropriate official may institute proceedings to enjoin the illegal exercise of the powers of a municipality.⁷³ This remedy being somewhat extraordinary, the attorney general should not intervene unless the abuse is one of a substantial nature.⁷⁴ It should appear that the public has a substantial interest in the question,⁷⁵ and the right involved should be a public right, or at least not a private right merely.⁷⁶

b. Municipality.—The municipality itself may institute a suit to prevent its officers from proceeding without authority of law.⁷⁷

Div. 165, 99 N. Y. Supp. 51. See *infra*, IV, J, 17.

66. See generally the titles "Jurisdiction" and "United States Courts."

67. *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. ed. 510. See also *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220.

68. *Des Moines v. Des Moines City R. Co.*, 214 U. S. 179, 29 Sup. Ct. 553, 53 L. ed. 958; *Portland Ry., L. & P. Co. v. Portland*, 201 Fed. 119.

69. *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532; *Bloomfield v. Thompson*, 133 La. 209, 62 So. 634.

Amount in controversy as test of jurisdiction generally, see the title "Jurisdiction."

70. *Bloomfield v. Thompson*, 133 La. 209, 62 So. 634.

71. *Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604; *Hutchinson v. Beckham*, 118 Fed. 399, 55 C. C. A. 333; *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532; *Bloomfield v. Thompson*, 133 La. 209, 62 So. 634. See also 12 STANDARD PROC. 1019.

72. See generally the titles "Injunctions;" "Parties."

73. *Fla.*—*Rickman v. Whitehurst*, 74 So. 205. *Kan.*—*State ex rel. Reed v. Comrs. of Marion County*, 21 Kan. 419. *Mich.*—*Attorney General v. Detroit*, 26 Mich. 263. *Mo.*—*Matthis v.*

Cameron, 62 Mo. 504; *State ex rel. Robinson v. Sanderson*, 54 Mo. 203; *State v. County Court Saline Co.*, 51 Mo. 350, 11 Am. Rep. 454. *N. Y.*—*Doolittle v. Suprs. of Broome*, 16 How. Pr. 512, 18 N. Y. 155. *Wis.*—*Bell v. Platteville*, 71 Wis. 139, 147, 36 N. W. 831.

See 13 STANDARD PROC. 20.

74. *Attorney General v. Detroit*, 26 Mich. 263.

75. *Attorney General v. Detroit*, 26 Mich. 263.

[a] Where there is no bad faith in failing to strictly follow the provisions of the charter in making a contract, the attorney general should not institute proceedings to enjoin carrying out the contract. *Attorney General v. Detroit Co.*, 55 Mich. 181, 20 N. W. 894; *Attorney General v. Detroit*, 26 Mich. 263.

76. *Atchison v. State ex rel. Tufts*, 34 Kan. 379, 389, 8 Pac. 367; *Attorney General v. Detroit*, 26 Mich. 263.

77. *Santa Cruz County v. Burgoon*, 12 Ariz. 295, 100 Pac. 792, under statute.

[a] **Unlawful issuance of bonds** may be enjoined at instance of municipality. *Duanesburgh v. Jenkins*, 46 Barb. (N. Y.) 294.

[b] **Payment of bonds issued** without authority of law may be enjoined by municipality. *Missouri River, Ft. S. & G. R. Co. v. Comrs. of Miami County*, 12 Kan. 230; *Cherry*

c. *Taxpayers.*—(I) *Generally.*—In the absence of statute limiting the right to interfere with municipal affairs to public officers, it is a general rule recognized by the weight of authority that bills to prevent misuse of corporate powers which will create burdens on the property holders and taxpayers, may be maintained by or on behalf of individual taxpayers.⁷⁸ This rule, although incorporated into statutes, in some states, does not in general depend upon statute.⁷⁹ And even in those states in which the right was not recognized formerly, statutes now generally provide for such actions, and authorize them with varying restrictions and limitations.⁸⁰ As a general rule, in the

Creek *v.* Becker, 50 Hun 601, 2 N. Y. Supp. 514, 18 N. Y. St. 485.

Injunction against nuisances by municipality, see 13 STANDARD PROC. 23 and the title "Nuisance."

[c] In Ohio, statute requires the city solicitor to bring the action in the name of the corporation. Butler *v.* Karb, 117 N. E. 953; Hensley *v.* Hamilton, 3 Ohio Cir. Ct. 201, 2 Ohio Cir. Dec. 114.

78. **U. S.**—Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. ed. 1070; Davenport *v.* Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377; Colorado Pav. Co. *v.* Murphy, 78 Fed. 28, 23 C. C. A. 631, 49 U. S. App. 17, 37 L. R. A. 630. **Alaska.**—Bates *v.* Nome, 1 Alaska 208. **Ark.**—Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180. *Compare* Jones *v.* Little Rock, 25 Ark. 301. **Cal.**—Gibson *v.* Trinity Co., 80 Cal. 359, 22 Pac. 225; Schumacker *v.* Toberman, 56 Cal. 508. **D. C.**—Dewey Hotel Co. *v.* United States Elec. L. Co., 17 App. Cas. 356, 366. **Ga.** Mayor of Americus *v.* Perry, 114 Ga. 871, 885, 40 S. E. 1004, 57 L. R. A. 230. **Ill.**—Chestnutwood *v.* Hood, 68 Ill. 132; Scott *v.* Allen, 53 Ill. App. 341. **Ind.**—Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811. **Ind. Ter.**—Tahlequah *v.* Guinn, 5 Ind. Ter. 497, 514, 82 S. W. 886. **La.**—Moss *v.* Hall, 133 La. 351, 63 So. 45; Bloomfield *v.* Thompson, 133 La. 209, 62 So. 634. **Md.**—Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. 706; St. Mary's Industrial School *v.* Brown, 45 Md. 310, 326. **Mich.**—George *v.* Wyandotte Elec. L. Co., 105 Mich. 1, 62 N. W. 985. But see Miller *v.* Grandy, 13 Mich. 540. **Miss.**—Anderson *v.* Montevideo, 162 N. W. 1073; Hodgman *v.* Chicago & St. P. Ry. Co., 20 Minn. 48. **Mo.**—Wagner *v.* Meety, 69 Mo. 150; Matthis *v.* Cameron, 62 Mo. 504. **Neb.**—Nor-

mand *v.* Board of Comrs. of Otoe County, 8 Neb. 18. **N. C.**—Merrimon *v.* Southern Pav. & Const. Co., 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574. **Ohio.**—Counterman *v.* Dublin, 38 Ohio St. 515, as to statute in Ohio see *infra* this section. **Ore.**—Sherman *v.* Bellows, 24 Ore. 553, 34 Pac. 549. **Pa.**—Sample *v.* Pittsburg, 212 Pa. 533, 541, 62 Atl. 201; Pittsburg's Appeal, 79 Pa. 317. **Tenn.**—Public Ledger Co. *v.* Memphis, 93 Tenn. 77, 23 S. W. 51. **Tex.**—Austin *v.* Nalle, 85 Tex. 520, 534, 22 S. W. 688, 960, *affirming* (Tex. Civ. App.), 21 S. W. 375, citing numerous cases. **Wash.**—Maxwell *v.* Smith, 87 Wash. 629, 152 Pac. 530. **Wis.**—Warden *v.* Elroy, 162 Wis. 495, 156 N. W. 466; Carstens *v.* Fond du Lac, 137 Wis. 465, 119 N. W. 117; Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. St. Rep. 657 to enjoin sales of tax certificates for less than value.

See also 13 STANDARD PROC. 14. But see Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586.

79. See the following: **Ark.**—Dreyfus *v.* Boone, 88 Ark. 353, 114 S. W. 718; Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180, the action is not only allowed by statute but may be maintained in the absence of statute. **Cal.**—Thomas *v.* Joplin, 14 Cal. App. 662, 112 Pac. 729. **Me.**—Johnson *v.* Thorndike, 56 Me. 32.

[a] In Arkansas, citizens may sue to enjoin "any illegal exaction whatever." Dreyfus *v.* Boone, 88 Ark. 353, 114 S. W. 718; Taylor Cleveland & Co. *v.* Pine Bluff, 34 Ark. 603.

80. See generally the statutes.

[a] **Construction of Statutes.**—A statute regulating taxpayer's action should be given a "somewhat liberal construction." Hicks *v.* Cocks, 169 App. Div. 964, 153 N. Y. Supp. 776;

absence of statute, the action may be brought by any taxpayer, or by several taxpayers uniting, or by one taxpayer on behalf of all.⁸¹

Butler v. Karb (Ohio St.), 117 N. E. 953.

[b] **Kansas Statute.**—*Pollock v. Kansas City*, 87 Kan. 205, 123 Pac. 985, 42 L. R. A. (N. S.) 465; *Water, Light & Gas Co. v. Hutchinson* 1. R. Co., 74 Kan. 661, 87 Pac. 883. But see *Wyandotte & K. C. Bridge Co. v. Board of County Comrs. of Wyandotte*, 10 Kan. 326; *Craft v. Jackson Co.*, 5 Kan. 518, decided before the statute.

[c] **In Massachusetts.**—*Draper v. Fall River*, 185 Mass. 142, 69 N. E. 1068; *Steele v. Municipal Signal Co.*, 160 Mass. 36, 35 N. E. 105; *Baldwin v. Wilbraham*, 140 Mass. 459, 4 N. E. 829.

[d] **Under the New York statute** (1) the mere illegality of an act which does not involve a waste of public funds does not of itself justify injunctive relief. To be entitled to this relief, it must appear that in addition to being an illegal official act, the threatened act is such as to imperil the public interests or is calculated to work public injury or produce some public mischief. The act must be such that it could be restrained on the application of the attorney-general or some body or officer acting on behalf of the public. *Altshul v. Ludwig*, 216 N. Y. 459, 467, 111 N. E. 216; *Rogers v. O'Brien*, 153 N. Y. 357, 361, 47 N. E. 456. See also *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470; *Slavin v. McGuire*, 205 N. Y. 84, 98 N. E. 405, Ann. Cas. 1913C, 881; *Matter of Reynolds*, 202 N. Y. 430, 440, 96 N. E. 87; *Peck v. Belknap*, 130 N. Y. 394, 29 N. E. 977; *Hearst v. McClellan*, 102 App. Div. 336, 92 N. Y. Supp. 484 (construing New York charter provision.) But see *Roosevelt v. Draper*, 23 N. Y. 318; *Doolittle v. Suprs. of Broom County*, 18 N. Y. 155, 16 How. Pr. 512, decided before the statute. (2) It is not necessary that both illegality and waste or injury be threatened. Either is sufficient. *Brill v. Miller*, 140 App. Div. 602, 125 N. Y. Supp. 865.

[e] **The Ohio statute** (1) provides for suit by taxpayer when the city solicitor fails, on request, to act. *Ohio Rev. St.*, §§1777, 1778; *Butler v. Karb*, 117 N. E. 953; *Youmans v. Board of Education*, 13 Ohio Cir. Ct. 207, 7

Ohio Cir. Dec. 269. (2) Where the municipal proceedings are void it is not necessary to wait until the tax fund is actually raised for expenditure before instituting the suit. *Link v. Karb*, 89 Ohio St. 326, 104 N. E. 632; *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335. Compare *Shaw v. Jones*, 4 Ohio N. P. 372, 6 Ohio Dec. 453.

81. *Beyer v. Crandon*, 98 Wis. 306, 312, 73 N. W. 771. See *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650.

[a] **An individual taxpayer may sue in his own name** to protect his own property from taxation, and the fact that a judgment in his favor would result in a benefit to all does not affect his right. *Kan.*—*Arnhold v. Klug*, 97 Kan. 576, 155 Pac. 805 (under statute). *Mich.*—*Curtenius v. Hoyt*, 37 Mich. 583. *Minn.*—*Hodgman v. Chicago & St. P. Ry. Co.*, 20 Minn. 48. *Wis.* *Beyer v. Crandon*, 98 Wis. 306, 312, 73 N. W. 771. Compare the paragraph following.

[b] **The suit should be brought in the name of the taxpayer for his own use and for the use of all others** where the complainant has no other interest than that which arises from a liability to pay taxes. *Colo.*—*Packard v. Board of Comrs. of Jefferson County*, 2 Colo. 338, 350. *Ind.*—*Ransbottom v. State ex rel. Robbins*, 178 Ind. 80, 96 N. E. 762, 98 N. E. 706. But compare *Comrs. of Delaware v. McClintock*, 51 Ind. 325. *N. J.*—*Lodor v. McGovern*, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446. Compare the preceding paragraph.

[c] **Under the Ohio statute** (1) the action by the taxpayer should be brought on behalf of the corporation, not on behalf of himself or other taxpayers. If not so brought it should be dismissed (*Wood v. Pleasant Ridge*, 12 Ohio Cir. Ct. 177; *Hensley v. Hamilton*, 3 Ohio Cir. Ct. 201, 2 Ohio Cir. Dec. 114 [following *Cincinnati St. Ry. Co. v. Smith*, 29 Ohio St. 291, 303]), unless (2) the court allows an amendment, as it may well do. *Shaw v. Jones*, 4 Ohio N. P. 372, 6 Ohio Dec. 453.

The state is not a necessary party to a suit by taxpayers for an injunction against municipal officers.⁸²

(II.) Necessity for and Nature of Injury. — Injury to the taxpayer is the gist of the suit, unless statute provides otherwise,⁸³ and equity will not in general grant an injunction in a taxpayer's action unless it appears the taxpayer and his class would be injured by the acts sought to be enjoined.⁸⁴ This rule has suffered a relaxation under special circumstances, however.⁸⁵ It is not necessary that the damage suffered by the complaining taxpayers be different in kind from that suffered by the public in general within the corporate limits;⁸⁶ the damage suffered by the increase of the burden of taxation is sufficient to authorize the suit.⁸⁷ Except under statutes prescribing a jurisdictional amount in chancery suits,⁸⁸ it is no objection to the taxpayer's suit, that he owns property of small value, or that his individual tax burden will be trifling.⁸⁹

82. *Baltimore v. Gill*, 31 Md. 375; *Newmeyer v. Missouri & M. R. R. Co.*, 52 Mo. 81, 89, 14 Am. Rep. 394.

83. *Sherman v. Bellows*, 24 Ore. 553, 34 Pac. 549.

84. **U. S.**—*Fellows v. Walker*, 39 Fed. 651. **Cal.**—*Clouse v. San Diego*, 159 Cal. 434, 114 Pac. 573. **Ga.**—*Blanton v. Merry*, 116 Ga. 288, 42 S. E. 211. **Ill.**—*Comrs. of Highways v. Deboe*, 43 Ill. App. 25, 33. **Ind.**—*Rice v. Indianapolis*, 183 Ind. 203, 108 N. E. 584. **Ia.**—*Searle v. Abraham*, 73 Iowa 507, 35 N. W. 612. **Md.**—*Williams v. Baltimore*, 128 Md. 140, 97 Atl. 140; *Turner v. King*, 117 Md. 403, 83 Atl. 649. **Mich.**—*Andrews v. South Haven*, 187 Mich. 294, 153 N. W. 827. **Mont.**—*Larkin v. Butte*, 52 Mont. 410, 158 Pac. 316. **N. Y.**—*Tietz v. Williams*, 91 Misc. 623, 155 N. Y. Supp. 612 (under statute authorizing taxpayers' suits to restrain waste or injury to public funds); *Western New York Water Co. v. Laughlin*, 157 N. Y. Supp. 257. But to restrain an illegal act, injury to taxpayers need not be shown. *Guenther v. Patch*, 135 N. Y. Supp. 629. **Wis.**—*Warden v. Elroy*, 162 Wis. 495, 156 N. W. 466; *Kasik v. Janssen*, 158 Wis. 606, 149 N. W. 398; *Bell v. Platteville*, 71 Wis. 139, 147, 36 N. W. 831.

[a] The Injury Must Be Great or Irreparable.—*Normand v. Board of Comrs. of Otoe County*, 8 Nev. 18.

Allegation in pleadings, see *infra*, V, I.

85. See *infra*, this note.

[a] Where a contract is void, the fact that the municipality would sustain no loss because, for example, the

property to be purchased is worth the agreed price does not prevent relief. The reason is there is no legal liability on the contract and the suit is to prevent an illegal payment of public money. *Barry v. Goad*, 89 Cal. 215, 223, 26 Pac. 785; *Winn v. Shaw*, 87 Cal. 631, 637, 25 Pac. 968.

Issuance of void bonds, see *infra*, V, J, 5, c, (I).

Application of rule to injunction to restrain execution of void contracts, see *infra*, V, J, 6, a.

86. *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *Meyer v. Boonville*, 162 Ind. 165, 173, 70 N. E. 146; *Spurrer v. Vater* (Ind. App.), 113 N. E. 732; *Shaw v. Jones*, 4 Ohio N. P. 372. See cases in next following note. But see *Rickman v. Whitehurst* (Fla.), 74 So. 205.

87. **Fla.**—*Rickman v. Whitehurst*, 74 So. 205. **Ia.**—*Brockman v. Creston*, 79 Iowa 587, 592, 44 N. W. 822. **Okla.**—*Hannan v. Board of Education of Lawton*, 25 Okla. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214. **Ore.**—*Sherman v. Bellows*, 24 Ore. 553. 34 Pac. 549. **Tex.**—*Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

[a] **Damage Is Special**. — *Schiffmann v. St. Paul*, 88 Minn. 43, 92 N. W. 503; *Hodgman v. Chicago & St. P. Ry. Co.*, 20 Minn. 48.

88. *Schurtz v. Grand Rapids* (Mich.), 165 N. W. 766; *McManus v. Petoskey*, 164 Mich. 390, 129 N. W. 681; *Kimmerle v. Cassopolis*, 160 Mich. 90, 125 N. W. 65; *Detroit v. Wayne Circ. Judge*, 128 Mich. 438, 87 N. W. 376.

89. **Ia.**—*Brockman v. Creston*, 79 Iowa

(III.) Rules Applied to Particular Cases. — Illustrating the general rules just discussed, a taxpayer may institute proceedings to enjoin the unlawful disposition and misapplication of municipal funds,⁹⁰ or the incurring of an indebtedness in violation of the charter and constitution.⁹¹ He may bring an action to enjoin municipal officers from entering into illegal and unauthorized contracts,⁹² and from carrying

587, 44 N. W. 822. **N. D.**—Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292. **Ohio.**—Shaw v. Jones, 4 Ohio N. P. 372, 6 Ohio Dec. 453. **Wis.**—Mueller v. Eau Claire Co., 108 Wis. 304, 311, 84 N. W. 430. But see Ebert v. Langlade, 107 Wis. 569, 83 N. W. 942.

Compare Kelly, Piet & Co. v. Baltimore, 53 Md. 134.

90. **U. S.**—Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; The Liberty Bell, 23 Fed. 843. **Ala.**—Kumpe v. Bynum, 158 Ala. 311, 48 So. 55. **Ark.**—Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180; Jacksonport v. Watson, 33 Ark. 704. **Colo.**—Packard v. Board of Comrs. of Jefferson County, 2 Colo. 338. **D. C.**—Downing v. Ross, 1 App. Cas. 251. **Fla.**—Rickman v. Whitehurst, 74 So. 205. **Ill.**—Jones v. O'Connell, 266 Ill. 443, 107 N. E. 731; Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 178; Littler v. Jayne, 124 Ill. 123, 132, 16 N. E. 374; McCord v. Pike, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85. **Ind.**—Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811; Richmond v. Davis, 103 Ind. 449, 3 N. E. 130. **Ia.**—Cascaden v. Waterloo, 106 Iowa 673, 77 N. W. 333. **Md.**—Painter v. Mattfeldt, 119 Md. 466, 87 Atl. 413. **Mich.**—Savidge v. Spring Lake, 112 Mich. 91, 70 N. W. 425. **Minn.**—Farmer v. St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199. **Mo.**—Newmeyer v. Missouri & M. R. R. Co., 52 Mo. 81, 14 Am. Rep. 394. **Mont.**—Milligan v. Miles City, 51 Mont. 374, 153 Pac. 276 (citing numerous local cases); Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249. **Neb.**—Tukey v. Omaha, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711. **N. H.**—Merrill v. Plainfield, 45 N. H. 126. **N. D.**—Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292. **Okla.**—El Reno v. Cleveland-Trinidad Fav. Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; Hannan v. Board of Education of Lawton, 25

Okla. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214; Kellogg v. School Dist. No. Ten, 13 Okla. 285, 74 Pac. 110. **Ore.**—Burness v. Multnomah, 37 Ore. 460, 60 Pac. 1005. **Pa.**—Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272. **Tex.**—Caruthers v. Harnett, 67 Tex. 127, 2 S. W. 523. **Wis.**—Webster v. Douglas, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; Willard v. Comstock, 58 Wis. 565, 571, 17 N. W. 401, 46 Am. Rep. 657.

[a] That the taxpayer has contributed nothing to the fund does not prevent his bringing the action. Jones v. O'Connell, 266 Ill. 443, 107 N. E. 731.

91. **U. S.**—Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. ed. 1070; The Liberty Bell, 23 Fed. 843. **Cal.**—Bradford v. San Francisco, 112 Cal. 537, 44 Pac. 912. **D. C.**—Downing v. Ross, 1 App. Cas. 251. **Ill.**—Wright v. Bishop, 88 Ill. 302; Springfield v. Edwards, 84 Ill. 626. **Md.**—Weber v. Probey, 125 Md. 544, 94 Atl. 162. **Minn.**—Schiffmann v. St. Paul, 88 Minn. 43, 92 N. W. 503. **Okla.**—El Reno v. Cleveland-Trinidad Pav. Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; Hannan v. Board of Education of Lawton, 25 Okla. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214; Kellogg v. School Dist. No. Ten, 13 Okla. 285, 74 Pac. 110. **Pa.**—McIntyre v. Perkins, 9 Phila. 484.

92. **Ind.**—Rice v. Indianapolis, 183 Ind. 203, 108 N. E. 584; Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811; Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416. **Kan.**—Pollock v. Kansas City, 87 Kan. 205, 123 Pac. 985, 42 L. R. A. (N. S.) 465. **Md.**—Packard v. Hayes, 94 Md. 233, 252, 51 Atl. 32. **Minn.**—Arpin v. Thief River Falls, 122 Minn. 34, 141 N. W. 833; Schiffmann v. St. Paul, 88 Minn. 43, 92 N. W. 503. **Neb.**—Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128. **Pa.**—McIntyre v. Perkins, 9 Phila. 484. **Tex.**—Austin v. McCall, 95 Tex. 565, 577, 68 S. W. 791; Sayles v. Abilene (Tex. Civ. App.), 196 S. W. 1000; Tullis v. Church (Tex.

out⁹³ or making payments on⁹⁴ contracts illegally entered into requiring expenditure of public funds, and from paying for work which is defective and does not comply with the contract.⁹⁵ He may enjoin issuance of vouchers or warrants,⁹⁶ or bonds,⁹⁷ as well as the payment of illegal claims,⁹⁸ and the enforcement of ordinances resulting in an illegal expenditure of revenues.⁹⁹ But private individuals cannot sue public officials to restrain purely public wrongs, not affecting their pecuniary interests.¹ Such actions should be brought at the instance of the state.²

(IV.) **Effect of Motive of Taxpayer.** — It has been held that the court cannot inquire into the motives of the taxpayer in bringing the action.³ But other authorities hold that the taxpayer must bring his action in good faith.⁴ But where he does so, the mere fact that the plaintiff

Civ. App.), 171 S. W. 803; *Wood v. Victoria*, 18 Tex. Civ. App. 573, 579, 46 S. W. 284, where the plaintiff sought to enjoin the illegal furnishing of city water to certain company.

[a] **A property owner not affected by special assessments for street paving**, but whose tax burdens will be increased by the paving of street intersections may enjoin the letting of an unauthorized contract for paving. *Pollock v. Kansas City*, 87 Kan. 205, 123 Pac. 985, 42 L. R. A. (N. S.) 465.

93. *Manly Bldg. Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *McKinnon v. Robinson*, 24 N. D. 367, 139 N. W. 580.

94. *Holden v. Alton*, 179 Ill. 318, 323, 53 N. E. 556; *Adams v. Brenen*, 177 Ill. 194, 201, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718; *Hanson v. Hunter*, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84.

95. *Lodor v. McGovern*, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446; *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

96. *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374.

97. **Ill.**—*Wright v. Bishop*, 88 Ill. 302. **Kan.**—*Hartzler v. Goodland*, 97 Kan. 129, 154 Pac. 265. **Mont.**—*McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99; *Hoffman v. Bd. of Comrs. of Gallatin County*, 18 Mont. 224, 44 Pac. 973. **Okla.**—*Afton v. Gill*, 156 Pac. 658. **Ore.**—*Avery v. Job*, 25 Ore. 512, 523, 36 Pac. 293. **Tenn.**—*Winston v. Tennessee & P. R. R. Co.*, 1 Baxt. 60. **Tex.**—*Nalle v. Austin* (Tex. Civ. App.), 21 S. W. 375. **Wis.**—*Lynch v. Eastern, L. & M. Ry. Co.*, 57 Wis. 430, 15 N. W. 743; *Lawson v. Schnellen*, 33 Wis. 288.

98. **Ala.**—*Allen v. La Fayette*, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. **Cal.**—*Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968. **Idaho.**—*Moore v. Hupp*, 17 Idaho 232, 105 Pac. 209. **Md.**—*Peter v. Prettyman*, 62 Md. 566. **Wis.**—*Baleh v. Beach*, 119 Wis. 77, 95 N. W. 132.

99. See *infra*, VI, J, 4, c, (III), (A).

1. **La.**—*Louisiana Nat. Bank v. New Orleans*, 27 La. Ann. 446. **Md.**—*Turner v. King*, 117 Md. 403, 83 Atl. 649. **Okla.**—*Afton v. Gill*, 156 Pac. 658; *Thompson v. Haskell*, 24 Okla. 70, 102 Pac. 700. **Wis.**—*Bell v. Platteville*, 71 Wis. 139, 36 N. W. 831.

See 13 STANDARD PROC. 18.

2. **Comrs. of Highways v. Deboe, 43 Ill. App. 25, 33; *Bell v. Platteville*, 71 Wis. 139, 147, 36 N. W. 831.**

3. **Ia.**—*Brockman v. Creston*, 79 Iowa 587, 44 N. W. 822. **Md.**—*Packard v. Hayes*, 94 Md. 233, 252, 51 Atl. 32, motives are immaterial. **Ohio.**—*Raynolds v. Cleveland*, 24 Ohio Cir. Ct. 215, 2 Ohio Cir. Ct. (N. S.), 139. *Contra*, *Ampt v. Cincinnati*, 2 Ohio N. P. (N. S.) 489; *Fergus v. Columbus*, 6 Ohio N. P. 82.

4. **D. C.**—*Downing v. Ross*, 1 App. Cas. 251. **Ill.**—*Stubbs v. Aurora*, 160 Ill. App. 351; *Comrs. of Highways v. Deboe*, 43 Ill. App. 25, 33. **N. Y.**—*Hull v. Ely*, 2 Abb. N. C. 440; *Nathan v. O'Brien*, 117 App. Div. 664, 102 N. Y. Supp. 947.

[a] **A mere colorable plaintiff**, suing in reality on behalf of other parties in interest, cannot obtain relief. *Stubbs v. Aurora*, 160 Ill. App. 351; *Comrs. of Highways v. Deboe*, 43 Ill. App. 25. See *Bednarski v. West Hammond*, 170 Ill. App. 543.

may also have private interests which he seeks to protect will not prevent him from suing.⁵

(V.) **Who Is Taxpayer.**—To constitute a person a taxpayer it is not requisite that he be a resident,⁶ or a citizen,⁷ or that he has actually paid taxes.⁸ But some statutes limit the suit to citizen residents.⁹

d. **Creditors.**—A creditor of the municipality may obtain injunctive relief as against the municipality where the direct tendency of the act sought to be enjoined will deprive him of his security,¹⁰ and

[b] An agreement (1) to indemnify the taxpayer against costs does not prevent him from suing, where he wanted to sue but was unable to undertake payment of costs. *McClain v. Kisson*, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Ct. 357. (2) That an unsuccessful bidder induced a taxpayer to bring suit, agreeing to defray expenses of suit, does not preclude relief. *Goshert v. Seattle*, 57 Wash. 645, 107 Pac. 860. *Contra*, *Hull v. Ely*, 2 Abb. N. C. (N. Y.) 440. (3) But it is otherwise if a bidder who is the real actor induces a taxpayer to permit the use of his name by a promise that the suit would be without cost to him. In such case the bill may be dismissed even if the municipal authorities were guilty of fraud. *Stubbs v. Aurora*, 160 Ill. App. 351.

[c] The fact that a taxpayer prosecutes the action on behalf of an organization such as a "Citizens' League" composed of himself and other citizens, does not affect his right to sue. *Moore v. Hupp*, 17 Idaho 232, 105 Pac. 209.

5. **N. Y.**—*Brill v. Miller*, 140 App. Div. 602, 125 N. Y. Supp. 865. **Pa.**—*Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693. **Wis.**—*Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

As to right of a taxpayer who is a bidder to enjoin carrying out of contracts let to one who is not the lowest bidder, see *infra*, V, J, 6, e.

[a] The fact that the taxpayer has a private grievance which induces him to bring the action does not preclude relief. *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *Grace v. Forbes*, 64 Misc. 130, 118 N. Y. Supp. 1062, where plaintiff was competitor of person to whom contract was let.

6. **Ia.**—*Brockman v. Creston*, 79 Iowa 587, 591, 44 N. W. 822, citing local cases. **Ohio.**—*McClain v. McKisson*, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec.

357. **Pa.**—*O'Malley v. Olyphant Borough*, 198 Pa. 525, 48 Atl. 483.

7. See *infra* this note.

[a] **Aliens who own property** which can be sold for taxes may institute proceedings. *Goedgen v. Suprs. of Manitowoc County*, 2 Biss. 328, 10 Fed. Cas. No. 5,501.

[b] **A foreign corporation** which pays taxes may institute proceeding. *United Cigar Stores Co. v. Von Bargen*, 7 Ohio N. P. (N. S.) 420.

8. See *infra* this note.

[a] **A person is a taxpayer** who is the owner of property which has been entered for taxation and who is liable to pay the taxes as soon as they are collectible by law although he has not yet resided long enough in the municipality to have actually paid taxes. *Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811.

9. See generally the statutes and *Thomas v. Joplin*, 14 Cal. App. 662, 112 Pac. 729.

10. **U. S.**—*Fazende v. Houston*, 34 Fed. 95, holding ordinance void because it violates a contract with bondholders as to disposition of funds. **Fla.**—See *Trustees of Internal Imp. Fund v. Bailey*, 10 Fla. 112, 81 Am. Dec. 194, where a bondholder enjoined appropriation by state officers. **Kan.** *Courtney v. Cherryvale*, 7 Kan. App. 391, 51 Pac. 930. **La.**—*Droz v. East Baton Rouge*, 36 La. Ann. 307. **Nev.** *Webster v. Fish*, 5 Nev. 190. **N. Y.** *Roosevelt v. Draper*, 23 N. Y. 318, 326.

[a] It is only as an aid to the enforcement of his debt that a creditor can enjoin municipal corporations from exceeding their powers. *Droz v. East Baton Rouge*, 36 La. Ann. 307.

[b] **A general creditor** cannot enjoin payment of a warrant payable out of the general fund. *Courtney v. Cherryvale*, 7 Kan. App. 391, 51 Pac. 930.

Right of creditor to enjoin issuance of city bonds, see *infra*, V, J, 5, c, (I).

where he has no adequate remedy at law.¹¹

e. *Other Persons Not Taxpayers.*—Persons who are not shown to be taxpayers cannot sue to prevent abuses threatened by municipal officers in the disbursement of corporate funds.¹²

2. **Defendants.**—The ordinary rules as to parties in equity and in injunction suits apply to taxpayers' suits for injunctive relief against municipalities or their officers.¹³ The municipal officers sought to be enjoined are necessary or at least proper parties, and if the interest or rights of the corporation are affected, it is a proper if not a necessary party.¹⁴ The holders of warrants against a fund are not necessary parties to a suit to restrain a transfer or diversion of money from that fund,¹⁵ unless a question of priority of payment arises.¹⁶

Ordinances.—The parties defendant to a suit to restrain the passage of ordinances should be the mayor and council,¹⁷ not the municipality.¹⁸ But an action to enjoin the enforcement of an ordinance may be brought against a municipality and its officers.¹⁹

Bonds.—In a suit to restrain the issuance of bonds for public improvements the municipality is a necessary party;²⁰ and if the bonds are to be delivered in payment of claims or of improvements contracted for, the claimant or contractor is an indispensable party.²¹ In suits to enjoin payment of bonds on the ground of their alleged

Right to enjoin annexation proceedings, see *infra*, V, J, 3.

11. *Hausmeister v. Porter*, 21 Fed. 355.

[a] Remedy by mandamus defeats right to injunctive relief. *Hausmeister v. Porter*, 21 Fed. 355.

12. *Comrs. of Perry County v. Medical Society*, 128 Ala. 257, 29 So. 586.

[a] Residents of a county but not within the limits of a municipality cannot institute injunction proceedings against municipal officers. *Marshall v. Mansura*, 116 La. 743, 41 So. 56.

Right of bidder to sue to enjoin municipal contracts, see *infra*, V, J, 6, e.

13. See *Fergus v. Columbus*, 6 Ohio N. P. 82 (under Ohio statute), and the titles "Injunctions;" "Parties."

14. See 13 STANDARD PROC. 35.

[a] In a suit to enjoin municipal action by municipal authorities, the municipality is a proper and necessary party. *Roswell v. Ezzard*, 128 Ga. 43, 51, 57 S. E. 114.

[b] A statute authorizing a suit against officers about to perform illegal acts does not declare them the only necessary parties and prevent a joinder of the municipality. *Hurlburt v. Banks*, 1 Abb. N. C. (N. Y.) 157. See also *Hicks v. Cocks*, 169

App. Div. 964, 153 N. Y. Supp. 776. But see *Wilkins v. New York*, 9 Misc. 610, 30 N. Y. Supp. 424, 62 N. Y. St. 89, holding statute does not authorize joinder of municipality.

15. *Williams v. Carroll* (Tex. Civ. App.), 182 S. W. 29, 40.

16. See *infra* this note.

[a] In a suit to enjoin payment of warrants issued in previous years out of a fund raised during the current year in which a question as to priority of payment arises, the holders of the warrants for previous years are necessary parties. *Pendleton v. Ferguson*, 99 Tex. 296, 89 S. W. 753.

17. *Wabaska Electric Co. v. Wy-more*, 60 Neb. 199, 92 N. W. 626.

18. *Wabaska Electric Co. v. Wy-more*, 60 Neb. 199, 92 N. W. 626.

19. *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883.

20. *Hurlburt v. Banks*, 1 Abb. N. C. (N. Y.) 157.

21. *Patterson v. Board of Suprs. of Yuba County*, 12 Cal. 105; *Hutchinson v. Burr*, 12 Cal. 103; *King v. Comrs. of Court of Throckmorton County*, 10 Tex. Civ. App. 114, 30 S. W. 257. Compare *Hoffman v. Board of Comrs. of Gallatin County*, 18 Mont. 224, 44 Pac. 973; *Hurlburt v. Banks*, 1 Abb. N. C. (N. Y.) 157.

invalidity, the holders of the bonds are necessary parties.²²

Municipal Aid. — In a proceeding to restrain a municipal subscription to railroad stock because of its illegality,²³ or to enjoin the collection of a tax to raise funds therefor,²⁴ the railroad is neither a proper nor necessary party. But in a suit to restrain the collection of taxes to pay interest on bonds in the possession of the railroad company, the railroad is a necessary party.²⁵ If the railroad company has negotiated the bonds, the bondholders are necessary parties.²⁶ So also where it is sought to cancel the subscription and enjoin the issuance of bonds, the railroad company which has the stock books,²⁷ and the county agent,²⁸ who has the bonds for negotiation are necessary parties. The board of commissioners are proper parties where they make the subscription,²⁹ and if it is sought to enjoin the collection of a tax therefor the county court who subscribed and levied the tax³⁰ and the treasurer³¹ are necessary parties.

3. New Parties and Intervention. — In actions against municipal officers, the municipality may be made a party by amendment.³² And in an action to restrain payment of a contract on the ground of its illegality, the contractor may come in and intervene.³³

G. DEMAND AND REFUSAL. — Applying the rule obtaining in actions by stockholders in private corporations,³⁴ it has been held that a citizen and taxpayer of a municipality cannot maintain a suit for an injunction to interfere with the control of corporate property or performance of its contracts unless he calls upon the governing body to perform their duties and they refuse to do so.³⁵ This rule does not apply when there is fraud,³⁶ where the threatened action is ultra vires,³⁷ or will create a public nuisance,³⁸ or where the attitude of the municipal officers is such that a demand would be futile,³⁹ or where

22. See 13 STANDARD PROC. 36.

23. See 13 STANDARD PROC. 34.

24. *Jager v. Doherty*, 61 Ind. 528.

25. *State v. Sanderson*, 54 Mo. 203.

26. *Board v. Texas & P. R. W. Co.*, 46 Tex. 316.

27. *State v. Callaway County Court*, 51 Mo. 395.

28. *State ex rel. v. Callaway County Court*, 51 Mo. 395.

29. See 13 STANDARD PROC. 34.

30. *State v. Sanderson*, 54 Mo. 204.

31. See 13 STANDARD PROC. 34.

32. *Saunders v. Rainey*, 141 Ga. 77, 80 S. E. 305.

33. *Schurtz v. Grand Rapids (Mich.)*, 165 N. W. 766.

34. See 5 STANDARD PROC. 704, et seq.

35. *N. J.*—*Lodor v. McGovern*, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446, to enjoin payment for defective work. *N. C.*—*Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574, a suit

to enjoin payment for work alleged to be defective. *Wis.*—*Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543, 566, per concurring opinion of Ryan, C. J.

[a] A request to the mayor is not a compliance with the rule. *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

36. *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

37. *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325 (suit to enjoin performance of void contract); *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

38. *Jones v. Wilkesboro*, 150 N. C. 646, 64 S. E. 866, a suit to enjoin purchase of pond for water supply on ground it will be a public nuisance.

39. *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

the governing body itself is about to do the wrong.⁴⁰ Some statutes prescribe as a condition precedent, a refusal by the city solicitor to sue,⁴¹ excepting where the municipality has no such officer.⁴²

H. BOND.—Statutes sometimes require the plaintiff in a suit against municipalities and their officers to give an undertaking.⁴³

I. PLEADINGS.—1. **Generally.**⁴⁴—In actions by taxpayers, the bill should show that the plaintiffs are taxpayers,⁴⁵ that municipal officers are abusing municipal franchises and exceeding their powers,⁴⁶ that there is no adequate remedy at law,⁴⁷ and that injury will be sustained by reason of the threatened acts which cannot be adequately remedied otherwise.⁴⁸ A previous demand upon municipal

40. *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 543, 566, *per concurring opinion of Ryan, C. J.*

41. See generally the statutes and the following: *Knorr v. Miller*, 5 Ohio Cir. Ct. 609, 3 Ohio Cir. Dec. 297; *Findlay Gas Light Co. v. Findlay*, 2 Ohio Cir. Ct. 237; 10 Ohio Cir. Dec. 463; *Ampt v. Cincinnati*, 2 Ohio N. P. (N. S.) 489, 496.

[a] **On Whom Demand Made.**—Request should be made to solicitor in office, not to his predecessor. *Rienoehl v. Huonker*, 66 Ohio St. 657, 65 N. E. 1132.

[b] **As the statute does not apply to suits to protect private property rights** as distinguished from the rights of the general public, a previous refusal by the city solicitor is not required in such suits. *Herrick v. Cleveland*, 7 Ohio Cir. Ct. 470, 4 Ohio Cir. Dec. 684; *Mills v. Norwood*, 6 Ohio Cir. Ct. 305, 3 Ohio Cir. Dec. 465.

42. *Pierce v. Hagans*, 79 Ohio St. 9, 86 N. E. 519, 36 L. R. A. (N. S.) 1, note.

43. See generally the statutes, and *Tappen v. Crissey*, 64 How. Pr. (N. Y.) 496.

[a] **Nunc pro tunc filing of bond** by taxpayers may be allowed. *Tappen v. Crissey*, 64 How. Pr. (N. Y.) 496.

[b] **A city solicitor suing under the Ohio statute** need give no undertaking. *Forsythe v. Winans*, 44 Ohio St. 277, 7 N. E. 13.

44. **Allegation of injury in bill to restrain enforcement of telephone rates**, see 13 STANDARD PROC. 77, note 50.

Bill by street railway to enjoin construction of sewer in center of street, see 13 STANDARD PROC. 69.

As to manner of pleading municipal

ordinances, see *infra*, VI, A.

45. **Ala.**—*Comrs.' Court v. Medical Society*, 128 Ala. 257, 29 So. 586. **Ill.** *Chicago v. Nichols*, 177 Ill. 97, 104, 52 N. E. 359. **Ohio.**—*Ampt v. Cincinnati*, 5 Ohio N. P. 98, 8 Ohio Dec. 475.

[a] **The amount of taxes paid or to be paid by the complainant** need not be pleaded. *Chicago v. Nichols*, 177 Ill. 97, 104, 52 N. E. 359.

[b] **The caption** need not describe plaintiff as a taxpayer. *Ampt v. Cincinnati*, 5 Ohio N. P. 98, 8 Ohio Dec. 475.

46. *Tiedt v. Argyle*, 129 Minn. 259, 152 N. W. 412; *Hurlbut v. Lookout Mountain (Tenn.)*, 49 S. W. 301. See also *Hopkins v. Lovell*, 47 Mo. 102.

[a] **Under a statute authorizing a suit whenever an order directing payment of money out of the county treasury is made without authority of law**, it is necessary to allege that the order was made. *Santa Cruz County v. Burgoon*, 12 Ariz. 295, 100 Pac. 792.

47. *Sayles v. Abilene (Tex. Civ. App.)*, 196 S. W. 1000.

[a] **Otherwise Under Statute.** *Haskins ex rel. Cincinnati v. Cincinnati Consol. St. R. R. Co.*, 7 Ohio Dec. (Reprint) 713.

[b] **That the municipal officers are insolvent** so as to render an action at law against them ineffectual must be shown. *Hopkins v. Lovell*, 47 Mo. 102; *Hurlbut v. Lookout Mountain (Tenn.)*, 49 S. W. 301.

48. **Fla.**—*Rickman v. Whitehurst*, 74 So. 205. **La.**—*Moss v. Hall*, 133 La. 351, 63 So. 45. **Mich.**—*Miller v. Grandy*, 13 Mich. 540. **Tex.**—*Sayles v. Abilene (Tex. Civ. App.)*, 196 S. W. 1000.

But see *Guenther v. Patch*, 135 N. Y. Supp. 629, under statute authorizing injunction to prevent illegal official act.

officers to perform their duties,⁴⁹ or upon the city solicitor to bring suit,⁵⁰ and a refusal, must be alleged when such demand and refusal is required. If it is claimed that the municipal authorities are abusing their discretion, facts must be pleaded showing fraud,⁵¹ or an abuse of discretion⁵² and which overcome presumptions of fair dealing,⁵³ unless it is claimed the acts will create a public nuisance.⁵⁴

2. Creation of Illegal Debts.—In a taxpayer's suit to enjoin the creation of a debt in excess of the debt limit, it is necessary to show that the debts already in existence were regularly created and are valid subsisting obligations at the time the debt is about to be created.⁵⁵

3. Municipal Contracts.⁵⁶—In a taxpayer's suit to restrain payment for work done under a contract on the ground of illegal exercise of municipal power to contract therefor, the taxpayer must show not only that the power was irregularly exercised,⁵⁷ but that he was

As to nature of injury generally, see *supra*, V, F, 1, c, (II).

[a] **General damage to the taxpayers** by the increase in the burden of taxation must be shown. **U. S.** *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070. **Ore.**—*Sherman v. Bel- lows*, 24 Ore. 553, 34 Pac. 549. **Tex.** *Altgelt v. San Antonio*, 81 Tex. 436, 449, 17 S. W. 75, 13 L. R. A. 383. **Wash.**—*Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530.

[b] **Special damage not suffered by taxpayers generally** need not be alleged. **U. S.**—*Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070. **Ind.** *Meyer v. Boonville*, 162 Ind. 165, 70 N. E. 146. **Wash.**—*Maxwell v. Smith*, 87 Wash. 629, 152 Pac. 530.

[c] **An averment that the cost of performing the contract is a certain amount is insufficient as an allegation that the consummation of the contract would increase the taxes.** *Sayles v. Abilene* (Tex. Civ. App.), 196 S. W. 1000.

[d] **Where statute requires city officials to exact a bond to indemnify the city against loss by reason of excavations, the petition of a taxpayer to enjoin the excavation must negative the execution of the bond.** *Spurrier v. Vater* (Ind. App.), 113 N. E. 732.

49. *Lodor v. McGovern*, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446; *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574. See also *Bound v. Wisconsin Cent. R. Co.*, 45

Wis. 543, *per concurring opinion of Ryan, C. J.*

As to demand, see *supra*, V, G.

50. *Findlay Gas Light Co. v. Findlay*, 2 Ohio Cir. Ct. 237, 10 Ohio Cir. Dec. 463; *Ampt. v. Cincinnati*, 5 Ohio N. P. 98, 8 Ohio Dec. 475. See *supra*, IV, G.

51. **Ala.**—*Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 68 So. 971. **Idaho.**—*Picotte v. Watt*, 3 Idaho 447, 31 Pac. 805. **Ind.**—*Seward v. Liberty*, 142 Ind. 551, 42 N. E. 39. **N. C.**—*Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574.

See generally the title **Fraud and Deceit.**

Alleging fraud in injunction suits, see 13 STANDARD PROC. 60.

52. *Sewart v. Liberty*, 142 Ind. 551, 42 N. E. 39; *Conrad v. O'Boyle*, 51 Pa. Super. 467.

53. *Seward v. Liberty*, 142 Ind. 551, 42 N. E. 39.

54. *Jones v. North Wilkesboro*, 150 N. C. 646, 64 S. E. 866.

55. *Tullos v. Church* (Tex. Civ. App.), 171 S. W. 803, sustaining general demurrer to petition for omission of such allegation.

56. **In bill to enjoin city from breaching contract to supply water, as to allegation as to price,** see 13 STANDARD PROC. 62, note 11.

57. *Lawton v. Racine*, 137 Wis. 593, 119 N. W. 331. See *Ness v. Board of Comrs. of Marshall County* (Ind. App.), 93 N. E. 283, 91 N. E. 618.

damaged thereby,⁵⁸ and without fault himself.⁵⁹ A bill for an injunction on the ground the contract was not awarded to the lowest responsible bidder must show fraud or a gross abuse of discretion.⁶⁰ But in an action to prevent execution of a contract awarded without considering all the bids, it has been held that it is unnecessary to allege that the bid not considered was lower than those considered.⁶¹

4. Claims.—A bill to restrain payment of a claim must allege that a claim has been made and filed,⁶² and that the treasurer intends to pay it.⁶³

5. Joinder of Actions.—In a bill to restrain payment of illegal claims, it is proper to join a cause of action against the municipal officers personally responsible for the claims that have been paid,⁶⁴ especially where the statute contemplates such a twofold relief.⁶⁵ But a cause of action to enjoin the performance of a contract let to other than the lowest bidder and one to compel award of the contract to the plaintiff cannot be joined as in one the plaintiff sues as a taxpayer and in the other as bidder.⁶⁶

6. Construction of Pleadings.—In actions of this kind, the court will give the pleadings a liberal construction.⁶⁷

J. APPLICATION OF RULES TO PARTICULAR CASES. — 1. Questioning Legality of Incorporation by Injunction.—The question as to whether or not a municipality is legally incorporated cannot be raised by a bill for an injunction, the remedy being by quo warranto.⁶⁸

58. *Lawton v. Racine*, 137 Wis. 593, 119 N. W. 331.

59. *Lawton v. Racine*, 137 Wis. 593, 119 N. W. 331, citing local cases.

As to estoppel against taxpayer, see *infra*, IV, J, 6, c.

60. *Inge v. Board of Public Wks. of Mobile*, 135 Ala. 189, 198, 33 So. 678, 93 Am. St. Rep. 20.

[a] A bill is sufficient against demurrer which alleges that the board never adjudicated who was the lowest responsible bidder but arbitrarily awarded the contract to the ——— company, whose bid was more than two thousand dollars in excess of the bid of the ——— company, the lowest responsible bidder. *Inge v. Board of Public Wks. of Mobile*, 135 Ala. 189, 198, 33 So. 678, 93 Am. St. Rep. 20.

61. *Baltimore v. Keyser*, 72 Md. 106, 114, 19 Atl. 706.

[a] The proposal which was not considered need not be filed as an exhibit. *Baltimore v. Keyser*, 72 Md. 106, 115, 19 Atl. 706.

62. *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577.

63. *Alston v. Dunn*, 176 Ala. 421, 58 So. 300.

64. *Barnes v. McGuire*, 33 Misc. 438, 68 N. Y. Supp. 485, equity administers complete relief.

[a] **The Cause of Action Should Be Separately Stated.**—*Barnes v. McGuire*, 33 Misc. 438, 68 N. Y. Supp. 485.

65. *Barnes v. McGuire*, 33 Misc. 438, 68 N. Y. Supp. 485.

66. *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865. But compare *Kelly v. Chicago*, 62 Ill. 279.

As to right of bidder to sue, see *infra*, V, J, 6, e, (III).

67. *Brooks v. MacLean*, 95 Neb. 16, 144 N. W. 1067.

68. Fla.—*Bateman v. Florida Commercial Co.*, 26 Fla. 423, 8 So. 51; *MacDonald v. Rehrer*, 22 Fla. 198; *Robinson v. Jones*, 14 Fla. 256. N. Y. *People ex rel. Kingsland v. Clark*, 70 N. Y. 518. Okla.—*Earlboro Tp. v. Howard*, 47 Okla. 455, 149 Pac. 136; *State ex rel. Standeven v. Armstrong*, 27 Okla. 810, 117 Pac. 332. Tenn. *Ford v. Farmer*, 9 Humph. 152. Wash. See *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

See generally the title "Quo Warranto."

2. **Organization of County and County Seats.**—The organization of counties pertains to the political rather than judicial branch of government and taxpayers cannot enjoin the proceedings.⁶⁹ But the removal of a county seat may be restrained by injunction on a proper showing.⁷⁰

3. **Boundaries and Annexation or Detachment of Territory.**—The remedy by injunction is appropriate to restrain further unauthorized proceedings to annex territory to or detach it from a municipality,⁷¹ and to restrain a municipality from exercising authority over territory where the annexation proceedings are void and of no effect.⁷² The action may be brought by one or more citizens and taxpayers of the territory sought to be annexed,⁷³ or by the municipality seeking

Questioning legality of annexation of territory, see *infra*, V, J, 3.

69. *Oden v. Barber* (Tex. Civ. App.), 126 S. W. 676, following *Hughes v. Dubbs*, 84 Tex. 502, 19 S. W. 684.

[a] **Whether the injunction is sought before or after the holding of the election is immaterial.** *Oden v. Barber* (Tex. Civ. App.), 126 S. W. 676.

[b] **That some of the territory does not contain sufficient population does not authorize an injunction.** *Stephens v. Minnerly*, 6 Thomp. & C. (N. Y.) 318.

70. **Ind.**—*Markle v. Board of County Comrs. of Clay*, 55 Ind. 185, 46 Ind. 96. **Ia.**—*Bennett v. Hetherington*, 41 Iowa 142. **Tenn.**—See *Saunders v. Metcalf*, 1 Tenn. Ch. 419. **Wash.**—*Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480.

[a] **Where the petition requesting the removal is insufficient, equity will grant an injunction.** *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480.

[b] **Announcing result of election to remove county seat will not be enjoined on the ground the election was illegally ordered.** *People ex rel. Attorney General v. Board of Suprs. of Shasta County*, 75 Cal. 179, 16 Pac. 776.

71. **Colo.**—*Pueblo v. Stanton*, 45 Colo. 523, 102 Pac. 512. **Ga.**—*Macon v. Hughes*, 110 Ga. 795, 804, 36 S. E. 247. **Ind.**—*Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937. **Pa.**—*Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201.

[a] **The holding of an annexation election will be enjoined where the ordinance calling it is ultra vires.** *Macon v. Hughes*, 110 Ga. 795, 804, 36 S. E. 247; *Layton v. Monroe*, 50 La. Ann. 121, 23 So. 99, where petition

was not signed by one-third of property owners.

[b] **Canvassing returns of illegal city election for annexation will be enjoined.** *Wilton v. Pierce County*, 61 Wash. 386, 112 Pac. 386.

[c] **A school district and township whose revenues will be reduced and whose rate of taxation increased have an interest authorizing their joinder as plaintiffs.** *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725.

[d] **The municipality is a necessary party defendant in a suit to enjoin a municipality from readjusting its lines.** *Town of Roswell v. Ezzard*, 128 Ga. 43, 51, 57 S. E. 114.

[e] **The mayor and clerk are necessary parties defendant to a suit to prevent them from certifying the result of the election, the statute imposing this duty on them by name.** *Town of Roswell v. Ezzard*, 128 Ga. 43, 51, 57 S. E. 114.

[f] **Issues.**—In an action to enjoin a city from extending its limits over a homestead, the question whether the homestead exemption would be reduced cannot be litigated. *Eskridge v. Emporia*, 63 Kan. 368, 65 Pac. 694.

72. **Ill.**—*Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388, Ann. Cas. 1913D, 399. **N. D.**—*Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725. **Pa.**—*Pittsburg's Appeal*, 79 Pa. 317.

[a] **An injunction to restrain collection of taxes on annexed territory is a proper remedy to test validity of annexation.** *Windman v. Vincennes*, 58 Ind. 480; *Stilz v. Indianapolis*, 55 Ind. 515. But see *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742.

73. **Colo.**—*Pueblo v. Stanton*, 45

to enjoin another city from exercising authority over its territory on the ground the annexation proceedings had are void.⁷⁴ But a creditor whose security will not be impaired cannot enjoin proceedings.⁷⁵

Where boundaries have been permanently established by a lawful survey, a proposed survey and change of boundaries will be enjoined.⁷⁶ The fact that the boundary line is not being located correctly does not authorize an injunction.⁷⁷

4. **Ordinances.**—a. *Enactment of Ordinances.*—Equity cannot properly interfere with or in advance restrain the discretion of a municipal body while in the exercise of its legislative powers.⁷⁸ The

Colo. 523, 102 Pac. 512. **Ga.**—Town of Roswell v. Ezzard, 128 Ga. 43, 57 S. E. 114. **Ind.**—Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937. **La.**—Layton v. Monroe, 50 La. Ann. 121, 23 So. 99. **N. D.**—Red River Valley Brick Co. v. Grand Forks, 27 N. D. 8, 145 N. W. 725. **Pa.**—Sample v. Pittsburg, 212 Pa. 533, 541, 62 Atl. 201; Pittsburg's Appeal, 79 Pa. 317. **Wash.** Wilton v. Pierce County, 61 Wash. 386, 112 Pac. 386.

[a] A statute providing that no person shall be competent to contest an election unless he is a qualified voter of the precinct in which the office is to be exercised does not apply to a suit to enjoin canvass of returns of illegal election for annexation. Wilton v. Pierce County, 61 Wash. 386, 112 Pac. 386.

74. Hyde Park v. Chicago, 124 Ill. 156, 16 N. E. 222, where the statute was unconstitutional.

75. Moore v. Ballard, 69 N. C. 21.

76. Washington v. Richards, 78 Kan. 114, 96 Pac. 32.

77. Board of Comrs. of Chatham County v. Thorn, 117 N. C. 211, 23 S. E. 184.

78. **U. S.**—New Orleans Water Works Co. v. New Orleans, 164 U. S. 471, 481, 17 Sup. Ct. 161, 41 L. ed. 518; Alpers v. San Francisco, 32 Fed. 503, 12 Sawy. 631. **Colo.**—Tebbetts v. People, 31 Colo. 461, 73 Pac. 869; Lewis v. Denver City Water Works Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248. **Ill.**—Stevens v. St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832; Illinois Central R. R. Co. v. Chicago, 141 Ill. 586, 600, 30 N. E. 1044, 17 L. R. A. 530. **Ia.**—Majestic Theater Co. v. Cedar Rapids, 153 Iowa 219, 133 N. W. 117, Ann. Cas. 1913E, 93 note. **Ky.**—Slade

v. Lexington, 121 S. W. 621. **La.**—Harrison v. New Orleans, 33 La. Ann. 222, 39 Am. Rep. 272. **Minn.**—Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131, 140 Am. St. Rep. 490. **Mo.**—State ex rel. Abel v. Gates, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152; Albright v. Fisher, 164 Mo. 56, 64 S. W. 106. **Neb.**—Chicago, R. I. & P. R. Co. v. Lincoln, 85 Neb. 733, 124 N. W. 142, 19 Ann. Cas. 207, note; Lee v. McCook, 82 Neb. 26, 116 N. W. 955. **N. J.**—Harrison Land Co. v. Crucible Steel Co., 82 N. J. Eq. 414, 89 Atl. 41; New Jersey St. Ry. Co. v. South Orange, 58 N. J. Eq. 83, 43 Atl. 53. **N. Y.**—Valparaiso v. Gardner, 97 N. Y. 1, 49 Am. Rep. 416; Whitney v. Mayor of New York, 28 Barb. 233; Milbau v. Sharp, 15 Barb. 193, 212. **Okla.**—Norman v. Allen, 47 Okla. 74, 147 Pac. 1002; El Reno v. Cleveland-Trinidad Pav. Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650. **Tenn.**—Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136. **Tex.**—Hatcher v. Dallas (Tex. Civ. App.), 133 S. W. 914. **Wis.** State ex rel. Rose v. Superior Court, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819.

[a] Especially where the proposed ordinance would be a nullity on its face. Spring Valley Water-Works v. Bartlett, 16 Fed. 615, 8 Sawy. 555; Dailey v. Nassau County Ry. Co., 52 App. Div. 272, 65 N. Y. Supp. 396.

[b] The enactment of ordinances for a governmental or public purpose will not be enjoined. Roberts v. Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844.

[c] Where an ordinance will have same force and effect as an act of state legislature, its enactment will not be enjoined. **Ia.**—Des Moines Gas Co. v. Des Moines, 44 Iowa 505, 24 Am. Rep. 756. **Ky.**—Roberts v. Louis-

fact that the threatened ordinance may be in disregard of the constitutional restraints and impair the obligation of contract does not affect the question.⁷⁹ But when the governing body of a municipality is acting in a ministerial capacity, an injunction will lie to restrain an illegal exercise of its powers although it speaks through ordinances.⁸⁰ So also it has been held that the passage of an invalid ordinance which is judicial in character, as where it declares a forfeiture of a franchise, will be enjoined.⁸¹ Other circumstances under which an injunction to restrain the passage of ordinances will lie, seem to be limited to cases where the governing body has no power to act legislatively on a particular subject at all;⁸² or where such

ville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844. Wis.—*State ex rel. Rose v. Superior Court*, 105 Wis. 651, 678, 81 N. W. 1046, 48 L. R. A. 819.

[d] **However unwise or impolitic** an ordinance within the authority of the city to enact may be, the court cannot interfere with its passage. *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Bond v. Newark*, 19 N. J. Eq. 376.

[e] **Even when done from corrupt motives** or for unworthy purposes. *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Bond v. Newark*, 19 N. J. Eq. 376.

[f] **The mere fact that the council has committed errors** in its proceedings which may be fatal to the validity of the ordinance, does not authorize an injunction. *State ex rel. Rose v. Superior Court*, 105 Wis. 651, 680, 81 N. W. 1046, 48 L. R. A. 819.

[g] **The passage of an ordinance creating an indebtedness** beyond the statutory limit will not be enjoined, as the ordinance is not self executing. *Murphy v. East Portland*, 42 Fed. 308.

[h] **Whether the act sought to be enjoined is legislative in character**, is a judicial question to be disposed of by the court and it can prohibit action until it can investigate and decide the question. *People ex rel. Negus v. Dwyer*, 90 N. Y. 402, 409, 2 Civ. Proc. 379; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

79. **U. S.**—*Alpers v. San Francisco*, 32 Fed. 503, 12 Sawy. 631. **Ala.**—*Montgomery Gas-Light Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616. **Ia.**—*Majestic Theater Co. v. Cedar Rapids*, 153 Iowa 219, 133 N. W. 117, Ann. Cas. 1913E, 93; *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756.

See *infra*, V, J, 6, d.

80. **Ill.**—*Stevens v. St. Mary's Training School*, 144 Ill. 336, 350, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832. **Mo.**—*State ex rel. Abel v. Gates*, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152. **Okla.**—*El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 659, 107 Pac. 163, 27 L. R. A. (N. S.) 650. **Wis.**—*State ex rel. Rose v. Superior Court*, 105 Wis. 651, 678, 81 N. W. 1046, 48 L. R. A. 819.

[a] **The passage of an illegal assessing ordinance** will be enjoined. *Norman v. Allen*, 47 Okla. 74, 147 Pac. 1002. See also *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 660, 107 Pac. 163, 167, 27 L. R. A. (N. S.) 650. See generally the title "**Taxation.**"

81. *North Jersey St. Ry. Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53.

82. **U. S.**—*Murphy v. East Portland*, 42 Fed. 308; *Alpers v. San Francisco*, 12 Sawy. 631, 32 Fed. 503. **Ill.**—*Stevens v. St. Mary's Training School*, 144 Ill. 336, 350, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832. **Okla.**—*El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 659, 107 Pac. 163, 27 L. R. A. (N. S.) 650. **Tenn.**—*Trading Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S. W. 136. **Wis.**—*State ex rel. Rose v. Superior Court*, 105 Wis. 651, 677, 81 N. W. 1046, 48 L. R. A. 819.

[a] **Irreparable Injury.**—An injunction will lie against the adoption of an ordinance which is beyond the power of the city, and which would result in irreparable injury. *Murphy v. East Portland*, 42 Fed. 308; *Spring Valley Water-Works v. Bartlett*, 3 Sawy. 555, 16 Fed. 615; *Wabaska Elec-*

body is clothed with certain powers, but threatens to go beyond and outside of such powers, and invade the property rights of the complainant;⁸³ or where such body threatens to squander or divest some fund or property held by it or some of its officials in trust for its taxpayers;⁸⁴ or which the municipality holds in its private character;⁸⁵ or where it appears the mere formal passage of the ordinance or resolution will instantly, without any action or attempt to enforce any right or privilege under it, effect an irremedial private injury, cause a multiplicity of suits, or violate existing contractual relations.⁸⁶ But even in those cases in which an injunction will lie, relief will be denied undoubtedly if the plaintiff has an adequate remedy by an action for damages,⁸⁷ or by an action to enjoin the enforcement of the ordinance when passed.⁸⁸ And the restraining power of the courts should be directed against the enforcement rather than the passage of unauthorized ordinances and resolutions.⁸⁹

tric Co. v. Wymore, 60 Neb. 199, 82 N. W. 626.

[b] **Multiplicity of Suits.**—Should the ordinance, which is beyond the legislative authority of the city, be of such a character and affect a number of persons and cause a multiplicity of suits before its illegality can be determined, the court will grant relief. Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136.

83. *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 659, 107 Pac. 163, 27 L. R. A. (N. S.) 650; *State ex rel. Rose v. Superior Court*, 105 Wis. 651, 678, 81 N. W. 1046, 48 L. R. A. 819.

84. **U. S.**—*Alpers v. San Francisco*, 32 Fed. 503, 12 Sawy. 631. **Ill.**—*Stevens v. St. Mary's Training School*, 144 Ill. 336, 350, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832. **Okla.** *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 659, 107 Pac. 163, 27 L. R. A. (N. S.) 650. **Wis.**—*State ex rel. Rose v. Superior Court*, 105 Wis. 651, 678, 81 N. W. 1046, 48 L. R. A. 819.

[a] **Corporate franchises** are not like a fund held in trust for the citizens, and ordinances granting them do not come within the rule of the text. *State ex rel. Rose v. Superior Court*, 105 Wis. 651, 679, 81 N. W. 1046, 48 L. R. A. 819.

85. *Roberts v. Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844; *Milhau v. Sharp*, 15 Barb. (N. Y.) 193, 212.

86. **U. S.**—*Spring Valley Water-Works v. Bartlett*, 16 Fed. 615, 8 Sawy.

555. **Colo.**—*Lewis v. Denver City Water Works Co.*, 19 Colo. 236, 241, 34 Pac. 993, 41 Am. St. Rep. 248, query. **Ill.**—*Stevens v. St. Mary's Training School*, 144 Ill. 336, 351, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832. **Ia.**—*Majestic Theater Co. v. Cedar Rapids*, 153 Iowa 219, 133 N. W. 117, Ann. Cas. 1913E, 93 (note), the rule as stated in this case is limited to ordinances passed in the administrative or business capacity of the city. **Minn.**—*Basting v. Minneapolis*, 112 Minn. 306, 127 N. W. 1131, 140 Am. St. Rep. 490, followed in *Sullivan v. East Grand Forks*, 131 Minn. 424, 155 N. W. 397. **Neb.**—*Chicago, R. I. & P. R. Co. v. Lincoln*, 85 Neb. 733, 124 N. W. 142. **N. Y.**—*Whitney v. Mayor of New York*, 28 Barb. 233. **Okla.**—*El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 659, 107 Pac. 163, 27 L. R. A. (N. S.) 650. See *Davenport v. Kleinschmidt*, 6 Mont. 502, 548, 13 Pac. 249.

As to contracts of municipalities, see *infra*, V, J, 6.

87. *Trading Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S. W. 136.

88. *Trading Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S. W. 136.

89. **Ill.**—*Adams v. Brenan*, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832; *Chicago v. Evans*, 24 Ill. 52. **Ind.**—*Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416. **Neb.** *Chicago, R. I. & P. Ry. Co. v. Lincoln*, 85 Neb. 733, 124 N. W. 142;

b. *Publication of Ordinances.*—The publication of an ordinance is purely a ministerial act and may be enjoined if the ordinance is void.⁹⁰

c. *Enforcement of Ordinances.*⁹¹—(I.) **Generally.**—Courts of equity do not look with favor upon bills to prevent the enforcement of municipal ordinances.⁹²

(II.) **Valid Ordinances.**—The enforcement of an ordinance which is valid or at least prima facie valid should not be enjoined.⁹³ The fact that the plaintiff is innocent of the charge of violating the ordinance,⁹⁴ or that it has not been enforced against others as strictly as against the plaintiff⁹⁵ does not authorize an injunction. Nor is it ground for an injunction that the enforcement will impose some hardships on the plaintiff.⁹⁶

(III.) **Void Ordinances.**⁹⁷—(A.) **GENERALLY.**—Equity has jurisdiction to restrain the enforcement of an illegal or ultra vires ordinance after it has passed.⁹⁸ But it is only in exceptional cases that such an injunction will be granted.⁹⁹ Equity will not grant an injunction against the enforcement of an ordinance merely on the ground it is illegal

Lee v. McCook, 82 Neb. 26, 116 N. W. 955. N. Y.—Whitney v. Mayor of New York, 28 Barb. 233.

As to restraining enforcement of ordinances, see *infra*, V, J, 4, c.

90. Minneapolis General E. Co. v. Minneapolis, 194 Fed. 215; Minneapolis St. Ry. Co. v. Minneapolis, 155 Fed. 989.

91. Enjoining collection of taxes, see the title "Taxation."

92. Cuba v. Mississippi Cotton Oil Co., 150 Ala. 259, 43 So. 706, 10 L. R. A. (N. S.) 310; Adams v. Cronin, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61.

93. International Text-Book Co. v. Auburn, 163 Fed. 543; Augusta v. Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340.

94. Ill.—Cicero Lumb. Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. Ind. Davis v. Fasig, 128 Ind. 271, 27 N. E. 726. N. Y.—Davis v. American Soc. for Prevention of Cruelty to Animals, 75 N. Y. 362.

See also Ludlow & Cincinnati Coal Co. v. Ludlow, 19 Ky. L. Rep. 1381, 43 S. W. 435; Beck Co. v. Milwaukee, 139 Wis. 340, 120 N. W. 293, 131 Am. St. Rep. 1061.

[a] The guilt or innocence of the

plaintiff cannot be determined in the injunction suit. Canon City v. Manning, 43 Colo. 144, 150, 95 Pac. 537, 17 L. R. A. (N. S.) 272.

95. Rock Island v. Wagner, 45 Ill. App. 444.

96. Mannix v. Frost, 164 N. Y. Supp. 1050; Schlumpf v. Seattle, 88 Wash. 192, 152 Pac. 673.

97. As to injunctions against laying of tracks, etc., under void ordinances, see the titles "Railroads;" "Street Railroads."

Enjoining ordinances fixing rates, see the title "Public Service Corporations."

98. U. S.—Alpers v. San Francisco, 32 Fed. 503, 12 Sawy. 631. Colo.—Lewis v. Denver City Water Wks. Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248. Ia.—Majestic Theater Co. v. Cedar Rapids, 153 Iowa 219, 133 N. W. 117, Ann. Cas. 1913E, 93 note. Mich. Board of Health of Grand Rapids v. Vink, 184 Mich. 688, 151 N. W. 672. Minn.—Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131, 140 Am. St. Rep. 490. N. Y.—New York & Harlem R. R. Co. v. New York, 1 Hilt. 562. Ore.—Chan Sing v. Astoria, 79 Ore. 411, 155 Pac. 378. Tenn.—Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136.

99. Brown v. Catlettsburg, 11 Bush (Ky.) 435; Coykendall v. Hood, 36 App. Div. 558, 55 N. Y. Supp. 718; United Traction Co. v. Watervliet, 35 Misc. 392, 71 N. Y. Supp. 977.

and void.¹ Nor will it grant relief if the plaintiff has an adequate remedy at law,² as by an action for damages,³ or by defense to a prosecution under it.⁴

As such suit involves an examination merely of purely legal questions unmixed with equity, it has been held by a number of cases that a court of equity will not take jurisdiction until after the illegality of the ordinance has been established in an action at law.⁵ But generally where there exists some well established equitable ground,⁶ such

1. **U. S.**—Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 276, 285, 29 Sup. Ct. 426, 53 L. ed. 796. **Ariz.**—Bisbee v. Arizona Ins. Agency, 14 Ariz. 313, 127 Pac. 722. **Fla.**—Orange City v. Thayer, 45 Fla. 502, 34 So. 573. **Ill.**—Kearney v. Canton, 273 Ill. 507, 517, 113 N. E. 98; Cicero Lumb. Co. v. Cicero, 176 Ill. 9, 31, 51 N. E. 758, 42 L. R. A. 696. **Okla.**—Thompson v. Tucker, 15 Okla. 486, 83 Pac. 413.

But see City Cab, Carriage & Transfer Co. v. Hayden, 73 Wash. 24, 131 Pac. 472, Ann. Cas. 1914D, 731, L. R. A. 1915F, 726.

2. **U. S.**—Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. ed. 796; Torpedo Co. v. Clarendon, 19 Fed. 231. **Conn.**—Dunham v. New Britain, 55 Conn. 378, 11 Atl. 354. **Fla.**—Orange City v. Thayer, 45 Fla. 502, 34 So. 573. **Ga.**—Mayor of Moultrie v. Patterson, 109 Ga. 370, 34 S. E. 600. **Ill.**—Field v. Western Springs, 181 Ill. 186, 54 N. E. 929; Cicero Lumb. Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; Rock Island v. Wagner, 45 Ill. App. 444. **Ia.**—Majestic Theater Co. v. Cedar Rapids, 153 Iowa 219, 133 N. W. 117, Ann. Cas. 1913E, 93. **Mo.**—Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. **N. Y.**—Schulz v. Albany, 27 Misc. 51, 57 N. Y. Supp. 963. **N. C.**—Paul v. Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902. **Ohio.**—Arnold v. Van Wert, 3 Ohio Cir. Ct. 545, 2 Ohio Cir. Dec. 314.

[a] A local improvement ordinance will not be restrained on the ground it is unreasonable, as the party has a remedy by opposing the confirmation of the assessment. Field v. Western Springs, 181 Ill. 186, 54 N. E. 929.

3. Doane v. Lake Street El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97; Paul v.

Washington, 134 N. C. 363, 367, 47 S. E. 793; Scott v. Smith, 121 N. C. 94, 28 S. E. 64. And see cases in preceding note.

[a] If the enforcement of the ordinance would merely result in a trespass, the plaintiff has an adequate remedy in damages and cannot obtain injunctive relief. Orange City v. Thayer, 45 Fla. 502, 34 So. 573.

[b] Where the officers enforcing the ordinance are insolvent, the plaintiff has no adequate remedy in damages precluding relief. Cicero Lumb. Co. v. Cicero, 176 Ill. 9, 32, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696. *Contra*, Paul v. Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

4. See *infra*, V, J, 4, c, (III), (B).

5. **U. S.**—Torpedo Co. v. Clarendon, 19 Fed. 231. **Ala.**—Foreheimer v. Mobile, 84 Ala. 126, 4 So. 112. **N. Y.**—Coykendall v. Hood, 36 App. Div. 558, 55 N. Y. Supp. 718; Schulz v. Albany, 27 Misc. 51, 57 N. Y. Supp. 963. **Ohio.**—Cavanaugh v. Cleveland, 6 Ohio N. P. 423.

[a] If the plaintiff is harassed by attempts to enforce an ordinance, notwithstanding it has been adjudged void, an injunction will be granted. Ala.—Foreheimer v. Mobile, 84 Ala. 126, 4 So. 112. Colo.—Denver v. Beede, 25 Colo. 172, 54 Pac. 624. Fla.—Orange City v. Thayer, 45 Fla. 502, 34 So. 573. Ky.—Brown v. Catlettsburg, 11 Bush 435. N. Y.—Wallack v. Society for Reformation, etc., 67 N. Y. 23; Marvin Safe Co. v. New York, 38 Hun 146.

6. **U. S.**—Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 276, 282, 29 Sup. Ct. 426, 53 L. ed. 796; Alpers v. San Francisco, 32 Fed. 503, 12 Sawy. 631. Fla.—Orange City v. Thayer, 45 Fla. 502, 34 So. 573. Ill.—Washingtonian Home v. Chicago, 281 Ill. 110, 117 N. E. 737; Stevens v. St. Mary's Training School, 144 Ill. 336,

as the prevention of irreparable injury to property rights,⁷ or of a

32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832. **S. C.**—*Riley v. Greenwood*, 72 S. C. 90, 51 S. E. 532, 110 Am. St. Rep. 592. **Wis.**—*State ex rel. Rose v. Superior Court*, 105 Wis. 651, 678, 81 N. W. 1046, 48 L. R. A. 819.

7. U. S.—*Boise Artesian H. & C. Water Co. v. Boise City*, 213 U. S. 276, 287, 29 Sup. Ct. 426, 53 L. ed. 796; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 39. **Ala.**—*Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259, 43 So. 706 (ordinance ordering removal of certain buildings); *Forcheimer v. Mobile*, 84 Ala. 126, 4 So. 112. **Cal.**—*Abbey Land & Imp. Co. v. San Mateo County*, 167 Cal. 434, 139 Pac. 1068, Ann. Cas. 1915C, 804, 52 L. R. A. (N. S.) 408; *Varney v. Williams*, 153 Cal. 318, 100 Pac. 867, 132 Am. St. Rep. 88, 21 L. R. A. (N. S.) 741, enjoining the tearing down of bill boards under a void ordinance prohibiting them absolutely. **Colo.**—*Denver v. Beede*, 25 Colo. 172, 54 Pac. 624. **Fla.**—*Orange City v. Thayer*, 45 Fla. 502, 34 So. 573. **Ill.**—*Kearney v. Canton*, 273 Ill. 507, 515, 113 N. E. 98; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696. **Ia.**—*Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883; *Bear v. Cedar Rapids*, 147 Iowa 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150, a void ordinance requiring a license may destroy plaintiff's business. **Ky.**—*Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133; *Chesapeake & O. Ry. Co. v. Harmon*, 153 Ky. 669, 156 S. W. 121 (enjoining ordinance requiring safety gates at railroad crossings); *Newport v. Newport & C. Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484. **La.**—*McFarlain v. Jennings*, 106 La. 541, 31 So. 62; *Guillotte v. New Orleans*, 12 La. Ann. 432, enjoining an ordinance violating the tenure by which a city held a certain interest in land. **Md.**—*Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L. R. A. 541; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239. **Mass.**—*Green v. Fitchburg*, 219 Mass. 121, 106 N. E. 573, where action will be "injurious to plaintiff's property rights." **Minn.**—*Nelson v. Minneapolis*, 112 Minn. 16, 127 N. W. 445, 29 L. R. A. (N. S.) 260 (based on *Cobb v. French*,

111 Minn. 429, 127 N. W. 415); *Lereh v. Duluth*, 88 Minn. 295, 92 N. W. 1116. **Mo.**—*Hays v. Poplar Bluff*, 263 Mo. 516, 173 S. W. 676, L. R. A. 1915D, 595. **N. Y.**—*United Traction Co. v. Watervliet*, 35 Misc. 392, 71 N. Y. Supp. 977. **Okla.**—*New York L. Ins. Co. v. Comanche*, 162 Pac. 466; *Yale Theater Co. v. Lawton*, 35 Okla. 444, 130 Pac. 135; *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650. **Ore.**—*Churchill v. Albany*, 65 Ore. 442, 133 Pac. 632, Ann. Cas. 1915A, 1094. **Tex.**—*Austin v. Austin Cemetery Association*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; *Ray v. Belton* (Tex. Civ. App.), 162 S. W. 1015; *Dallas v. Dallas Consol. Elec. Co.* (Tex. Civ. App.), 159 S. W. 76; *Wade v. Nunnally*, 19 Tex. Civ. App. 256, 46 S. W. 668. **W. Va.**—*Donohoe v. Fredlock*, 72 W. Va. 712, 79 S. E. 736.

[a] **A threat to take the employees of a street car company off its cars** by arrest under an invalid ordinance, if carried out, would involve such a serious interference with the use of its property as to authorize equitable intervention. *United Traction Co. v. Watervliet*, 35 Misc. 392, 71 N. Y. Supp. 977; *Mahoning & S. Ry. & L. Co. v. New Castle*, 233 Pa. 413, 82 Atl. 501, Ann. Cas. 1913B, 658.

[b] **Speed Ordinance.**—The enforcement of an ordinance prescribing an unreasonably low rate of speed for street cars will be enjoined because it is an impairment of the company's property rights. *United Traction Co. v. Watervliet*, 35 Misc. 392, 71 N. Y. Supp. 977.

[c] **The laying of sidewalks by the municipality under an invalid ordinance** requiring owners to lay them within a limited time will be enjoined where no appeal could be heard until after the expiration of that time. In such a case, the legal remedy is inadequate. *Angle v. Stroudsburg Borough*, 29 Pa. Super. 601.

[d] **If the municipal authorities (1) threaten to summarily close up plaintiff's place of business for noncompliance with a void ordinance** (*Union & M. Club v. Atlanta*, 136 Ga. 721, 71 S. E. 1060, where city was enjoined from closing club refusing to pay priv-

multiplicity of suits,⁸ equity will entertain the bill and grant injunctive relief at the instance of any person whose interests are impaired by it,⁹ provided, of course, that no adequate remedy exists at

illegale tax to sell liquors), or (2) without a judicial determination that he violated it (*Canon City v. Manning*, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272; *Ryan v. Jacob*, 8 Ohio Dec. [Reprint] 167), an injunction will issue, as plaintiff's legal remedies are inadequate.

8. U. S.—*Boise Artesian H. & C. Water Co. v. Boise City*, 213 U. S. 276, 285, 29 Sup. Ct. 426, 53 L. ed. 796; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532. **Ga.**—*Waycross v. Georgia Inv. Co.*, 146 Ga. 2, 90 S. E. 281, ordinance imposing tax. **Ill.**—*Kearney v. Canton*, 273 Ill. 507, 113 N. E. 98; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Cicero Lumb. Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696; *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408, ordinance imposing wheel tax. **Ind.**—*Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575, 587, 28 N. E. 853, 15 L. R. A. 321; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726. **Ky.**—*Chesapeake & O. Ry. Co. v. Harmon*, 153 Ky. 669, 153 S. W. 121, 45 L. R. A. (N. S.) 946; *South Covington, etc. R. Co. v. Berry*, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. Rep. 161, 15 L. R. A. 604; *Brown v. Catlettsburg*, 11 Bush 435. **Mo.**—*Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. **N. Y.**—*United Traction Co. v. Watervliet*, 35 Misc. 392, 71 N. Y. Supp. 977. **Pa.**—*Harper's Appeal*, 109 Pa. 9, 1 Atl. 791, ordinance imposing tax. **Tex.**—*Auto Transit Co. v. Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

See generally the title "Multiplicity of Suits."

[a] Not unless the ordinance affects a right or interest common to all the complainants. *Kearney v. Canton*, 273 Ill. 507, 517, 113 N. E. 98.

[b] Where an ordinance requiring payment of a license fee or tax by persons engaged in certain businesses, is void or is inoperative as against certain persons, such as those engaged in interstate commerce, and where the

city intends to institute prosecutions for every sale in violation of it, equity will enjoin its enforcement to prevent a multiplicity of suits. **U. S.**—*Hutchinson v. Beckham*, 118 Fed. 399, 55 C. C. A. 333; *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532; *Jewel Tea Co. v. Lee's Summit*, 189 Fed. 280. **Ky.** See *Jones v. City of Paducah*, 157 Ky. 781, 164 S. W. 101, enjoining ordinance licensing illegal business. **Mo.** *Jewel Tea Co. v. Carthage*, 257 Mo. Co. v. St. Louis, 130 Mo. 323, 32 383, 165 S. W. 743; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. **Tex.** *Auto Transit Co. v. Ft. Worth* (Tex. Civ. App.), 182 S. W. 685. *Contra*, *Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313, 127 Pac. 722.

[c] A complaint states a cause of action, which alleges that plaintiff has a business in a city, that the city threatens to institute and prosecute numerous actions against the plaintiff for violation of a certain ordinance (which is set out) in the regular prosecution of such business, whereby plaintiff will be subjected to a multiplicity of suits and compelled to pay out large sums in fines and that his business will be ruined unless the prosecution of the suits be enjoined. *Joseph Schlitz Brew. Co. v. Superior*, 117 Wis. 297, 93 N. W. 1120.

9. U. S.—*Old Colony Trust Co. v. Atlanta*, 83 Fed. 39. **Ill.**—*Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; *Kappes v. Chicago*, 119 Ill. App. 436. **Ky.**—*Boyd v. Frankfort*, 117 Ky. 199, 213, 77 S. W. 669, 111 Am. St. Rep. 240; *Newport v. Newport, etc. Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484. **Md.**—*Baltimore v. Scharf*, 54 Md. 499; *Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195. **N. Y.** *Buffalo Fertilizer Co. v. Cheektowaga*, 113 N. Y. Supp. 901.

[a] A person showing a well grounded apprehension of loss by the enforcement of the ordinance may maintain a bill for an injunction. *Old Colony Trust Co. v. Atlanta*, 83 Fed. 39.

law,¹⁰ even though the invalidity of the ordinance has not been adjudicated at law.¹¹ And if the carrying out of illegal resolutions or ordinances will result in an illegal expenditure of public revenue, the action may be maintained by a taxpayer.¹² If the ordinance has the effect of depriving one of his property without due process of law,¹³ or of impairing the obligation of one's contract with the municipality,¹⁴ its enforcement may be enjoined if the remedy at law is inadequate.

Enforcement Must Be Threatened. — If there is no room for apprehension that the ordinance will be enforced,¹⁵ or if the ordinance cannot be enforced because of lack of an appropriation,¹⁶ the court will deny relief, unless the ordinance itself acts in *terrorem*.¹⁷

10. See *infra*, this section.

11. *Torpedo Co. v. Clarendon*, 19 Fed. 231; *Rago v. Melrose Park*, 161 Ill. App. 18.

12. *Cascaden v. Waterloo*, 106 Iowa 673, 77 N. W. 333.

As to taxpayers' suits generally, see *supra*, V, F, 1, c.

[a] On the ground that an ordinance violates vested rights of a corporation, taxpayers who have no legal interest in the corporation cannot enjoin its enforcement. *Morris v. Municipal Gas Co.*, 121 La. 1016, 46 So. 1001.

13. **U. S.**—*Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169; *Minneapolis General E. Co. v. Minneapolis*, 194 Fed. 215. **Ga.** *Savannah v. Granger*, 145 Ga. 578, 89 S. E. 690. **Ill.**—*Carter v. Chicago*, 57 Ill. 283. **Ia.**—*Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883. **La.** *New Orleans Baseball & Amusement Co. v. New Orleans*, 118 La. 228, 42 So. 784, 118 Am. St. Rep. 366, 7 L. R. A. (N. S.) 1014. **Okla.**—*El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650, where the city attempted to repeal an assessment ordinance after letting a contract. **S. C.**—*Riley v. Greenwood*, 72 S. C. 90, 51 S. E. 532, 110 Am. St. Rep. 592, where an ordinance directed destruction of obstruction and fences on private alley as often as placed there on the theory it to be a public alley. **Tex.**—*City of Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; *Goar v. Rosenberg*, 53 Tex. Civ. App. 218, 115 S. W. 653.

Jurisdiction of federal courts, see *supra*, V, E.

[a] **Ordinance Directing Removal of Railroad Tracks.**—*Seaboard Air Line*

Ry. Co. v. Raleigh, 219 Fed. 573.

[b] **Ordinance Changing Industrial District.**—*Dobbins v. Los Angeles*, 195 U. S. 223, 241, 25 Sup. Ct. 18, 49 L. ed. 169.

[c] But where unconstitutionality is a perfect defense to an ordinance prescribing limits for location of industries, injunction will not lie. *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575.

[d] If the plaintiff's right is disputed an injunction will not issue. *Weed v. Hillsdale Tp.*, 85 N. J. Eq. 203, 96 Atl. 661.

Where enforcement of ordinance would abrogate franchise, see *infra*, V, J, 6, d.

14. *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. ed. 721; *Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. ed. 341 (where city proposed to construct its own waterworks in violation of a contract giving a company an exclusive right to furnish water); *Denver v. Mercantile Trust Co.*, 201 Fed. 790, 798, 120 C. C. A. 100; *Portland Ry., L. & P. Co. v. Portland*, 201 Fed. 119; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720; *El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650.

15. *Weller v. Gadsden*, 141 Ala. 642, 662, 37 So. 682; *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, 69 S. W. 300.

16. *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, 69 S. W. 300.

17. *City of Austin v. Austin City*

Clear Case Must Be Shown. — A person claiming unconstitutionality of an ordinance as to him must make a clear showing of that fact.¹⁸

Determination of Unconstitutionality. — Where a proper case is made a court of equity will determine whether or not the ordinance is void, and grant relief if it finds such is the case.¹⁹ Equity will not pass on any more of the ordinance than is squarely before it and is absolutely necessary to a decision of the case.²⁰ And where the plaintiff does not point out any particular provision which injuriously affects his rights, to justify the court in declaring the ordinance void, the ordinance must be void as a whole, not in some of its provisions merely.²¹ Generally the court cannot consider the motives of the council in passing the ordinance in question.²²

(B.) **PENAL ORDINANCES.** — Void ordinances which are criminal in nature and do not affect rights in property will not be enjoined,²³ as the party has an adequate remedy at law. Furthermore, if the ordinance is enforceable only by indictment and fines or penalties for its violation, equity will not grant an injunction since the invalidity of

Cemetery Assn., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; *Dallas v. Dallas Consol. Elec. St. Ry. Co.* (Tex. Civ. App.), 159 S. W. 76.

18. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371 (where it is claimed ordinance fixing rates is confiscatory); *Price Co. v. Atlanta*, 105 Ga. 358, 31 S. E. 619.

19. **U. S.** — *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886. **Mo.** — *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. **Tex.** — *Auto Transit Co. v. Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

See *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354.

20. *Hillman v. Seattle*, 33 Wash. 14, 73 Pac. 791.

21. *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726.

22. *Harrison Land Co. v. Crucible Steel Co.*, 82 N. J. Eq. 414, 89 Atl. 41; *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 54 N. E. 1081; *United Traction Co. v. Watervliet*, 35 Misc. 392, 71 N. Y. Supp. 977; *New York & Harlem R. R. Co. v. New York*, 1 Hilt. (N. Y.) 562, 588.

[a] **Exception.** — But where the facts as to the situation and conditions are such as to establish the exercise of

police power in such a manner as to oppress or discriminate against a class or an individual, the court will consider the motives of the council in determining the validity of the ordinance. *Dobbins v. Los Angeles*, 195 U. S. 223, 240, 25 Sup. Ct. 18, 49 L. ed. 169.

23. **Ariz.** — *Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313, 127 Pac. 722. **Ga.** — *Southern Express Co. v. Ty Ty*, 141 Ga. 421, 81 S. E. 114; *Jonesboro v. Central of Ga. Ry. Co.*, 134 Ga. 190, 67 S. E. 716. **Ia.** — *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883. **La.** — *Boin v. Jennings*, 107 La. 410, 31 So. 866, where plaintiff was threatened with a fine and imprisonment and alleged damage to business. **N. Y.** — *Coykendall v. Hood*, 36 App. Div. 558, 55 N. Y. Supp. 718. *Compare* *Wood v. Brooklyn*, 14 Barb. 425, 433. **N. C.** — *Crawford v. Marion*, 154 N. C. 73, 69 S. E. 763, 35 L. R. A. (N. S.) 193. **Ohio.** — *Ryan v. Jacobs*, 8 Ohio Dec. (Reprint) 167.

[a] **Injury by illegal arrest is not of such an irreparable nature that it cannot be compensated in damages.** *Burch v. Cavanaugh*, 12 Abb. Pr. N. S. (N. Y.) 410.

[b] **Threat to arrest and fine daily, notwithstanding the pendency of an appeal from a judgment fining the plaintiff for conducting a business in violation of a statute, not sufficient to require injunction.** *Benjamin Levy & Co. v. Shreveport*, 27 La. Ann. 620.

the ordinance is a perfect defense to a prosecution under it,²⁴ although there are authorities to the contrary.²⁵

If the enforcement of the invalid ordinance would affect and destroy rights in property, the fact that it is quasi-criminal in character will not prevent the granting of relief.²⁶

d. *Restraining Violation of Ordinances.* — As a general rule equity

24. **U. S.**—Boise Artesian H. & C. Water Co. *v.* Boise City, 213 U. S. 276, 287, 29 Sup. Ct. 426, 53 L. ed. 796; Seaboard Air Line Ry. Co. *v.* Raleigh, 219 Fed. 573; McCormack Bros. Co. *v.* Tacoma, 201 Fed. 374. **Colo.**—Denver *v.* Beede, 25 Colo. 172, 54 Pac. 624. **Ga.**—Savannah *v.* Granger, 145 Ga. 578, 89 S. E. 690; Sylvania *v.* Hilton, 123 Ga. 754, 51 S. E. 744, 107 Am. St. Rep. 162, 2 L. R. A. (N. S.) 483. **La.**—Hottinger *v.* New Orleans, 42 La. Ann. 629, 8 So. 575. **N. Y.** Wallack *v.* Society, etc., 67 N. Y. 23; Marvin Safe Co. *v.* New York, 38 Hun 146; West *v.* New York, 10 Paige 539. **N. C.**—Paul *v.* Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902; Wardens St. Peter's E. Church *v.* Washington, 109 N. C. 21, 13 S. E. 700. **Okla.**—Thompson *v.* Tucker, 15 Okla. 486, 83 Pac. 413.

As to right to enjoin criminal prosecutions, see the title "Suits and Actions."

[a] Where the employer of the person arrested brings the equity suit, the rule in the text does not apply. United Traction Co. *v.* Watervliet, 35 Misc. 392, 71 N. Y. Supp. 977. See also Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Mahoning & S. R. & L. Co. *v.* New Castle, 233 Pa. 413, 82 Atl. 501, Ann. Cas. 1913B, 658.

25. City Cab, Carriage & Transfer Co. *v.* Hayden, 73 Wash. 24, 131 Pac. 472, Ann. Cas. 1914D, 731, L. R. A. 1915F, 726, citing many local cases and holding that the legal remedies of submitting to arrest or bringing an action for damages are inadequate because judgments do not prevent future repetitions of the acts giving rise to the action. See also City of Austin *v.* Austin City Cem. Assn., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

[a] If an invalid ordinance acts in *terrorem* and practically accomplishes a prohibition against a lawful busi-

ness, equity will enjoin its enforcement although its invalidity may be determined in a criminal action or by habeas corpus. City of Austin *v.* Austin City Cem. Assn., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114. See also Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106.

26. **U. S.**—Dobbins *v.* Los Angeles, 195 U. S. 223, 241, 25 Sup. Ct. 18, 49 L. ed. 169 (ordinance unreasonably restricting territory where gas works could be erected); Seaboard Air Line Ry. Co. *v.* Raleigh, 219 Fed. 573; Little *v.* Tanner, 208 Fed. 605. **Ala.**—Board of Comrs. of Mobile *v.* Orr, 181 Ala. 308, 61 So. 920, 45 L. R. A. (N. S.) 575; Port of Mobile *v.* Louisville & N. R. R. Co., 84 Ala. 115, 125, 4 So. 106, 5 Am. St. Rep. 342. **Ariz.**—Bisbee *v.* Arizona Ins. Agency, 14 Ariz. 313, 127 Pac. 722. **Ia.**—Huston *v.* Des Moines, 176 Iowa 455, 156 N. W. 885. **La.**—State *ex rel.* Tranchina *v.* New Orleans, 141 La. 788, 75 So. 683; New Orleans Baseball & Amusement Co. *v.* New Orleans, 118 La. 228, 42 So. 784, 7 L. R. A. (N. S.) 1014. **N. Y.**—United Traction Co. *v.* Watervliet, 35 Misc. 392, 71 N. Y. Supp. 977. **N. C.**—Crawford *v.* Marion, 154 N. C. 73, 69 S. E. 763, 35 L. R. A. (N. S.) 193. **Ohio.** Ryan *v.* Jacob, 8 Ohio Dec. (Reprint) 167. **Tex.**—Auto Transit Co. *v.* Ft. Worth (Tex. Civ. App.), 182 S. W. 685. **Wash.**—Hillman *v.* Seattle, 33 Wash. 14, 73 Pac. 791. **W. Va.**—Bluefield Water Works & Imp. Co. *v.* Bluefield, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759.

[a] Three concurring conditions must exist to authorize injunction against enforcement of a police ordinance, to-wit: The invasion of a property right must be clearly shown; the unconstitutionality or illegality must be manifest, and the judge must be satisfied the applicant is threatened with an irreparable injury against which there is no adequate legal remedy. State *ex rel.* Tranchina *v.* New Orleans, 141 La. 788, 75 So. 683.

will not restrain a threatened violation of an ordinance,²⁷ unless the act threatened to be done would be a nuisance per se.²⁸ But this remedy is sometimes established by statute²⁹ or charter.³⁰ Accordingly at the suit of the municipality,³¹ or an individual suing solely to enforce the ordinance,³² a court of equity will not restrain the threatened violation of an ordinance establishing a fire zone, where the proposed building will not constitute a nuisance. But when such an in-

27. **Ark.**—*De Queen v. Fenton*, 98 Ark. 521, 136 S. W. 945. **Ill.**—*Finegan v. Allen*, 46 Ill. App. 553. **Ind.**—*Rochester v. Walters*, 27 Ind. App. 194, 60 N. E. 1101. **Me.**—*Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733, 102 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580. **Mich.**—*St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671. **Minn.**—*Higgins v. Lacroix*, 119 Minn. 145, 137 N. W. 417. **Mo.**—*Kansas City G. Adv. Co. v. Kansas City*, 240 Mo. 659, 144 S. W. 1099. **N. H.**—*Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700. **N. Y.**—*Mt. Vernon v. Seeley*, 74 App. Div. 50, 77 N. Y. Supp. 250; *Mellen v. Brooklyn Heights R. Co.*, 87 Misc. 65, 150 N. Y. Supp. 222; *Hudson v. Thorne*, 7 Paige 261; *Brockport v. Johnston*, 13 Abb. N. C. 468. *Compare Rochester v. Gutberlett*, 211 N. Y. 309, 320, 105 N. E. 548, L. R. A. 1915D, 209. **Pa.**—*Butler v. Logan*, 19 Pa. Dist. 952. **Wis.**—*Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808; *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446.

To prevent violation of health regulation, see 10 STANDARD PROC. 986.

[a] Provision in ordinance directing officer to enjoin violation does not enlarge equity jurisdiction. *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446. But see *Detroit v. Kunin*, 181 Mich. 604, 148 N. W. 207.

28. **Me.**—*Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733, 102 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580. **La.**—*New Orleans v. Lambert*, 14 La. Ann. 247. **Mich.**—*St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671. **Minn.**—*Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763. **N. Y.**—*Mt. Vernon v. Seeley*, 74 App. Div. 50, 77 N. Y. Supp. 250; *Hudson v. Thorne*, 7 Paige 261; *Brockport v. Johnston*, 13 Abb. N. C. 468. **Ohio.**—*Reynolds v. Harris*, 11 Ohio Dec. (Reprint) 509, 27 Wkly. L. Bul. 229. **Wash.**—*Baxter v. Seattle*, 3 Wash. 352, 28 Pac. 537.

As to suits to enjoin nuisances generally, see the title "Nuisance."

[a] Must be a nuisance in fact and not one created solely by an ordinance. *Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700. See *Houlton v. Titcomb*, 102 Me. 272, 285, 66 Atl. 733, 120 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580, where statute makes the act a nuisance, it may be enjoined.

29. See generally the statutes, and *New York v. Wineburgh Adv. Co.*, 122 App. Div. 748, 107 N. Y. Supp. 478.

30. *Rochester v. Gutberlett*, 211 N. Y. 309, 320, 105 N. E. 548, L. R. A. 1915D, 209; *Baxter v. Seattle*, 3 Wash. 352, 28 Pac. 537.

31. **Ind.**—*Rochester v. Walters*, 27 Ind. App. 194, 60 N. E. 1101. **Ky.**—*City of Monticello v. Bates*, 163 Ky. 38, 173 S. W. 159. **Mich.**—*St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671. **N. H.**—*Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700. **N. Y.**—*Hudson v. Thorne*, 7 Paige 261; *New Rochelle v. Lang*, 75 Hun 608, 27 N. Y. Supp. 600. **Wis.**—*Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808; *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446.

See *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481, holding there is no good reason for the distinction as to cases where the act would be a nuisance per se.

[a] Where ordinance provides no penalty for its violation, the remedy at law is inadequate and equity will grant an injunction. *City of Monticello v. Bates*, 163 Ky. 38, 173 S. W. 159.

32. *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; *Rochester v. Walters*, 27 Ind. App. 194, 60 N. E. 1101; *Rice v. Jefferson*, 50 Mo. App. 464.

dividual will suffer irreparable injury to himself and his property, equity will enjoin the erection of a building in violation of the ordinance, even where, it has been held, the building would not be a nuisance per se.³³

e. *Initiative and Referendum*.—A petitioner for a referendum may sue to enjoin an illegal rejection of the petition.³⁴

5. **Municipal Finances**.—a. *Illegal Appropriations and Expenditures*.—The discretion of municipal authorities in making appropriations will not be interfered with by injunction unless the constitutional limits are exceeded.³⁵ But equity has jurisdiction at the instance of a taxpayer,³⁶ or of the attorney general,³⁷ or, in a proper case, of a creditor³⁸ to enjoin municipal authorities from misapplying or from making unauthorized expenditures of corporate funds.³⁹

33. *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

[a] **Joinder of Parties**.—Several distinct owners of property may join in the suit as there is one object of common interest among them all. *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481.

34. *State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 Pac. 309.

35. *N. Y.*—*Western New York Water Co. v. Laughlin*, 157 N. Y. Supp. 257; *Holtz v. Diehl*, 26 Misc. 224, 56 N. Y. Supp. 841, perhaps the city might enjoin the transfer. *R. I.*—*Sherman v. Carr*, 8 R. I. 431. *Tex.*—*Ault v. Hill County*, 102 Tex. 335, 116 S. W. 359 (Tex. Civ. App.), 111 S. W. 425; *Williams v. Carroll* (Tex. Civ. App.), 182 S. W. 29.

36. See *supra*, V, F, 1, c, (III).

37. *Attorney General v. Detroit*, 26 Mich. 263. See also *supra*, V, F, 1, a.

38. See *supra*, V, F, 1, d.

39. *Ala.*—*Kumpe v. Bynum*, 158 Ala. 311, 48 So. 55; *Inge v. Board of Public Wks. of Mobile*, 135 Ala. 189, 33 So. 678, 93 Am. St. Rep. 20. *Fla.*—*Whitner v. Woodruff*, 68 Fla. 465, 67 So. 110. *Ga.*—*Adel v. Woodal*, 122 Ga. 535, 50 S. E. 481; *Mayor of Americus v. Perry*, 114 Ga. 871, 885, 40 S. E. 1004, 57 L. R. A. 230, where city abolished the board of police commissioners created by statute and proceeded to elect a police force. *Ill.*—*Carney v. Marseilles*, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328. *Ind.*—*Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393. *Ia.*—*Drew v.*

School Tp. of Madison, 146 Iowa 721, 125 N. W. 815. *La.*—*Pleasants v. Shreveport*, 110 La. 1046, 35 So. 283. *Mass.*—*Draper v. Fall River*, 185 Mass. 142, 69 N. E. 1068. *Mich.*—*McManus v. Petoskey*, 164 Mich. 390, 129 N. W. 681; *Bates v. Hastings*, 145 Mich. 574, 108 N. W. 1005; *Black v. Common Council of Detroit*, 119 Mich. 571, 78 N. W. 660, expenditure for entertainment. *Mont.*—*Milligan v. Miles City*, 51 Mont. 374, 153 Pac. 276. *Neb.*—*Tukey v. Omaha*, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711. *N. Y.*—*Cleveland v. Watertown*, 99 Misc. 66, 165 N. Y. Supp. 305. *Okla.*—*Afton v. Gill*, 156 Pac. 658. *W. Va.*—*Harner v. Monongalia Co. Ct.*, 92 S. E. 781. *Wis.*—*Schmidt v. Joint School Dist. No. 4*, 146 Wis. 635, 132 N. W. 583; *Beyer v. Crandon*, 98 Wis. 306, 312, 73 N. W. 771.

[a] **The doing of an illegal act which would result in a wasting of public funds will be enjoined**. *Roberts v. Thompson*, 82 Neb. 458, 118 N. W. 106.

[b] **An unlawful diversion of money from a fund may be enjoined**. *Woldenberg v. Sampson*, 55 Wash. 152, 104 Pac. 184.

[c] **Under Unconstitutional Statute**. *Page v. Allen*, 58 Pac. 338, 98 Am. Dec. 272.

[d] **Failure to comply with conditions precedent prescribed by statute authorize an injunction**. *Dunkin v. Blust*, 83 Neb. 80, 119 N. W. 8 (where no estimate was made); *State v. Commissioners*, 39 Ohio St. 58; *Stem v. Cincinnati*, 6 Ohio N. P. 15.

Form of decree restraining misapplication of corporate funds, see 9 STAND-ARD PROC. 625.

unless there is an adequate remedy at law. The legislative act of making an unauthorized appropriation will not be enjoined.⁴⁰ But where the legislative act of passing the resolution or ordinance has been already performed, equity will enjoin the municipal officers from carrying out a resolution of the governing body making an unlawful appropriation.⁴¹

A person who voluntarily pays a void tax with knowledge of facts rendering it void cannot restrain its application to the object for which it was levied,⁴² unless the invalidity arises from want of power to make the contract and levy the tax, not merely from fatal defects in the execution of the power.⁴³ And a person who refuses to pay a tax cannot restrain a diversion to other purposes, of the money paid in.⁴⁴

b. *Incurring Indebtedness.* — An injunction will lie, at the instance of a taxpayer,⁴⁵ to prevent municipal authorities from creating or contracting an unauthorized debt, which will increase the burdens of taxation.⁴⁶ The writ will issue not only in cases where the municipality has no authority to incur such indebtedness under any circumstances,⁴⁷ but also where it has authority under certain conditions which have not been complied with.⁴⁸ The creation of an indebtedness beyond the

40. *Stevens v. St. Mary's Training School*, 144 Ill. 336, 345, 32 N. W. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832.

As to restraining passage of ordinances, see *supra*, V, J, 4, a.

41. U. S.—*Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; *The Liberty Bell*, 23 Fed. 843. Conn.—*Webster v. Harwinton*, 32 Conn. 131; *New London v. Brainard*, 22 Conn. 552. Ill.—*Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832; *McCord v. Pike*, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85. Ind.—*Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244. Md.—*Baltimore v. Gill*, 31 Md. 375. N. H.—*Merrill v. Plainfield*, 45 N. H. 126. R. I.—*Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Place v. Providence*, 12 R. I. 1.

[a] The remedy by action to recover back the money is not adequate. *Webster v. Harwinton*, 32 Conn. 131.

42. *State ex rel. Alter v. Bader*, 13 Ohio Cir. Ct. 15; *Babcock v. Fond du Lac*, 58 Wis. 230, 16 N. W. 625.

43. *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253, *distinguishing* *Babcock v. Fond du Lac*, 58 Wis. 230, 16 N. W. 625, on the ground that in it the court had power but its power was dormant because of the constitutional limit on indebtedness.

44. *Davis v. Bradford School Dist.*, 4 Pa. Co. Ct. 656.

45. See *supra*, V, F, 1, c, (III).

46. Ala.—*Inge v. Board of Public Wks. of Mobile*, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20. Cal.—*Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912. Ga.—*Renfroe v. Atlanta*, 140 Ga. 81, 78 S. E. 449, 45 L. R. A. (N. S.) 1173. Ill.—*Chicago v. Nichols*, 177 Ill. 97, 104, 52 N. E. 359; *Wright v. Bishop*, 88 Ill. 302; *Springfield v. Edwards*, 84 Ill. 626. La.—*Dunham v. Slidell*, 139 La. 933, 72 So. 465. Md.—*Weber v. Probyer*, 125 Md. 544, 94 Atl. 162. Mass.—*Draper v. Fall River*, 185 Mass. 142, 69 N. E. 1068. Neb.—*Roberts v. Thompson*, 82 Neb. 458, 118 N. W. 106. Va.—*Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

47. *Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

48. La.—*Dunham v. Slidell*, 133 La. 212, 62 So. 635, without having made provision for payment. Neb.—*Tukey v. Omaha*, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711, the authority given by a vote of the people to incur a debt must be strictly complied with. Va.—*Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

See *infra*, V, J, 6.

limit fixed for the city by the constitution will be enjoined.⁴⁹

c. *Bonds and Negotiable Paper.*—(I.) *Issuance.*—A discretion as to the issuance of bonds will not be interfered with by injunction if not abused.⁵⁰ Where municipal authorities threaten or are about to execute and put in circulation negotiable municipal bonds or other negotiable paper of the corporation in contravention of the authority given by law for that purpose, or in violation of the trust reposed in them, equity will grant an injunction,⁵¹ at the instance of a taxpayer,⁵² where the threatened act will increase the burdens of taxation,⁵³ unless there exists an adequate remedy by appeal.⁵⁴ A creditor and holder of city bonds may bring suit under certain circumstances.⁵⁵ If the bonds would be void and unenforceable even in the hands of bona fide holders, an injunction will not be granted,⁵⁶ although it has

49. **U. S.**—City Water Supply Co. v. Ottumwa, 120 Fed. 309. **Del.**—Lore v. Wilmington, 4 Del. Ch. 575. **Ill.**—Springfield v. Edwards, 84 Ill. 626. **Minn.**—Rogers v. Le Sueur Co., 57 Minn. 434, 59 N. W. 488. **Mont.**—Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249. **S. D.**—Bailey v. Sioux Falls, 19 S. D. 231, 103 N. W. 16. **Tex.**—Tullos v. Church (Tex. Civ. App.), 171 S. W. 803.

50. Griffith v. Vicksburg, 102 Miss. 1, 58 So. 781.

51. **Ark.**—Riddle v. Ballew, 197 S. W. 27. **Colo.**—Thomas v. Grand Junction, 13 Colo. App. 80, 56 Pac. 665. **Fla.**—L'Engle v. Holmes, 65 Fla. 179, 61 So. 320. **Ga.**—Heilbron v. Cuthbert, 96 Ga. 312, 23 S. E. 206. **Ill.**—Wright v. Bishop, 88 Ill. 302; Chestnutwood v. Hood, 68 Ill. 132. **Kan.**—Hartzler v. Goodland, 97 Kan. 129, 154 Pac. 265. **Md.**—Rushe v. Hyattsville, 116 Md. 122, 81 Atl. 278, Ann. Cas. 1913D, 73. **Miss.**—North Carrollton v. Carrollton, 113 Miss. 1, 73 So. 812. **Neb.**—Cook v. Beatrice, 32 Neb. 80, 48 N. W. 828. **N. Y.**—Hurlburt v. Banks, 1 Abb. N. C. 157. **N. C.**—Bennett v. Comrs. of Rockingham County, 173 N. C. 625, 92 S. E. 603. **S. C.**—Cleveland v. Spartanburg, 54 S. C. 83, 31 S. E. 871. **Tex.**—Cohen v. Houston (Tex. Civ. App.), 176 S. W. 809. **Wash.**—Bier v. Clements, 167 Pac. 903; Patterson v. Edmonds, 72 Wash. 88, 129 Pac. 895. **W. Va.**—List v. Wheeling, 7 W. Va. 501. **Wis.**—Lynch v. Eastern, L. & M. Ry. Co., 57 Wis. 430, 15 N. W. 743; Bound v. Wisconsin Cent. R. Co., 45 Wis. 543.

Enjoining issuance of municipal aid

bonds, see *infra*, V, J, 5, e, (II).

[a] *Issuance Must Be Threatened.* Goodson v. Dean, 173 Ala. 301, 55 So. 1010.

[b] The fact that a vacancy exists in the council at the time a bond issue is authorized does not of itself warrant injunctive relief. Hartzler v. Goodland, 97 Kan. 129, 154 Pac. 265.

[c] A restriction in the resolution as to the amount of bonds authorized that shall be issued in any one year, is binding and will be enforced by injunction. L'Engle v. Holmes, 65 Fla. 179, 61 So. 320.

[d] Issuance of funding bonds for debts illegally contracted will be enjoined. Dunbar v. Comrs. of Canyon, 5 Idaho 407, 49 Pac. 409.

52. See *supra*, V, F, 1, e, (III).

53. Fellows v. Walker, 39 Fed. 651.

[a] Where bonds will be paid without resort to taxation an injunction will not be granted. Fellows v. Walker, 39 Fed. 651.

54. Morgan v. County Comrs. of Kootenai County, 4 Idaho 418, 39 Pac. 1118.

55. Smith v. Appleton, 19 Wis. 468. Right of creditors to sue generally, see *supra*, V, F, 1, d.

56. **Ark.**—Jones v. Little Rock, 25 Ark. 301. **Cal.**—Streator v. Linseott, 153 Cal. 285, 95 Pac. 42, where bonds contain provisions in conflict with statute. See McCoy v. Briant, 53 Cal. 247. **Minn.**—Harrington v. Plainview, 27 Minn. 224, 6 N. W. 777. **Mo.**—Hopkins v. Lovell, 47 Mo. 102. **Tex.**—Polly v. Hopkins, 74 Tex. 145, 11 S. W. 1084; Bolton v. San Antonio (Tex. Civ. App.), 21 S. W. 64.

been held that this is no reason for denying an injunction.⁵⁷

An injunction against the issuance and delivery of bonds will be granted, it has been held, where the statute authorizing them is unconstitutional,⁵⁸ where the statute authorizing the issuance of bonds has not been complied with in matters of substance,⁵⁹ where the approval of the legal voters at an election called pursuant to law was not had,⁶⁰ where a premature issuance is threatened,⁶¹ and where the issuance of the bonds would raise the city indebtedness beyond the debt limit.⁶² If the funds cannot be lawfully applied to the purpose for which they are voted, equity will enjoin the issuance of the bonds.⁶³ Where the issuance of the bonds is lawful, and the sole ground of attack is that the funds derived from the sale of the bonds will be wrongfully diverted from their lawful purpose,⁶⁴ or be expended by improper persons,⁶⁵ equity will not interfere until the

57. *Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 23 S. E. 951.

58. *La.*—*Powell v. Providence*, 127 La. 66, 53 So. 429; *New Orleans Taxpayers' Assn. v. New Orleans*, 33 La. Ann. 567. *Mont.*—*Hoffman v. Board of Comrs. of Gallatin County*, 18 Mont. 224, 44 Pac. 973. *Wis.*—*Smith v. Appleton*, 19 Wis. 468.

59. *U. S.*—*Union Pac. R. Co. v. Lincoln*, 3 Dill. 300, 24 Fed. Cas. No. 14,380. *Ala.*—*Coleman v. Eutaw*, 157 Ala. 327, 47 So. 703, where ballot was not in prescribed form. *Fla.*—*City of Miami v. Romfh*, 66 Fla. 280, 63 So. 440. *Neb.*—*Brooks v. MacLean*, 95 Neb. 16, 144 N. W. 1067. *Ohio.*—*Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335; *Guckenberger v. Dexter*, 5 Ohio N. P. 429, 8 Ohio Dec. 530.

See *infra*, V, J, 5, e, (II). But see *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084 (where not authorized by commissioners' court); *Bolton v. San Antonio* (Tex. Civ. App.), 21 S. W. 64, where there was no previous appropriation the bonds are void in the hands of bona fide holders.

[a] Issuance without previous approval of voters will be enjoined. *Hoffman v. Board of Comrs. of Gallatin County*, 18 Mont. 224, 44 Pac. 973.

[b] Issuance of more bonds than authorized by statute will be enjoined. *Rogers v. Board of Suprs. of Union County* (Miss.), 75 So. 123.

[c] If the bonds do not comply with the statute (1) as to the time when they are payable, equity will enjoin their issuance. *Union Pac. R. R. Co. v. Lincoln*, 2 Dill. 300, 24 Fed. Cas.

No. 14,380. And (2) if the interest is payable at shorter intervals than prescribed by statute their issuance will be enjoined. *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215.

60. See *infra*, V, J, 5, e, (II).

[a] Mere irregularities and illegalities in the conduct of the election do not authorize an injunction, as such wrongs can be redressed in an election contest. *Link v. Karb*, 89 Ohio St. 326, 104 N. E. 632.

[b] Where polls are not kept open the prescribed time, equity will not enjoin the issuance of the bonds. *Link v. Karb*, 89 Ohio St. 326, 104 N. E. 632.

61. *Neale v. County Court of Wood*, 43 W. Va. 90, 27 S. E. 370.

See *infra*, V, J, 5, e, (II).

[a] Relief.—If a premature issuance of bonds is threatened, an injunction against the issue of any bonds is too broad. *Neale v. County Court of Wood*, 43 W. Va. 90, 27 S. E. 370.

62. *Ky.*—*City of Winchester v. Nelson*, 175 Ky. 63, 193 S. W. 1040; *Bradford v. Glasgow*, 143 Ky. 401, 136 S. W. 647. *Minn.*—*Rogers v. Le Sueur Co.*, 57 Minn. 434, 59 N. W. 488. *N. C.*—*Bain v. Goldsboro*, 164 N. C. 102, 80 S. E. 256. *Okla.*—*Marlow v. School Dist. No. 4*, 29 Okla. 304, 116 Pac. 797. *W. Va.*—*List v. Wheeling*, 7 W. Va. 501.

63. *Colvin v. Ward*, 189 Ala. 198, 66 So. 98. See *Afton v. Gill* (Okla.), 156 Pac. 658.

64. *State ex rel. Coleman v. Clay Center*, 76 Kan. 366, 91 Pac. 91.

65. *Tampa v. Salomonson*, 35 Fla. 446, 486, 17 So. 581.

attempted wrongful application of the funds. But under special circumstances some courts of equity have restrained the issuance of negotiable bonds because of a contemplated misapplication of funds.⁶⁶

If the bonds have already been issued, a perpetual injunction restraining their issuance is erroneous,⁶⁷ although in a proper case the court may require them to be surrendered, or if they have passed into the hands of bona fide holders pending suit, the court may render a money judgment against the parties who obtained them and placed them beyond the jurisdiction of the court.⁶⁸ If the bondholders are not parties, equity will not pass on the validity of the bonds and enjoin the establishment of the enterprise for which the bonds were issued.⁶⁹

(II.) **Payment.** — Payment of municipal bonds which are illegal or were issued without authority of law may be enjoined.⁷⁰ But an illegal use of the money received from legal bonds is not a ground for enjoining payment.⁷¹

d. **Claims.** — (I.) **Auditing and Allowance.** — A municipal auditing board will not in advance be restrained from auditing and allowing claims on the ground they are improper and illegal claims.⁷²

(II.) **Issuance of Warrants.** — Equity will enjoin the issuance of warrants on illegal claims or void contracts,⁷³ as well as warrants

66. See *infra*, this note.

[a] **Illustrations.** — Where municipal officers intend to use the money raised from sale of negotiable bonds voted for a public purpose, to the payment of a bonus to induce certain industries to locate in the city, equity will enjoin the issuance of the bonds, for if the bonds are once negotiated and a debt against the city created, it is too late for the taxpayer to be protected. *Bates v. Hastings*, 145 Mich. 574, 108 N. W. 1005, followed in *Afton v. Gill* (Okla.), 156 Pac. 658, where funds derived from bonds voted for submain sewers were to be used to construct lateral sewers which abutting owners are required to pay for.

67. III. — *Menard v. Hood*, 68 Ill. 121, municipal aid bonds. **Kan.** — *Alma v. Loehr*, 42 Kan. 308, 22 Pac. 424. **Tex.** *Simpson v. Nacogdoches* (Tex. Civ. App.), 152 S. W. 858.

68. *Muskingum County Comrs. v. State*, 78 Ohio St. 287, 85 N. E. 562. See 14 **STANDARD PROC.** 202, note 16.

69. *Ramsey v. Marble Rock*, 123 Iowa 7, 98 N. W. 134.

70. *Missouri River, Ft. S. & G. R. Co. v. Comrs. of Miami County*, 12 Kan. 230; *Keehn v. Wooster*, 13 Ohio Cir. Ct. 270. See *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87.

But see *Scott v. Twombly*, 20 App. Div. 535, 46 N. Y. Supp. 699.

Enjoining collection of tax to pay bonds, see the title "Taxation."

[a] **Delivery of bonds before ordinance takes effect** does not authorize injunction against payment. *Thompson-Houston Elec. Co. v. Newton*, 42 Fed. 723.

[b] **Decree for Repayment of Consideration.** — Payment of bonds issued in excess of the limit of indebtedness will be enjoined without decreeing repayment to bondholders of the money received on the bonds. *Turner v. Cruzen*, 70 Iowa 202, 30 N. W. 483.

71. *White v. Chatfield*, 116 Minn. 371, 133 N. W. 962.

72. *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577; *Merriam v. Board of Suprs. of Yuba County*, 72 Cal. 517, 14 Pac. 137. See *Stevens v. St. Mary's Training School*, 144 Ill. 336, 345, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 332, explaining *Fitzgerald v. Harms*, 92 Ill. 372. But see contrary dictum in *Beyer v. Crandon*, 98 Wis. 306, 312, 73 N. W. 771.

73. **Ala.** — *Inge v. Board of Public Wks. of Mobile*, 135 Ala. 187, 33 So. 678, 93 Am. St. Rep. 20. **Cal.** — *Barry v. Goad*, 89 Cal. 215, 26 Pac. 785; *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968. **Conn.** — *Samis v. King*, 40 Conn. 298. **Ill.** — *Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374. **Okla.** — *Dolezal v. Bostick*, 41 Okla. 743, 139 Pac. 964. **Wis.** — *Mc-*

which contain illegal provisions rendering them negotiable,⁷⁴ unless the warrants have already been issued.⁷⁵ And when there are no funds in the treasury, equity will enjoin the issuance of orders or warrants exceeding the constitutional debt limit,⁷⁶ or if they have been issued, equity will enjoin their payment.⁷⁷

(III.) **Payment.**—(A.) **OF WARRANTS AND CLAIMS GENERALLY.**—An injunction against making payment of illegal claims or warrants therefor will issue,⁷⁸ except where it would be inequitable to grant relief,⁷⁹ or the taxpayer is estopped from challenging the validity of the illegal claim,⁸⁰ and except where the plaintiff has an adequate remedy by appeal,⁸¹ or certiorari,⁸² to review the action of the municipal board on the claim.

(B.) **OF JUDGMENTS.**—Payment of a judgment fraudulently obtained through collusion with municipal officers will be enjoined.⁸³ But equity will not enjoin payment of a judgment where there is a question as to the legality of the demand and the city acting in good

Gowan *v.* Paul, 141 Wis. 388, 123 N. W. 253.

74. Mizell *v.* De Soto County, 63 Fla. 541, 59 So. 16.

75. Comrs. of Highways *v.* Deboe, 43 Ill. App. 25; Webster *v.* Fish, 5 Nev. 190.

76. Ill.—Springfield *v.* Edwards, 84 Ill. 626. Ind.—Sackett *v.* New Albany, 88 Ind. 473, 45 Am. Rep. 467. Ore.—Wormington *v.* Pierce, 22 Ore. 606, 30 Pac. 450.

77. Ballard *v.* Cerney, 83 Neb. 606, 120 N. W. 151.

78. Ala.—Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. Cal.—Andrews *v.* Pratt, 44 Cal. 309. Conn.—Samis *v.* King, 40 Conn. 298. Idaho.—Moore *v.* Hupp, 17 Idaho 232, 105 Pac. 209. Ill.—Stevens *v.* St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832; Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374. Ia.—Fullerton *v.* Des Moines, 115 N. W. 607. Md.—Peter *v.* Prettyman, 62 Md. 566. Mo.—Hooper *v.* Ely, 46 Mo. 505. Neb.—Ballard *v.* Cerney, 83 Neb. 606, 120 N. W. 151. N. Y.—Mollnow *v.* Rafter, 89 Misc. 495, 152 N. Y. Supp. 110; Barnes *v.* McGuire, 33 Misc. 438, 68 N. Y. Supp. 485. Okla.—Adams *v.* Board of Comrs. of Garvin County, 35 Okla. 440, 130 Pac. 148. Wis.—Beyer *v.* Crandon, 98 Wis. 306, 312, 73 N. W. 771.

[a] The allowance of an unfounded claim is not an adjudication estopping a taxpayer from maintaining a suit to enjoin payment. Fullerton *v.* Des Moines (Iowa), 115 N. W. 607.

[b] The court cannot determine the constitutionality of a statute under which ballots are printed in a suit to enjoin payment of a claim for printing. Fahey *v.* Bloomington, 268 Ill. 386, 109 N. E. 292.

79. Ala.—Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497. Minn.—Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199. N. Y.—Wilkins *v.* New York, 9 Misc. 610, 30 N. Y. Supp. 424, 62 N. Y. St. 89. Ohio.—County Comrs. of Lucas County *v.* Hunt, 5 Ohio St. 488, 67 Am. Dec. 303.

[a] Illustration.—Although the warrants are void their payment will not be enjoined where the holder has a valid claim for money advanced on them, which he may enforce by action on implied contract. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497.

80. Beyer *v.* Crandon, 98 Wis. 306, 312, 73 N. W. 771.

Estoppel to enjoin payment of contract, see *infra*, V, J, 6, b.

81. Picotte *v.* Watt, 3 Idaho 447, 31 Pac. 805.

82. Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

83. Mo.—Matthis *v.* Cameron, 62 Mo. 504. Okla.—Ashton *v.* Board of Comrs. of Murray County, 45 Okla. 731, 147 Pac. 305. Wis.—Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132; Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771.

As to equitable relief against judg-

faith allowed judgment to be rendered,⁸⁴ or where through negligence unmixed with fraud, judgment on an illegal claim is rendered by default.⁸⁵ And although the judgment may be void, payment will not be enjoined where the warrants themselves remain as unimpeached evidence of an audited debt.⁸⁶

(IV.) **Delivering Up Warrants.** — In a proper case the holder of a warrant issued on an illegal claim may be required, by mandatory injunction, to deliver it up for cancellation.⁸⁷

e. *Municipal Aid.* — (I.) **Enjoining Election.** — Equity will not at the instance of a taxpayer enjoin a canvassing board from canvassing the returns⁸⁸ or declaring the result⁸⁹ of an election held to authorize a subscription to stock in a public utility and the issuance of bonds therefor.

(II.) **Enjoining Issuance of Bonds.**⁹⁰ — Equity will enjoin the issuance of bonds for the purpose of aiding railroads or other public utilities if there is no statute authorizing them,⁹¹ or if the statute authorizing them is invalid,⁹² as well as in those cases where the statute is not complied with,⁹³ or where the approval of the legal voters at an election called pursuant to law is not had,⁹⁴ or where an

ments generally, see 15 STANDARD PROC. 256.

84. *Chaffee v. Granger*, 6 Mich. 51, where council directed attorney to withdraw his plea.

85. *Matthis v. Cameron*, 62 Mo. 504.

86. *Bush v. Wolf*, 55 Ark. 124, 17 S. W. 709.

87. *Hooper v. Ely*, 46 Mo. 505.

88. *State ex rel. Pierce v. Comrs. of Wabaunsee County*, 36 Kan. 180, 12 Pac. 942.

89. *State ex rel. Pierce v. Comrs. of Wabaunsee County*, 36 Kan. 180, 12 Pac. 942.

90. **Parties**, see *supra*, V, F, 2.

91. **III.**—*Campbell v. Paris & D. R. Co.*, 71 Ill. 611. **Ind.**—*Comrs. of Delaware v. McClintock*, 51 Ind. 325. **W. Va.**—*List v. Wheeling*, 7 W. Va. 501, where the statute was repealed by the subsequent adoption of a constitution.

92. *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, under a special statute authorizing a town to loan money to a saw mill. But compare *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. 777, holding that if by recital of an unconstitutional statute under which the bonds issue their validity is apparent, so that there can be no bona fide holder of them, equity will not enjoin their issuance.

93. **U. S.**—*Goedgen v. Suprs. of*

Manitowoc Co., 2 Biss. 328, 10 Fed. Cas. No. 5,501, where special meeting of board to call election was not convened as directed by law. **Ga.**—*Blake v. Macon*, 53 Ga. 172. **Kan.**—*Water, Light & Gas Co. v. Hutchinson Interurban Ry. Co.*, 74 Kan. 661, 87 Pac. 883. **Mich.**—*Curtenius v. Hoyt*, 37 Mich. 583. **Minn.**—*Hodgman v. Chicago & St. P. Ry. Co.*, 20 Minn. 48. See *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. 777. **Wis.**—See *Lynch v. Eastern, L. & M. Ry. Co.*, 57 Wis. 430, 15 N. W. 743.

94. **Colo.**—*Packard v. Board of County Comrs. of Jefferson*, 2 Colo. 338. **Ga.**—*Blake v. Macon*, 53 Ga. 172. **Ill.**—*Wright v. Bishop*, 88 Ill. 302; *Chestnutwood v. Hood*, 68 Ill. 132, where required number of notes in favor of bonds were not cast. **Ia.**—*McMillan v. Boyles*, 3 Iowa 311. **Neb.**—*Cook v. Beatrice*, 32 Neb. 80, 48 N. W. 828. **N. J.**—*Lane v. Schomp*, 20 N. J. Eq. 82. **N. C.**—*Goforth v. Rutherford Ry. Const. Co.*, 96 N. C. 535, 2 S. E. 361; *McDowell v. Massachusetts & S. Const. Co.*, 96 N. C. 514, 2 S. E. 351. **Tenn.**—*Winston v. Tennessee & P. R. Co.*, 1 Baxt. 60. **Va.**—*Redd v. Suprs. of Henry County*, 31 Gratt. (72 Va.) 695.

[a] If the petition to call the election to vote the bonds is not lawful, equity will enjoin their issuance. *Deforth v. Wisconsin & M. R. Co.*, 52

issuance contrary to the proposition submitted to the people is threatened,⁹⁵ or where the railroad to be aided is not one within the contemplation of the statute.⁹⁶ Likewise equity will enjoin a threatened issuance of the bonds before a compliance with conditions precedent,⁹⁷ or after the municipality has been released from its subscription to stock.⁹⁸ Persons induced by false representations to sign a petition to call an election to vote municipal aid bonds, may set up such representations as grounds for an injunction.⁹⁹

(III.) *Negotiation of Bonds.* — The negotiation of municipal aid bonds issued without authority may be restrained at the suit of the municipality.¹

(IV.) *Payment of Bonds and Subscriptions.* — Equity will enjoin the collection of a tax to pay a subscription to stock made without authority of law by a municipality to aid utilities,² as well as the payment of bonds or the collection of taxes therefor where the bonds are void either because a noncompliance with the statute,³ or because of an entire absence of a statute authorizing such bonds.⁴

f. *Receiving Municipal Warrants in Payment of Obligations.* — A taxpayer cannot enjoin a municipality from receiving its warrants in payment of licenses and similar obligations as his pecuniary interests are not affected.⁵

6. Municipal Contracts and Franchises. — a. *Making and Per-*

Wis. 320, 9 N. W. 17, 38 Am. Rep. 737.

[b] Where the election is void for want of sufficient notice, the issuance of bonds in aid of a railroad will be enjoined. *Harding v. Rockford*, R. I. & St. L. R. Co., 65 Ill. 90; *McDowell v. Massachusetts & S. Const. Co.*, 96 N. C. 514, 2 S. E. 351.

95. *Neale v. County Court of Wood*, 43 W. Va. 90, 27 S. E. 370, issuance before completion of road.

96. *Water, Light & Gas Co. v. Hutchinson Interurban Ry. Co.*, 74 Kan. 661, 87 Pac. 883.

97. Ill.—*Board of Suprs. of Jackson County v. Brush*, 77 Ill. 59. Mo.—*Wagner v. Meety*, 69 Mo. 150. Vt.—*Danville v. Montpelier & St. J. R. Co.*, 43 Vt. 144. Wis.—*Lawson v. Schnellen*, 33 Wis. 288.

[a] If a town should propose to violate its contract of subscription made contingent on like subscriptions by other towns who cannot legally subscribe, equity will enjoin the issuance of bonds. *Phillips v. Albany*, 28 Wis. 340.

98. *Noesen v. Port Washington*, 37 Wis. 168 (where there is a material change in the route); *Phillips v. Albany*, 28 Wis. 340.

99. *Wullenwaber v. Dunigan*, 30 Neb. 877, 882, 47 N. W. 420, 13 L. R. A. 811. See also *Curry v. Board of Suprs. of Decatur*, 61 Iowa 71, 15 N. W. 602; *Sinnett v. Moles*, 38 Iowa 25, enjoining collection of tax on this ground.

1. *Duanesburgh v. Jenkins*, 46 Barb. (N. Y.) 294, where despite the non-acceptance of authority conferred by the legislature, a city officer subscribed for stock and issued bonds.

2. Ind.—*Bronenberg v. Madison*, 41 Ind. 502. Ky.—*Kentucky Union R. Co. v. Bourbon Co.*, 85 Ky. 98, 116, 2 S. W. 687. Wis.—*Foster v. Kenosha*, 12 Wis. 616, tax to pay scrip issued in payment of subscription.

3. Ind.—*Finney v. Lamb*, 54 Ind. 1; *Bronenberg v. Madison*, 41 Ind. 502, where aid to two railroads was voted in a lump sum. Kan.—*Missouri R., Ft. S. & G. R. Co. v. Comrs. of Miami County*, 12 Kan. 230, where in submitting the question to voters no corporation was named. N. Y.—*Metzger v. Attica & Arcade R. R. Co.*, 79 N. Y. 171; *Cherry Creek v. Becker*, 50 Hun 601, 2 N. Y. Supp. 514, 18 N. Y. St. 485.

4. *Flack v. Hughes*, 67 Ill. 384.

5. *Louisiana Nat. Bank v. New Orleans*, 27 La. Ann. 446.

formance of Contracts Generally.—Contracts Within Discretion of Municipality. —Equity will not enjoin the execution,⁶ or carrying out⁷ of contracts within the discretion of municipal authorities when they are not exceeding their powers or abusing their discretion.

Unauthorized and Illegal Contracts.—A taxpayer who will sustain injury⁸ may enjoin a municipality from illegally letting or from entering into unauthorized contracts in the execution of which it will be necessary to expend public money or to incur an illegal indebtedness,⁹ or if already entered into, he may enjoin carrying them into effect.¹⁰ It has been held that if the contract is void and unenforceable

6. **Ala.**—Board of Revenue of Covington County *v.* Merrill, 193 Ala. 521, 68 So. 971. **Conn.**—Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506. **Ind.**—Seward *v.* Liberty, 142 Ind. 551, 42 N. E. 39; Bluffton *v.* Silver, 62 Ind. 262. **N. Y.**—Cleveland Fire Alarm Tel. Co. *v.* Board of Metropolitan Fire Comrs., 55 Barb. 288, 7 Abb. Pr. (N. S.) 49.

7. Tahlequah *v.* Guinn, 5 Ind. Ter. 497, 514, 82 S. W. 886; McCutcheon *v.* Terminal Station Com., 217 N. Y. 127, 111 N. E. 661.

8. See *supra*, V, F, 1, c, (III).

As to necessity for injury, see *supra*, V, F, 1, c, (II).

9. **Ill.**—Loeffler *v.* Chicago, 246 Ill. 43, 92 N. E. 586; Chicago *v.* Nichols, 177 Ill. 97, 52 N. E. 359. **Ind.**—Bailey *v.* Board of Comrs., 57 Ind. App. 285, 107 N. E. 38. **Kan.**—Arnhold *v.* Klug, 97 Kan. 576, 155 Pac. 805. **Md.**—Baltimore *v.* Keyser, 72 Md. 106, 19 Atl. 706. **Minn.**—Le Tourneau *v.* Hugo, 90 Minn. 420, 97 N. W. 115; Diamond *v.* Mankato, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448; Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199. **N. Y.**—Peck *v.* Belknap, 130 N. Y. 394, 29 N. E. 977; Gibbs *v.* Luther, 81 Misc. 611, 143 N. Y. Supp. 90. **Ohio.**—State *v.* Commissioners, 39 Ohio St. 58. **Tex.**—Austin *v.* McCall, 95 Tex. 565, 68 S. W. 791. **Wash.**—Goshert *v.* Seattle, 57 Wash. 645, 107 Pac. 860.

[a] Entry into a contract with a religious institution as to detention of prisoners will be enjoined. Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

10. **U. S.**—City Water Supply Co. *v.* Ottumwa, 120 Fed. 309. **Cal.**—Ertle *v.* Leary, 114 Cal. 238, 46 Pac. 1. **Ga.**—Dancer *v.* Shingler, 92 S. E. 935; Henry *v.* Means, 137 Ga. 153, 72 S. E. 1021; Atlanta *v.* Stein, 111 Ga. 789, 36

S. E. 932, where a contract is let under an ordinance against letting contracts to non-union labor. **Ill.**—Stevens *v.* St. Mary's Training School, 144 Ill. 336, 354, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832. **Mich.**—George *v.* Wyandotte Electric Light Co., 105 Mich. 1, 62 N. W. 985. **N. Y.**—Grace *v.* Forbes, 64 Misc. 130, 118 N. Y. Supp. 1062. See Knowles *v.* New York, 176 N. Y. 430, 440, 68 N. E. 860, denying relief as officials had power to make a new contract immediately except as to the void condition, which they may waive. **Ohio.**—Raynolds *v.* Cleveland, 24 Ohio Cir. Ct. 215, 2 Ohio Cir. Ct. (N. S.) 139; Haskins *ex rel.* Cincinnati *v.* Cincinnati Consol. St. R. R. Co., 7 Ohio Dec. (Reprint) 713. **Okla.**—Harlow *v.* Board of County Comrs. of Payne, 33 Okla. 353, 360, 125 Pac. 449; El Reno *v.* Cleveland-Trinidad Pav. Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650.

[a] Carrying out of fraudulent contracts will be enjoined. **Ark.**—Shackelford *v.* Campbell, 110 Ark. 355, 161 S. W. 1019, Ann. Cas. 1915D, 753. **N. Y.**—Birge *v.* Berlin Iron Bridge Co., 133 N. Y. 477, 31 N. E. 609. **Wis.**—Willard *v.* Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657.

[b] Though commenced before passage of assessment ordinance and creation of lien on taxpayers' property, a suit to enjoin carrying out of paving is not premature. El Reno *v.* Cleveland-Trinidad Pav. Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650.

[c] If a franchise is fraudulently granted, a taxpayer may institute proceedings to have it declared void and to enjoin the grantee from proceeding under it. Adamson *v.* Union Ry. Co., 74 Hun 3, 26 N. Y. Supp. 136, 56 N. Y. St. 214.

as against the city, equity will not enjoin the letting of the contract at the instance of a taxpayer, as he would suffer no injury by its execution.¹¹ But this rule is not strictly followed in all jurisdictions.¹²

A taxpayer may enjoin the making of municipal contracts which will increase the city indebtedness beyond the debt limit,¹³ as well as the execution¹⁴ and carrying into effect¹⁵ of contracts which are void because of a failure to comply with some prerequisite. And if the municipal authorities exceed their powers in inserting conditions in contracts which will unduly increase the price to be paid for the work and therefore amounts to a waste of public funds, an injunction will issue.¹⁶ But a suit to enjoin the execution or carrying out¹⁷ of a con-

11. **Cal.**—*Barto v. San Francisco*, 135 Cal. 494, 67 Pac. 758; *Linden v. Case*, 46 Cal. 171. **Conn.**—*Dibble v. New Haven*, 56 Conn. 199, 14 Atl. 210. **Ia.**—*Searle v. Abraham*, 73 Iowa 507, 35 N. W. 612. **Tenn.**—*Public Ledger Co. v. Memphis*, 93 Tenn. 77, 23 S. W. 51.

12. *Fones Hdw. Co. v. Erb*, 54 Ark. 645, 659, 17 S. W. 7, 13 L. R. A. 353 (since the letting of the contract would result in confusion and loss to contractor); *Pullman v. New York*, 49 Barb. (N. Y.) 57, 2 Abb. Pr. N. S. 29.

[a] If the contract is valid on its face but void because of extrinsic facts, and if there is a reasonable inference that the municipality will recognize it as valid, equity will grant an injunction to prevent its execution. *Schiffmann v. St. Paul*, 88 Minn. 43, 92 N. W. 503; *Farmer v. St. Paul*, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199; *Judd v. Fox Lake*, 28 Wis. 583.

13. **Ill.**—*Bednarski v. West Hammond*, 170 Ill. App. 543. **Ind.**—*Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755. **Ky.**—*City of West Covington v. Dods*, 152 Ky. 617, 153 S. W. 964. **Mo.**—*State ex rel. McMillan v. Woodside*, 254 Mo. 580, 163 S. W. 845.

As to enjoining creation of illegal indebtedness, see *supra*, V, J, 5, b.

14. **Ark.**—*Fones Hdw. Co. v. Erb*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353. **Ill.**—*Westbrook v. Middlecoff*, 99 Ill. App. 327. **Kan.**—*Pollock v. Kansas City*, 87 Kan. 205, 123 Pac. 985, 42 L. R. A. (N. S.) 465 (where petition for improvement was void); *State ex rel. Reed v. Comrs. of Marion County*, 21 Kan. 419. **Mich.**—*Detroit v. Wayne Circ. Judge*, 79 Mich. 384, 44 N. W. 622. **Minn.**—*Arpin v. Thief*

River Falls, 122 Minn. 34, 141 N. W. 833; *Schiffmann v. St. Paul*, 88 Minn. 43, 92 N. W. 503. **Ohio.**—See *Plessner v. Pray*, 6 Ohio N. P. 444.

15. **Cal.**—*Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1; *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968. **Ga.**—*Manly Building Co. v. Newton*, 114 Ga. 245, 40 S. E. 274. **Ill.**—*Littler v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Ayers v. Jacksonville*, 171 Ill. App. 129. **Minn.**—*McLean v. North St. Paul*, 73 Minn. 146, 75 N. W. 1042. **N. Y.**—*Coykendall v. Harrison*, 150 App. Div. 46, 134 N. Y. Supp. 446. **N. D.**—*McKinnon v. Robinson*, 24 N. D. 367, 139 N. W. 530. **Pa.**—*Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693. **W. Va.**—*Lawson v. Kanawha County Court*, 92 S. E. 786. **Wis.**—*Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

16. **Ala.**—*Inge v. Board of Public Wks. of Mobile*, 135 Ala. 189, 202, 33 So. 678, 93 Am. St. Rep. 20. **N. Y.**—*Meyers v. New York*, 58 App. Div. 534, 69 N. Y. Supp. 529. **Ohio.**—*Cincinnati St. Ry. Co. v. Smith*, 29 Ohio St. 291, 307.

[a] If the unauthorized stipulations are so connected with the authorized that their separation is impracticable, the performance of the entire contract will be enjoined. The same is true if the subject-matter is such that the court cannot say that the council would have passed the ordinance without the unauthorized stipulations. Otherwise performance as to the unauthorized provisions only will be enjoined. *Cincinnati St. Ry. Co. v. Smith*, 29 Ohio St. 291, 307.

17. See *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855; *Merritt v. Duluth*, 103 Minn. 236, 114 N. W. 758.

tract is premature where the objection is directed at the apportionment of the expense burden.

Where it is doubtful whether the municipal authorities are exceeding their powers, equity will not interfere.¹⁸

If there is no imminent danger that the contract is about to be entered into, an injunction will not be granted.¹⁹

b. *Acceptance of Work and Payment.*—Payment of illegal contracts will be enjoined,²⁰ unless it would be inequitable to grant the writ.²¹ Where taxpayers knowingly stand by and allow a contractor to incur liabilities under a contract with the municipality, equity will not enjoin its payment because of irregularities in its execution unattended with fraud.²² But where there is a want of power and not merely an irregular exercise of power an estoppel against taxpayers is not applied,²³ although there are authorities to the contrary.²⁴

Acceptance.—The correctness of the judgment of the council as to compliance with a contract will not be reviewed in a proceeding to restrain payment.²⁵ But it has been held that if the municipal authorities are about to accept and pay for work performed under a contract which is not a substantial compliance with it,²⁶ equity will

18. *Plessner v. Pray*, 6 Ohio N. P. 444, where it was doubtful whether the statute requiring advertisement for bids applied to the contract in question.

19. *Admiral Realty Co. v. Gaynor*, 147 App. Div. 719, 132 N. Y. Supp. 220; *Press Pub. Co. v. Holahan*, 29 Misc. 684, 62 N. Y. Supp. 872.

20. *Ia.*—*Hanson v. Hunter*, 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84, where contract is payable out of general fund. *Kan.*—*Board of Comrs. of Harper County v. State ex rel. Beebe*, 47 Kan. 283, 27 Pac. 997. *Mass.*—*Claflin v. Hopkinton*, 4 Gray 502. *Okla.*—*Board of Comrs. of Kay County v. Smith*, 47 Okla. 184, 148 Pac. 111. *Ore.*—*Burness v. Multnomah*, 37 Ore. 460, 468, 60 Pac. 1005. *Pa.*—*O'Malley v. Olyphant Borough*, 198 Pa. 525, 48 Atl. 483. *Tex.*—*Altgelt v. San Antonio*, 81 Tex. 436, 446, 17 S. W. 75, 13 L. R. A. 383. *Wash.*—*Booth v. Snohomish County*, 75 Wash. 122, 134 Pac. 686. *Wis.*—*Sayles v. Hartford*, 161 Wis. 136, 152 N. W. 853; *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253.

21. See *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837.

22. *Ill.*—*Badger v. Inlet Drainage Dist.*, 141 Ill. 540, 31 N. E. 170; *Westbrook v. Middlecoff*, 99 Ill. App. 327. *Kan.*—*Meistrell v. Bd. of County Comrs. of Ellis*, 76 Kan. 319, 91 Pac.

65. *La.*—*McMahon v. New Orleans*, 52 La. Ann. 1226, 27 So. 650. *Neb.*—*Hadlock v. Tucker*, 93 Neb. 510, 141 N. W. 192; *Brown v. Merriek*, 18 Neb. 355, 25 N. W. 356; *Follmer v. Nuckolls*, 6 Neb. 204; *Clark v. Dayton*, 6 Neb. 192, 203. *Wash.*—*Travis v. Ward*, 2 Wash. 30, 25 Pac. 908.

23. *Mich.*—*Black v. Detroit*, 119 Mich. 571, 78 N. W. 660. *R. I.*—*Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648, where town entertained certain strangers. *Wis.*—*McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253; *Lawton v. Racine*, 137 Wis. 593, 119 N. W. 331 (citing many local cases); *Beaser v. Barber Asphalt Pav. Co.*, 120 Wis. 599, 601, 98 N. W. 525.

24. *Farmer v. St. Paul*, 65 Minn. 176, 182, 67 N. W. 990, 33 L. R. A. 199; *Tash v. Adams*, 10 Cush. (Mass.) 252.

25. *O'Neill v. Auburn*, 76 Wash. 207, 135 Pac. 1000, 50 L. R. A. (N. S.) 1140.

26. *Pleasants v. Shreveport*, 110 La. 1046, 35 So. 283; *Schumm v. Seymour*, 24 N. J. Eq. 143, 147, the officers are guilty of a breach of trust which amounts to fraud. See *Lodor v. McGovern*, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446, and *Merrimon v. Southern Pav. & Const. Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574, denying relief on the state of the pleadings.

grant an injunction, unless there is a remedy by appeal from the allowance of the claim for work.²⁷

c. *To Restrain Violation of Contract.*—An injunction will not lie to prevent a municipality from violating its contracts, for there is a plain remedy at law in such case.²⁸ Nor will equity by mandatory injunction command a city to insist that a contractor live up to his contract, as it would require constant supervision of the court to enforce its writ.²⁹ But where a city decides that its contract or franchise has not been complied with, interferes by force with the exercise of the privileges granted, equity will by injunction preserve the status quo and allow the city to pursue its legal remedy.³⁰

d. *Ordinances Amounting to Contracts and Granting Franchises.*³¹ *Passage.*—Although some cases hold that the passage of ordinances amounting to contracts,³² or granting franchises,³³ is an exercise of the ministerial powers of a municipality and therefore subject to control by an injunction when void, it is the general rule that the passage of ordinances authorizing contracts³⁴ and granting franchises³⁵ is legislative in character and is therefore immune from judicial interference. But whether the act is regarded as the exercise of a legislative or contractual function, equity cannot grant an injunction if the expediency not the legality of the ordinance is in question.³⁶

Publication.—It has been held that a suit to restrain publication of a resolution declaring a necessity exists for a certain improvement is premature.³⁷

Enforcement.—When the legislation with respect to contracts and franchises is sought to be made effective by a mere ministerial act,³⁸

As to demand on council to contest claim of contractor, see *supra*, V, G.

27. *Manly Mfg. Co. v. Broadbush*, 94 Va. 547, 27 S. E. 438.

28. *Wabaska Electric Co. v. Wy- more*, 60 Neb. 199, 82 N. W. 626.

29. *Conrad v. O'Boyle*, 51 Pa. Super. 467.

30. *Akron, B. & C. R. Co. v. Bedford*, 6 Ohio N. P. 276; *Cleveland City Ry. Co. v. Cleveland*, 4 Ohio N. P. 21.

[a] **The fact that the plaintiff has in fact violated its contract does not preclude relief.** *Akron, B. & C. R. Co. v. Bedford*, 6 Ohio N. P. 276; *Cleveland City Ry. Co. v. Cleveland*, 4 Ohio N. P. 21.

31. **As to ordinances generally,** see *supra*, V, J, 4.

32. *State ex rel. Abel v. Gates*, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152, *explaining and limiting* *Albright v. Fisher*, 164 Mo. 56, 64 S. W. 106.

33. *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128.

34. *Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832.

35. **U. S.**—*New Orleans Water- works Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. ed. 518. **Ala.**—*Montgomery Gas-Light Co. v. Montgomery*, 87 Ala. 245, 257, 6 So. 113, 4 L. R. A. 616. **Ia.**—*Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756. **Ky.**—*Slade v. Lexington*, 121 S. W. 621; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487. **La.**—*Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272. **N. Y.**—*Whit- ney v. New York*, 28 Barb. 233; *Dailey v. Nassau County Ry. Co.*, 52 App. Div. 272, 65 N. Y. Supp. 396. **Wis.**—*State ex rel. Rose v. Superior Court*, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819.

36. *Tebbetts v. People*, 31 Colo. 461, 468, 73 Pac. 869.

37. *Pitser v. Pawnee*, 47 Okla. 559, 149 Pac. 201.

38. *Dailey v. Nassau County Ry.*

such as the execution of the contract,³⁹ or carrying out⁴⁰ equity will interfere if the contract is one in excess of corporate authority or is void. Accordingly an injunction may issue to restrain the enforcement of an ordinance tending to abrogate privileges conferred by a franchise,⁴¹ as well as to enjoin private parties threatening to exercise privileges under a franchise granted in violation of a previous franchise.⁴²

e. *Competitive Contracts.*—(I.) *Generally.*—A taxpayer may enjoin the execution or, if already executed, the carrying into effect of a competitive contract on the ground that there was no advertisement or provision made for competitive bidding when required,⁴³ on the ground the advertisement is insufficient,⁴⁴ or on the ground that the contract was awarded without considering all the proposals submitted.⁴⁵ A board will be enjoined from letting a contract at any other time than that fixed by the advertisement,⁴⁶ even though the board was prevented from sooner letting it by an injunction.⁴⁷ Likewise the execution or performance of a contract not in conformity with the specifica-

Co., 52 App. Div. 272, 65 N. Y. Supp. 396.

39. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Davenport v. Kleinschmidt*, 6 Mont. 502, 549, 13 Pac. 249.

[a] The execution of a contract creating an indebtedness beyond the statutory or constitutional limit, will be enjoined. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Davenport v. Kleinschmidt*, 6 Mont. 502, 549, 13 Pac. 249.

40. *Meyer v. Boonville*, 162 Ind. 165, 70 N. E. 146, enjoining carrying out ordinance which was not published.

41. **U. S.**—*Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; *New Orleans Water Wks. Co. v. New Orleans*, 164 U. S. 471, 481, 17 Sup. Ct. 161, 41 L. ed. 518. **Ala.**—*Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127, 4 So. 626; *Forchheimer v. Mobile*, 84 Ala. 126, 4 So. 112; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342. **Ohio.**—*Mill Creek Valley St. Ry. Co. v. Carthage*, 18 Ohio Cir. Ct. 216.

42. *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; *Birmingham & P. M. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

Injunction to protect franchises generally, see the title "Public Service Corporations."

43. *Arpin v. Thief River Falls*, 122 Minn. 34, 141 N. W. 833.

44. *Little v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Ayers v. Jacksonville*, 171 Ill. App. 129.

[a] Where specifications are not set forth in the advertisement, (1) a contract awarded under it would be ultra vires and its execution will be enjoined. *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32. (2) In such case, it is immaterial whether the plans submitted increased the cost above those previously adopted by the board. *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1.

[b] The fact (1) that materials named in the specifications are patented and can be used by a single dealer authorizes an injunction (**La.**—*Saxon v. New Orleans*, 124 La. 717, 50 So. 663. **N. Y.**—*Dolan v. New York*, 4 Abb. Pr. [N. S.] 397. **Wis.**—*Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099, 116 Am. St. Rep. 54, 5 L. R. A. [N. S.] 680. *Contra*, *Holmes v. Common Council of Detroit*, 120 Mich. 226, 79 N. W. 200, 77 Am. St. Rep. 587, 45 L. R. A. 121; *Schuck v. Reading*, 186 Pa. 248, 40 Atl. 310), (2) unless statute authorizes the use of a patented article. *Greaton v. Griffin*, 4 Abb. Pr. N. S. (N. Y.) 310.

45. *Baltimore v. Keyser*, 72 Md. 106, 19 Atl. 706.

46. *Board of Comrs. of Benton County v. Templeton*, 51 Ind. 266.

47. *Board of Comrs. of Benton County v. Templeton*, 51 Ind. 266.

tions in the advertisement will be enjoined.⁴⁸ But a discretion in rejecting bids will not be controlled by injunction unless abused.⁴⁹

(II.) **Letting to Lowest Bidder.** — Before the municipal authorities have acted on bids submitted in response to an advertisement therefor, equity will not enjoin them from letting the contract to other than the lowest bidder,⁵⁰ although previously they may have adopted a resolution not to award contracts to a certain class of bidders.⁵¹ Furthermore, it has been held that the award of such a contract would be void and would not irreparably injure taxpayers.⁵²

Lowest Responsible Bidder. — Under a statute requiring contracts to be let to the lowest and best or lowest responsible bidder, the municipality has a discretion and will not be restrained from letting the contract to a particular bidder,⁵³ unless there is fraud or a gross abuse of discretion.⁵⁴ Nor will equity compel it to award the contract to a particular bidder by mandatory injunction.⁵⁵

Lowest Bidder. — Under a statute requiring contracts to be let to the lowest bidder, a taxpayer may enjoin either the execution⁵⁶ or the

48. **Minn.**—*Le Tourneau v. Hugo*, 90 Minn. 420, 97 N. W. 115; *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448. **Ohio.**—*Pease v. Ryan*, 7 Ohio Cir. Ct. 44, 3 Ohio Cir. Dec. 654. **Pa.**—*Flinn v. Philadelphia*, 102 Atl. 24 (where advertisement required stone to be cut in city); *McIntyre v. Perkins*, 9 Phila. 484. **Wash.** *Shields v. Seattle*, 79 Wash. 308, 140 Pac. 353, where contract was awarded to one submitting a proposal for materials not mentioned in the advertisement.

49. *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 1109; *Gunning Gravel & Pav. Co. v. New Orleans*, 45 La. Ann. 911, 13 So. 182.

50. *Barto v. San Francisco*, 135 Cal. 494, 67 Pac. 758.

51. *Barto v. San Francisco*, 135 Cal. 494, 67 Pac. 758, where board resolved not to let contracts to non-union labor.

52. *Barto v. San Francisco*, 135 Cal. 494, 67 Pac. 758. See *supra*, V, J, 6, b.

53. **Ala.**—*Inge v. Board of Public Wks. of Mobile*, 135 Ala. 189, 198, 33 So. 678, 93 Am. St. Rep. 20. **Cal.** *People ex rel. Merrill v. Nellis*, 14 Cal. App. 250, 111 Pac. 631. **D. C.**—*Downing v. Ross*, 1 App. Cas. 251, 259. **Ill.** *Kelly v. Chicago*, 62 Ill. 279; *Stubbs v. Aurora*, 160 Ill. App. 351. **Ind.** *Eigenmann v. Board of Comrs.*, 53 Ind. App. 1, 101 N. E. 38. **Ohio.**—*McClain v. McKisson*, 15 Ohio Cir. Ct. 517, 8 Ohio Cir. Dec. 357; *Coppin v. Her-*

mann, 7 Ohio N. P. 528, 9 Ohio Dec. 584. *Compare Akron v. France*, 4 Ohio Cir. Ct. (N. S.) 496. **Pa.**—*Findley v. Pittsburgh*, 82 Pa. 351. **Wash.**—*State ex rel. News Pub. Co. v. Milligan*, 3 Wash. 144, 28 Pac. 369.

[a] Except where there is a plain and palpable violation of duty to award a franchise to the highest and best bidder. *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487.

54. **Ala.**—*Inge v. Board of Public Wks. of Mobile*, 135 Ala. 189, 198, 33 So. 678, 93 Am. St. Rep. 20. **D. C.** *Downing v. Ross*, 1 App. Cas. 251, 259. **Ill.**—*Kelly v. Chicago*, 62 Ill. 279; *Standard Pav. Co. v. Elgin*, 164 Ill. App. 396. **Ind.**—*Eigenmann v. Board of Comrs.*, 53 Ind. App. 1, 101 N. E. 38. **Pa.**—*Findley v. Pittsburgh*, 82 Pa. 351.

See *Kelly, Piet & Co. v. Baltimore*, 53 Md. 134, holding fraud of subagent not involving board is insufficient to warrant relief.

55. **Ill.**—*Johnson v. Sanitary District*, 163 Ill. 285, 45 N. E. 213; *Stubbs v. Aurora*, 160 Ill. App. 351. **Ky.** *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 1109. **Mo.**—*Denny v. Jefferson Co.*, 199 S. W. 250.

Mandamus to compel award of contract to lowest bidder, see *supra*, IV, C, 10, a.

56. *Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811; *Knorr v. Miller*, 5 Ohio Cir. Ct. 609, 3 Ohio Cir. Dec. 297. But see *Dibble v. New Haven*,

carrying out⁵⁷ of a contract which has been awarded to one who is not the lowest bidder, and which will cast a debt on the county. And if the municipal authorities are about to make payments on the contract, an injunction against payment will issue.⁵⁸ But if a board advertises for bids, when it is not required to do so, equity will not interfere with their discretion and enjoin them from awarding the contract to one who is not the lowest bidder.⁵⁹

(III.) **Who May Sue.** — The fact that the taxpayer is also a bidder will not preclude relief.⁶⁰ But a bidder suing as such and not in his character as a taxpayer cannot maintain the action.⁶¹

7. Custody, Waste and Injury to Corporate Property. — Equity has jurisdiction at the suit of taxpayers, to enjoin an illegal and wrongful use⁶² or disposition⁶³ of municipal property where there is

56 Conn. 199, 14 Atl. 210; *Cleveland Fire Alarm Tel. Co. v. Board of Metropolitan Fire Comrs.*, 55 Barb. (N. Y.) 288, 7 Abb. Pr. (N. S.) 49, holding words "lowest bidder" are not to be construed literally.

57. *Times Publishing Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865; *Mueller v. Eau Claire Co.*, 108 Wis. 304, 84 N. W. 430.

[a] If the plaintiff's bid is conditional and is rejected on that account, equity will not grant an injunction on finding the bid to be illegal. *Trowbridge v. New York*, 24 Misc. 517, 53 N. Y. Supp. 616.

58. *Holden v. Alton*, 179 Ill. 318, 223, 53 N. E. 556.

59. *Cleveland Fire Alarm Tel. Co. v. Board of Metropolitan Fire Comrs.*, 55 Barb. (N. Y.) 288, 7 Abb. Pr. (N. S.) 49.

60. Ill.—*Holden v. Alton*, 179 Ill. 318, 53 N. E. 556. Pa.—*Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693. Wash. *Times Publishing Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865.

Contra, *Mathers v. Cincinnati*, 7 Ohio Dec. (Reprint) 521.

61. Ark.—*Arkansas Democrat Co. v. Press Printing Co.*, 57 Ark. 322, 21 S. W. 586. Md.—*Kelly, Piet & Co. v. Baltimore*, 53 Md. 134. Mich.—*Detroit v. Wayne Circ. Judge*, 128 Mich. 438, 87 N. W. 376. Ohio.—*Johnson v. West Side St. R. Co.*, 9 Ohio Dec. (Reprint) 71.

But compare *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487.

62. Conn.—*Scotfield v. Eighth School District*, 27 Conn. 499, enjoining use of school house for church and Sunday school at instance of taxpayers.

La.—*Sugar v. Monroe*, 108 La. 677, 32 So. 961, 59 L. R. A. 723, where a school house was being used as a theater. Minn.—*Anderson v. Montevideo*, 162 N. W. 1072 (holding city could rent auditorium for motion picture theater); *Nerlien v. Brooten*, 94 Minn. 361, 102 N. W. 867, use of village hall for private commercial purposes enjoined. N. Y.—*People ex rel. Negus v. Dwyer*, 90 N. Y. 402, 410, 2 Civ. Proc. 379. Ohio.—*Weir v. Day*, 35 Ohio St. 143; *Gall v. Cincinnati*, 18 Ohio St. 563, holding city had authority to use land purchased for market purposes for other public purposes. Okla.—*Perry Public Library Assn. v. Lobsitz*, 35 Okla. 576, 130 Pac. 919, 45 L. R. A. (N. S.) 368, enjoining city from putting building furnished for library to other uses.

[a] **Injury.**—In *Scotfield v. Eighth School District*, 27 Conn. 499, the use of a school house for church purposes was enjoined on the ground that more or less injury must arise from use of building and furniture, from deranging books and stationery, and from increased risk of destruction by fire. As to necessity for injury, see *supra*, V, F, 1, c, (II).

63. U. S.—*Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377, where parks were sold for private use. D. C.—*Dewey Hotel Co. v. United States Electric Lighting Co.*, 17 App. Cas. 356. Ind.—*Spurrier v. Vater* (Ind. App.), 113 N. E. 732. Ia.—*Brockman v. Creston*, 79 Iowa 587, 44 N. W. 822. Ky.—*Roberts v. Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844. N. Y.—*People ex rel. Negus v. Dwyer*, 90 N. Y. 402, 410, 2 Civ. Proc. 379. Wis.—*Carstens v.*

no adequate remedy at law. And some statutes provide for taxpayers' suits to prevent waste or injury to any property of a municipal corporation by its officers.⁶⁴ Equity will not interfere with the bona fide exercise of discretion in the management and disposition of municipal property,⁶⁵ even though it may be erroneous and injurious consequences may follow.⁶⁶ As the remedy by injunction will not be granted where it would operate inequitably, equity will not protect the wrongful possession of city property by a party on the ground that jurisdiction to evict him is not vested in the particular officers who assume to act.⁶⁷

8. Purchase of Property.—The exercise of discretion of municipal authorities in purchasing property for the municipality will not be interfered with by injunction in the absence of abuse,⁶⁸ even where the facts alleged indicate a want of prudence and good judgment.⁶⁹ But equity will grant an injunction if the authority reposed in the officers is exceeded,⁷⁰ or if the debt created by the purchase would exceed the debt limit.⁷¹

9. Public Improvements.—A discretion reposing in municipal authorities as to public improvements will not be interfered with by the granting of an injunction,⁷² in the absence of an abuse of discre-

Fond du Lac, 137 Wis. 465, 119 N. W. 117; Willard v. Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657.

64. See generally the statutes, and Wenk v. New York, 171 N. Y. 607, 64 N. E. 509.

[a] **The granting of a license not purporting to be a grant of a franchise,** is not a waste of corporate property within the statute. Hart v. New York, 16 App. Div. 227, 44 N. Y. Supp. 767.

65. Athens v. Camak, 75 Ga. 429; Bell v. Platteville, 71 Wis. 139, 36 N. W. 831. Compare People ex rel. Negus v. Dwyer, 90 N. Y. 402, 2 Civ. Proc. 379.

66. Athens v. Camak, 75 Ga. 429.

67. Rogers v. O'Brien, 153 N. Y. 357, 47 N. E. 456, the action cannot be maintained under a statute allowing a taxpayer's suit to prevent "any illegal official act."

68. N. Y.—Ziegler v. Chapin, 126 N. Y. 342, 348, 27 N. E. 471. N. C. Jones v. North Wilkesboro, 150 N. C. 646, 64 S. E. 866. Ohio.—Fergus v. Columbus, 6 Ohio N. P. 82. Ore.—Avery v. Job, 25 Ore. 512, 525, 36 Pac. 293. Pa.—Newell v. Bradford, 18 Pa. Co. Ct. 465. R. I.—Lewis v. Providence, 10 R. I. 97, 101.

[a] **Discretion as to Price.**—(1) For a mere error of judgment involving no greater difference than might exist

between persons purchasing property for themselves, equity will not restrain the purchase. Winkler v. Summers, 51 Hun 636, 5 N. Y. Supp. 723, 22 Abb. N. C. 80, granting an injunction where it was agreed to pay \$11,000 for a lot worth only \$8000. See also Ziegler v. Chapin, 126 N. Y. 342, 348, 27 N. E. 471; Lewis v. Providence, 10 R. I. 97. (2) But it is otherwise where the price to be paid is so excessive as to shock the conscience. McCormick v. New Brunswick, 83 N. J. Eq. 1, 89 Atl. 1034; Avery v. Job, 25 Ore. 512, 525, 36 Pac. 293, where \$28,000 was to be paid for a water-works plant not worth \$10,000 and wholly inadequate.

[b] **Where purchase of property will create a public nuisance,** equity has jurisdiction to enjoin it. Jones v. North Wilkesboro, 150 N. C. 646, 64 S. E. 866.

69. Ziegler v. Chapin, 126 N. Y. 342, 348, 27 N. E. 471.

70. Lewis v. Providence, 10 R. I. 97.

71. Lore v. Wilmington, 4 Del. Ch. 575.

72. U. S.—Chostkov v. Pittsburgh, 177 Fed. 936; Thompson-Houston Elec. Co. v. Newton, 42 Fed. 723, erection of electric light plant. Ark.—Graham v. Nix, 102 Ark. 277, 144 S. W. 214. Ga.—Dunn v. Beck, 144 Ga. 148, 86

tion,⁷³ and not even then if there is an adequate remedy by appeal.⁷⁴ But if there is a failure to comply with the authority given either by law,⁷⁵ or by a vote of the people,⁷⁶ which will increase the burden of taxation, a taxpayer may obtain an injunction. An important public work will not be delayed by injunction except in a clear case.⁷⁷

10. Restraining Seizure of Private Property.—Where there is no adequate remedy at law, a municipality may be enjoined from un-

S. E. 385. **Kan.**—Shanks *v.* Pearson, 66 Kan. 168, 71 Pac. 252. **N. J.**—Berdan *v.* Passaic Valley Sewerage Comrs., 82 N. J. Eq. 235, 88 Atl. 202. **N. Y.** Bell *v.* Rochester, 30 N. Y. Supp. 365, 61 N. Y. St. 721. **N. C.**—Newton *v.* School Committee of Charlotte, 158 N. C. 186, 73 S. E. 886. **Tex.**—Comrs. Court of Floyd County *v.* Nichols (Tex. Civ. App.), 142 S. W. 37.

[a] That the improvement is not necessary will not authorize an injunction. Chostkov *v.* Pittsburgh, 177 Fed. 936.

Discretion as to improvement of highway, see 11 STANDARD PROC. 126.

73. **Ga.**—Dunn *v.* Beck, 144 Ga. 148, 86 S. E. 385. **Kan.**—Shanks *v.* Pearson, 66 Kan. 168, 71 Pac. 252. **Mich.** Conrad *v.* Smith, 32 Mich. 429.

74. Graham *v.* Nix, 102 Ark. 277, 144 S. W. 214.

75. Chostkov *v.* Pittsburgh, 177 Fed. 936; McDougall *v.* Racine County, 156 Wis. 663, 146 N. W. 794.

[a] Where statute provides for the erection of permanent improvements by letting of contracts to the lowest bidders, the county commissioners will not be enjoined from engaging in the business of erecting them personally or by agent, where there is no showing that the burden of taxation will be increased. Rickman *v.* Whitehurst (Fla.), 74 So. 205. But see Follmer *v.* Nuckolls, 6 Neb. 204, granting an injunction and dismissing as absurd the proposition that commissioners can build a bridge cheaper than a contractor who is an expert in that business.

[b] Where improvement would increase indebtedness beyond debt limit injunction will issue. State *ex rel.* McMillan *v.* Woodside, 254 Mo. 580, 595, 163 S. W. 845.

[c] The fact that an improvement will cost more than the estimate does not authorize an injunction. Chostkov *v.* Pittsburgh, 177 Fed. 936.

[d] To prevent locating a public

building on a site selected contrary to law an injunction will lie. State *ex rel.* Elliott *v.* Custer, 11 Ind. 210, where board refused to recognize selection of appellate tribunal.

[e] An unauthorized use of a building is not ground for enjoining its completion. White *v.* Chatfield, 116 Minn. 371, 133 N. W. 962.

[f] Where Land Title Is Imperfect. The fact that the title to land on which it is proposed to erect a public building is imperfect, does not authorize an injunction. Kendall *v.* Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118.

[g] Where a vote or resolution to levy a tax for public improvement is illegal, equity will not enjoin the carrying of the resolution into effect and incurring indebtedness on the faith of it, as this is at most a threatened invasion of the rights of the taxpayers which would not be irreparable. McGowan *v.* Paul, 141 Wis. 388, 123 N. W. 253; Sage *v.* Fifield, 68 Wis. 546, 32 N. W. 629; Judd *v.* Fox Lake, 28 Wis. 583.

76. Tukey *v.* Omaha, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711.

[a] Illustration.—Where authority is given by vote to secure a site for and erect a building, the erection of the building on land owned by the city and used as a park will be enjoined. Tukey *v.* Omaha, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711.

77. Berdan *v.* Passaic Valley Sewerage Comrs., 82 N. J. Eq. 235, 88 Atl. 202; Easton *v.* New York & L. B. R. Co., 24 N. J. Eq. 49, 58.

[a] If it is a matter of doubt whether the city had not acquired a right to make the improvement, the writ will be denied. Bass *v.* Shakopee, 27 Minn. 250, 4 N. W. 619, 6 N. W. 776.

[b] And when the improvement is so nearly completed that the issuance of the injunction would produce confusion and give rise to embarrassing

lawfully taking or injuring private property without compensation.⁷³

11. Permits.—A taxpayer may enjoin the issuing of a permit for the construction of a building or other structure in violation of an ordinance under a statute authorizing taxpayers' suits to prevent any illegal official act.⁷⁹ But permitting the work to proceed under a permit already issued will not be enjoined.⁸⁰ The fact that a permit is wrongfully denied does not authorize an injunction against interference with action had without a permit.⁸¹ But if an ordinance is void because it gives arbitrary power to withhold a permit, equity will enjoin its enforcement against persons proceeding without a permit.⁸²

12. Engaging in Private Business.—A taxpayer can enjoin a municipality from unlawfully engaging in a private business⁸³ unless, it has been held, the business is being operated without cost to the city or at a profit.⁸⁴ But the action cannot be brought by a person who in his capacity as a business man suffers injury by the competition.⁸⁵

13. Enjoining Discrimination in Operation of Public Utilities.

questions, the parties will be left to whatever remedy they may have at law. *White v. Stamford*, 37 Conn. 578.

78. Ala.—*Niehaus & Co. v. Cooke*, 134 Ala. 223, 32 So. 728; *Montgomery v. Lemle*, 121 Ala. 609, 25 So. 919. **Cal.**—*Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, where a city attempted to take possession of waterworks without authority. **Minn.**—See *Bass v. Shakopee*, 27 Minn. 250, 4 N. W. 619, 6 N. W. 776. **Wis.**—*Church v. Joint School Dist. No. 12*, 55 Wis. 399, 13 N. W. 272.

[a] Where city is proceeding to open street over plaintiff's property without paying for it. **Conn.**—*Wetherell v. Newington*, 54 Conn. 67, 5 Atl. 858. **Ill.**—*Peoria v. Johnston*, 56 Ill. 45. **Ind.**—*Faust v. Huntington*, 91 Ind. 493. **Mass.**—*Winslow v. Nayson*, 113 Mass. 411. **N. J.**—*Folley v. Passaic*, 26 N. J. Eq. 216. **W. Va.**—*Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Mason City S. & M. Co. v. Mason*, 23 W. Va. 211. **Wis.**—*Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902.

Where city is proceeding to change grade of street, without making compensation. See 11 STANDARD PROC. 138, note 27.

79. *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216; *Brill v. Miller*, 140 App. Div. 602, 125 N. Y. Supp. 865; *Southern Leasing Co. v. Williams*, 96 Misc. 358, 160 N. Y. Supp. 440, electric sign,

[a] The title to property cannot be tried in an action to prevent issuance of a permit. *Lakes Island Realty Co. v. McDermott*, 96 Misc. 37, 160 N. Y. Supp. 450.

80. *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470, mandamus is the proper remedy.

81. *Mutual Electric Light Co. v. Ashworth*, 118 Cal. 1, 50 Pac. 10. See also *New York & N. J. Water Co. v. North Arlington Borough*, 76 N. J. Eq. 514, 74 Atl. 973, where, in refusing an application improperly addressed to the mayor and council instead of the mayor merely, unreasonable conditions are imposed.

82. *Boyd v. Frankfort*, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240. See *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220.

As to enjoining enforcement of ordinances generally, see *supra*, V, J, 4, c.

83. *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602; *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

84. *Blanton v. Merry*, 116 Ga. 288, 42 S. E. 211, *distinguishing* *Barnesville v. Murphey*, 113 Ga. 779, 39 S. E. 413, where city operated liquor dispensary. *Contra*, *Keen v. Waycross*, 101 Ga. 588, 29 N. E. 42. And compare *Follmer v. Nuckolls*, 6 Neb. 204.

As to necessity for injury, see *supra*, V, F, 1, c, (II).

85. *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42.

A treatment of this matter will be found elsewhere in this work.⁸⁶

14. Abatement of Nuisances.⁸⁷ — The proper exercise of a right of a city to abate nuisances will not be interfered with by injunction.⁸⁸ Equity will enjoin the summary enforcement of a void order, ordinance, or resolution singling out and declaring to be a nuisance a structure or business which is not such per se.⁸⁹ But regardless of the validity of an ordinance authorizing municipal authorities to remove certain structures, equity will refuse any writ designed to perpetuate them if they constitute a public nuisance.⁹⁰

15. Municipal Suits. — An injunction against the maintenance of an action by the municipality will not be granted on the ground the claim is unfounded and the agreement for attorney's fees is extravagant and a waste of public money.⁹¹

16. Enjoining Use of Corporate Name. — A municipality cannot enjoin the use of its name to designate another place.⁹²

17. Police. — Equity will not enjoin the police authorities from exercising their lawful powers and preserving the peace,⁹³ except in

86. See the title "Public Service Corporations."

87. As to restraining violation of ordinances where acts constitute a nuisance, see *supra*, V, J, 4, d.

88. *Birmingham v. Graves* (Ala.), 76 So. 395.

As to nuisances generally, see the title "Nuisance."

Restraining board of health from abating nuisance. See 10 STANDARD PROC. 938.

89. Ala.—*Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259, 43 So. 706, 10 L. R. A. (N. S.) 310. Mo.—*Hays v. Poplar Bluff*, 263 Mo. 516, 173 S. W. 676, L. R. A. 1915D, 595. N. Y. *Schuster v. Metropolitan Board of Health*, 49 Barb. 450. Va.—*Bristol Door & Lumb. Co. v. Bristol*, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783. W. Va.—*Parker v. Fairmont*, 72 W. Va. 638, 79 S. E. 660, 47 L. R. A. (N. S.) 1138.

90. *Varney v. Williams*, 155 Cal. 318, 100 Pac. 867, 132 Am. St. Rep. 88, 21 L. R. A. (N. S.) 741.

91. *Normand v. Board of Comrs. of Otoe County*, 8 Neb. 18.

92. *Gulf & Ship I. R. Co. v. Seminary*, 81 Miss. 237, 32 So. 953.

93. Ill.—*Chicago v. Wright*, 69 Ill. 318. Mo.—*Kearney v. Laird*, 164 Mo. App. 406, 144 S. W. 904. N. J.—*Rosenberg v. Arrowsmith*, 82 N. J. Eq. 570, 89 Atl. 524. N. Y.—*Devlin v. McAdoo*, 116 App. Div. 224, 101 N. Y. Supp. 546; *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51; *Campbell*

v. York, 30 Misc. 340, 63 N. Y. Supp. 581 (denying an injunction to restrain police from "interfering" with playing of music in public place without a license); *Cerele Francais de L'Harmonie v. French*, 44 Hun 123, 19 Abb. N. C. 32, 7 N. Y. St. 475 (invasion of public festivities in public building will not be enjoined); *Moore v. Owen*, 109 N. Y. Supp. 585. Okla.—*Pabst Brew. Co. v. Johnston*, 166 Pac. 123.

[a] **Inappropriate Methods.** — The fact that the police without warrant in fact employed an inappropriate measure which is merely incidental to a lawful act, does not authorize an injunction. *Rosenberg v. Arrowsmith*, 82 N. J. Eq. 570, 89 Atl. 524 (where police in closing theater on Sunday read the riot act and dispersed the audience); *Yorkville Amusement Co. v. Bingham*, 118 N. Y. Supp. 753.

[b] **Interference with machines claimed to be gambling machines** will not be enjoined. *Caille Co. v. Haager*, 20 Ky. L. Rep. 1889, 50 S. W. 244.

[c] **The enforcement of a valid police order** will not be restrained by injunction. *Dry Dock, E. B. & B. R. Co. v. New York*, 47 Hun 221, 13 N. Y. St. 391.

[d] **An injunction against closing up plaintiff's place of business** (1) for an alleged violation of law will not issue in the absence of any showing of insolvency of the defendant, as plaintiff has a remedy in damages. *Fineke v. Police Comrs.*, 66 How. Pr. (N. Y.) 318. (2) But the police

extreme cases when necessary to prevent grave injustice and irreparable injury.⁹⁴ Nor will it lend its aid in furtherance of an unlawful business.⁹⁵ Generally it is only in those cases where police officers are acting without authority and are either ignorantly, wilfully, or maliciously committing or threatening to commit illegal acts against the rights of a citizen to his irreparable damage for which there is no adequate remedy at law, that an injunction should be issued.⁹⁶ Equity will not enjoin the stationing of police officers on a public street near a place of business which they have good reason to suspect is violating the law.⁹⁷ If there is reasonable ground for believing that the plaintiff is violating the law, and there is no pretense that officers entering plaintiff's premises do not do so in good faith to make arrests, equity will not grant an injunction.⁹⁸ But when the police

authorities may be enjoined from interfering with and closing a business where such act would cause irreparable injury and is wrongful either because the statute or ordinance under which they threaten to act is unconstitutional (*Adams Express Co. v. New York Board of Police*, 65 How. Pr. [N. Y.] 72; *Dinsmore v. Board of Police*, 12 Abb. N. C. [N. Y.] 436, restraining interference with interstate commerce under Sunday law), or (3) does not apply to the plaintiff. *Manhattan Iron Works Co. v. French*, 12 Abb. N. C. (N. Y.) 446, where the police threatened to close a blast furnace under a Sunday law. See also *Anonymous*, 12 Abb. N. C. (N. Y.) 455, and *Anonymous*, 12 Abb. N. C. (N. Y.) 458, denying relief as the statute applied to plaintiff.

[e] Preventing the sending of minor messengers to houses of prostitution will not be enjoined. *Andrieux v. Butte*, 44 Mont. 557, 121 Pac. 291, Ann. Cas. 1913B, 712.

[f] In Ohio, the board of police commissioners is a state board, and an abuse of their powers is not an abuse of corporate powers within the statute. *Fitzpatrick v. Bromwell B. & W. Goods Co.*, 5 Ohio N. P. 165.

94. *Adams Express Co. v. New York Board of Police*, 65 How. Pr. (N. Y.) 72; *Dinsmore v. Board of Police*, 12 Abb. N. C. (N. Y.) 436; *Manhattan Iron Wks. v. French*, 12 Abb. N. C. (N. Y.) 446; *Moore v. Owen*, 109 N. Y. Supp. 585. And see next preceding note.

[a] The threatened removal of a building which does not violate the ordinance prescribing fire limits may

be enjoined. *McKibbin v. Fort Smith*, 35 Ark. 352.

[b] A resolution taking from mayor control of police and vesting it in a board of police commissioners is void, and an injunction will lie to prevent its enforcement. *Francis v. Blair*, 89 Mo. 291, 1 S. W. 297.

95. *Andrieux v. Butte*, 44 Mont. 557, 121 Pac. 291, Ann. Cas. 1913B, 712; *Rosenberg v. Arrowsmith*, 82 N. J. Eq. 570, 89 Atl. 524.

96. *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51.

97. Ala.—*Queen City Stock & Grain Co. v. Cunningham*, 128 Ala. 645, 29 So. 583, 86 Am. St. Rep. 164. Cal.—*Pon v. Wittman*, 147 Cal. 280, 81 Pac. 984, 2 L. R. A. (N. S.) 683, followed in *Asiatic Club v. Biggy*, 160 Cal. 713, 117 Pac. 912. N. Y.—*Delaney v. Flood*, 183 N. Y. 323, 76 N. E. 209, 111 Am. St. Rep. 759, 2 L. R. A. (N. S.) 678, 5 Ann. Cas. 480 (where the officers stationed warned persons about to enter a saloon that the plaintiff was violating the law and was likely to be raided at any moment); *Stevens v. McAdoo*, 112 App. Div. 458, 98 N. Y. Supp. 553; *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81, denying relief on the ground plaintiff did not come into equity with clean hands, it appearing plaintiff was violating the law.

[a] Injury to Other Lawful Businesses.—The fact that the complainant conducts a lawful business which is suffering injury because of surveillance of a suspected business near by does not authorize injunctive relief. *Pon v. Wittman*, 147 Cal. 280, 295, 81 Pac. 984, 2 L. R. A. (N. S.) 683.

98. *Asiatic Club v. Biggy*, 160 Cal.

invade the premises of a person conducting a lawful business and persist in remaining indefinitely without any showing of justification therefor, equity will enjoin the continuing trespass.⁹⁹ Equity will not undertake to determine on conflicting evidence, however, whether or not a crime has been committed or whether a business is lawful.¹

18. Highway Officers.—Under proper circumstances, an injunction is a proper remedy to restrain the laying out and opening of a highway,² to restrain improvement or repair,³ to prevent unlawful change of grade of street or prevent enforcement of a void order changing the route of a highway,⁴ to restrain an obstruction on a highway such as a public nuisance,⁵ to restrain injuries to a public highway or street,⁶ and to restrain the unlawful vacation of a highway or street.⁷

VI. ORDINANCES AND THEIR ENFORCEMENT.—A. PLEADING ORDINANCES IN GENERAL.—Municipal ordinances are regarded as private statutes. Hence courts of general jurisdiction do not take judicial cognizance of an ordinance and where a right is claimed thereunder, it must be pleaded.⁸ But where the cause of action is not

713, 117 Pac. 912 (where the officers had a search warrant); *Devlin v. McAdoo*, 116 App. Div. 224, 101 N. Y. Supp. 546; *Cleary v. McAdoo*, 113 App. Div. 178, 99 N. Y. Supp. 60.

99. *Olms v. Bingham*, 116 App. Div. 804, 101 N. Y. Supp. 1106; *Hagan v. McAdoo*, 113 App. Div. 506, 99 N. Y. Supp. 255; *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47; *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51; *Hale v. Burns*, 101 App. Div. 101, 91 N. Y. Supp. 929; *Fairmont Athletic Club v. Bingham*, 113 N. Y. Supp. 905; *Cullen v. Bourke*, 93 N. Y. Supp. 1085, where cigar store was watched for gambling.

[a] In *Delaney v. Flood*, 183 N. Y. 323, 76 N. E. 209, 111 Am. St. Rep. 759, 2 L. R. A. (N. S.) 678, 5 Ann. Cas. 480, the court refused to enjoin the police from stationing an officer at the door of a saloon and warning people the place was about to be raided. The statute of New York gives the police the right to inspect places where liquors are sold under a license. In *Hagan v. McAdoo*, 113 App. Div. 506, 99 N. Y. Supp. 255, it is held that this case is to be limited in its application to liquor selling places. See also *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47, discussing the scope of the *Delaney* case.

[b] The duty to inspect licensed places does not prevent a court of equity from granting an injunction

against unlawful trespasses on licensed hotels. *Olms v. Bingham*, 116 App. Div. 804, 101 N. Y. Supp. 1106.

1. *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51.

2. See 11 STANDARD PROC. 107.

For form of complaint to restrain opening of highway defectively laid out, see *Ruhland v. Jones*, 55 Wis. 673, 13 N. W. 689.

3. See 11 STANDARD PROC. 126.

4. See 11 STANDARD PROC. 138.

Bill to restrain change of grade, see 13 STANDARD PROC. 73, note 45.

5. See 11 STANDARD PROC. 174.

6. See 11 STANDARD PROC. 197.

7. See 11 STANDARD PROC. 269.

The city is a necessary party, see 13 STANDARD PROC. 34.

8. **U. S.**—*Choctaw, O. & G. R. Co. v. Hamilton*, 182 Fed. 117; *Robinson v. Denver City Tramway Co.*, 164 Fed. 174, 90 C. C. A. 160. **Ala.**—*Excelsior, etc. Co. v. Lomax*, 166 Ala. 612, 52 So. 347; *Clayton v. Martin*, 7 Ala. App. 190, 60 So. 963; *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138. **Ark.**—*Malvern v. Cooper*, 108 Ark. 24, 156 S. W. 845; *Driffoos v. Jonesboro*, 107 Ark. 99, 154 S. W. 196. **Cal.**—*May v. Craig*, 13 Cal. App. 368, 109 Pac. 842. **Colo.**—*Wolfe v. Abbott*, 54 Colo. 531, 131 Pac. 386; *Garland v. Denver*, 11 Colo. 534, 19 Pac. 460; *Coors v. Brock*, 22 Colo. App. 470, 125 Pac. 599. **D. C.** *District of Columbia v. Petty*, 37 App. Cas. 156. **Ga.**—*Nobles v. Dublin*, 18

predicated upon the ordinance, which is merely matter of evidence,⁹ or is invoked as a defense,¹⁰ it need not be pleaded. And in municipal courts constituted for the express purpose of enforcing municipal ordinances they are the law of the forum and need not be pleaded,¹¹ and the same rule is applicable in justices' courts invested with jurisdiction to enforce ordinances.¹² And in some states an appellate court

Ga. App. 498, 89 S. E. 605; *Porter v. Thomasville*, 16 Ga. App. 313, 85 S. E. 283. **Idaho**.—*People v. Buchanan*, 1 Idaho 681. **Ill.**—*Condon v. Chicago*, 249 Ill. 596, 94 N. E. 976; *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Cordatos v. Chicago*, 129 Ill. App. 471. **Ind.**—*Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802; *Central Indiana Ry. Co. v. Wishard* (Ind. App.), 104 N. E. 593. **Ia.**—*Goodrich v. Brown*, 30 Iowa 291. **Kan.**—*Sullivan v. Darratt*, 83 Kan. 799, 109 Pac. 777. **La.**—*Rudison v. Glover*, 131 La. 381, 59 So. 817. **Me.**—*Lewiston v. Fairfield*, 47 Me. 481. **Mass.**—*Com. v. Odenweller*, 156 Mass. 234, 30 N. E. 1022. **Mich.**—*People v. Quider*, 172 Mich. 280, 137 N. W. 546. **Minn.**—*Minnesota v. Martin*, 124 Minn. 498, 145 N. W. 383, Ann. Cas. 1915B, 812, 51 L. R. A. (N. S.) 40; *Winona v. Burke*, 23 Minn. 254. **Miss.**—*Thomas v. State*, 101 Miss. 74, 57 So. 364. **Mo.**—*St. Louis v. Henning*, 235 Mo. 44, 138 S. W. 5; *St. Louis v. Liessing*, 190 Mo. 464, 84 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. (N. S.) 918; *Canton v. Madden*, 120 Mo. App. 404, 96 S. W. 699. **Mont.**—*Miles City v. Kern*, 12 Mont. 119, 29 Pac. 720. **N. Y.**—*Porter v. Waring*, 69 N. Y. 250, 2 Abb. N. C. 230; *Schnaier & Co. v. Grigsby*, 132 App. Div. 854, 117 N. Y. Supp. 455; *New York v. Knickerbocker Trust Co.*, 104 App. Div. 223, 93 N. Y. Supp. 937, 16 N. Y. Ann. Cas. 347; *People v. Bell*, 148 N. Y. Supp. 753. **N. C.**—*Greensboro v. Shields*, 78 N. C. 417. **Okla.**—*Cunningham v. Ponca City*, 27 Okla. 858, 113 Pac. 919. **S. C.**—*Brasington v. South Bound R. Co.*, 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905. **Tex.**—*Austin v. Walton*, 68 Tex. 507, 5 S. W. 70. **Vt.**—*State v. Cruickshank*, 71 Vt. 94, 42 Atl. 983. **Va.**—*Norfolk, etc. Traction Co. v. Forrests's Admx.*, 109 Va. 658, 64 S. E. 1034. **Wash.**—*Spokane v. Robinson*, 6 Wash. 547, 3 Pac. 960. **Wis.**—*State v. Koch*, 138 Wis. 27, 119 N. W. 839; *Stittgen v. Rundle*, 99 Wis. 78, 74 N.

W. 536. **Wyo.**—*Stutsman v. Cheyenne*, 18 Wyo. 499, 113 Pac. 322.

[a] **Violation of Building Ordinance.** *Helling v. Ross*, 121 N. Y. Supp. 1013.

In an action based on negligence, see the title "Negligence."

9. **Cal.**—*Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 93 Pac. 1063, 16 Ann. Cas. 1061, with annotations. **Mo.**—*Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182. **S. C.**—*Brasington v. South Bound R. Co.*, 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905. **Wash.**—*Jaquith v. Worden*, 73 Wash. 349, 132 Pac. 33, 48 L. R. A. (N. S.) 827.

But see cases in preceding note.

In an action based on negligence, see the title "Negligence."

10. *Flynn v. Chicago, etc. Ry. Co.*, 250 Ill. 460, 95 N. E. 449.

11. **Cal.**—*Ex parte Davis*, 115 Cal. 445, 47 Pac. 258. **Ill.**—*Chicago v. Williams*, 254 Ill. 360, 93 N. E. 666 (statute constitutional requiring Chicago municipal court to take judicial notice of municipal ordinances); *Houren v. Chicago, etc. R. Co.*, 236 Ill. 620, 86 N. E. 611, 127 Am. St. Rep. 309, 20 L. R. A. (N. S.) 1110. **Ia.**—*Seranton v. Danenbaum*, 109 Iowa 95, 80 N. W. 221. **Kan.**—*Solomon v. Hughes*, 24 Kan. 211. **La.**—*State v. Fulco*, 135 La. 269, 65 So. 239. **Me.**—*O'Malia v. Wentworth*, 65 Me. 129. **Mich.**—*People v. Quider*, 172 Mich. 280, 137 N. W. 546. **Neb.**—*Steiner v. State*, 78 Neb. 147, 110 N. W. 723. **N. J.**—*Sidelsky v. Atlantic City*, 84 N. J. L. 198, 86 Atl. 531; *Galen H. Co. v. Atlantic City*, 76 N. J. L. 20, 68 Atl. 1092. **N. Y.**—*Buffalo v. Stevenson*, 145 App. Div. 117, 129 N. Y. Supp. 125. **S. C.**—*Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632. **S. D.**—*Milbank v. Cronlokken*, 29 S. D. 46, 135 N. W. 711, Ann. Cas. 1914C, 1231. **W. Va.**—*Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373.

See 7 ENCY. OF EV. 1025.

12. *Ex parte Hansen*, 158 Cal. 494, 111 Pac. 528. But see *City of Winona v. Burke*, 23 Minn. 254.

reviewing a judgment of a municipal court will likewise take judicial notice of a municipal ordinance,¹³ although there is authority to the contrary.¹⁴

The power of a municipal corporation to enact the ordinance relied upon need not be specifically averred, since it is judicially noticed.¹⁵ Nor is it ordinarily necessary to allege that the ordinance was legally published,¹⁶ but a general allegation that the ordinance was duly adopted is sufficient without an averment of the manner of its publication,¹⁷ unless the statute expressly requires that the mode of publication of an ordinance be set forth in the pleadings.¹⁸

An ordinance generally may be pleaded by quoting its exact language or by setting forth the substance of its provisions;¹⁹ in which

13. Ill.—*Fisher v. Levy Cir. Co.*, 182 Ill. App. 393. Kan.—*Solomon v. Hughes*, 24 Kan. 211. Neb.—*Steiner v. State*, 78 Neb. 147, 110 N. W. 723. N. J. *Sidelsky v. Atlantic City*, 84 N. J. L. 198, 86 Atl. 531. N. Y.—*Buffalo v. Stevenson*, 145 App. Div. 117, 129 N. Y. Supp. 125. S. D.—*Milbank v. Cronlokken*, 29 S. D. 46, 135 N. W. 711, Ann. Cas. 1914C, 1231.

See 7 ENCY. OF EV. 1025, 1026.

14. *Karchmer v. State*, 61 Tex. Crim. 221, 134 S. W. 700. See 7 ENCY. OF EV. 1025.

15. N. J.—*State ex rel. Bd. of Health v. Henzler* (N. J. Eq.), 41 Atl. 228. Vt.—*Winooski v. Gokey*, 49 Vt. 282. Wis.—*Janesville v. Milwaukee & M. R. Co.*, 7 Wis. 484.

[a] An averment that an ordinance was enacted by the board of trustees sufficiently shows that it was passed by the proper authorities, as the trustees alone are authorized to enact ordinances. *Vinson v. Monticello*, 118 Ind. 103, 19 N. E. 734.

16. *State ex rel. Bd. of Health v. Henzler* (N. J. Eq.), 41 Atl. 228.

17. Ind.—*Vinson v. Monticello*, 118 Ind. 103, 19 N. E. 734. Ky.—*Tennessee Paving B. Co. v. Barker*, 119 Ky. 654, 59 S. W. 755. Mo.—*Becker v. Washington*, 94 Mo. 375, 7 S. W. 291. N. J.—*State ex rel. Bd. of Health v. Henzler* (N. J. Eq.), 41 Atl. 228. Tex.—*Altgelt v. Gerbie* (Tex. Civ. App.), 149 S. W. 233.

[a] And an averment that the council duly adopted an ordinance is sufficient to show that everything necessary to be done by the council had been done to give it validity. *Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. 890.

18. *San Luis Obispo Co. v. Greenberg*, 120 Cal. 300, 52 Pac. 797.

[a] An averment that an ordinance was published in a certain newspaper selected by the common council to publish the ordinances is sufficient. *Henderson v. Brown*, 13 Ky. Op. 941.

19. D. C.—*District of Columbia v. Petty*, 37 App. Cas. 156. Ind.—*Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706. Kan.—*Watt v. Jones*, 60 Kan. 201, 56 Pac. 16. Md.—*Shanfelter v. Baltimore*, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648. Mo.—*Hirst v. Ringen, etc. Co.*, 169 Mo. 194, 69 S. W. 368; *State v. Sherman*, 42 Mo. 210; *St. Louis v. Stoddard*, 15 Mo. 173. N. J. *Kip v. Paterson*, 26 N. J. L. 298. N. Y. *Helling v. Ross*, 121 N. Y. Supp. 1013. Ohio.—*Cincinnati Water Co. v. Cincinnati*, 4 Ohio 443. Ore.—*Dillon v. Beacon*, 67 Ore. 118, 134 Pac. 778, 135 Pac. 336. Pa.—*Com. v. Chittenden*, 2 Pa. Dist. 804. S. C.—*Brasington v. South Bound R. Co.*, 62 S. C. 325, 40 S. E. 665, 89 Am. St. Rep. 905. Tex.—*Austin v. Walton*, 68 Tex. 507, 5 S. W. 70.

[a] While it is not necessary to set out an ordinance in *haec verba*, either the part of the ordinance relied upon or all the substantial parts of the ordinance should be set out so that the requirements of the ordinance may appear upon the face of the pleading. *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521.

[b] An averment of the conclusions of the pleader (1) upon the legal effect of an ordinance without a statement of the provisions of an ordinance either in terms or in substance, is insufficient. *Brush Elec. L. & P. Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771.

event reference to its title or date of enactment is not necessary.²⁰ There is authority, however, to the effect that an ordinance must be set out in full,²¹ or a copy of it attached to the complaint.²² Some statutes permit an ordinance to be pleaded merely by reference to its title, section and chapter,²³ or title and date of adoption.²⁴ But in the absence of statute such an abbreviated pleading of an ordinance without a statement of its substance, is not sufficient.²⁵ While a statutory method of pleading is usually permissive and not exclusive,²⁶ if relied upon it must be strictly followed. Thus, under a statute providing that an ordinance may be pleaded by reference to its title and the day of its passage, it is not sufficient to state merely the number of the ordinance.²⁷

B. MANDAMUS TO COMPEL ENACTMENT.—Mandamus is a proper remedy to compel the enactment of an ordinance where the duty of the council is ministerial merely.²⁸

C. INJUNCTION AGAINST ENACTMENT.—Generally the enactment of municipal ordinances cannot be enjoined.²⁹

D. PROCEEDINGS TO ENFORCE ORDINANCES.—**1. Proceedings for Violation of Ordinance.**—*a. Nature of Proceeding.*—A proceeding for the violation of a municipal ordinance seems to be regarded in some jurisdictions as a civil proceeding,³⁰ in others as a quasi crimi-

(2) Thus, an averment that by virtue of an ordinance a certain duty was imposed upon defendant is of no avail but the ordinance must be set out to show that such duty existed as a matter of law. *Rockford City Ry. Co. v. Matthews*, 50 Ill. App. 267.

[c] Where the ordinance is lost it is not sufficient to merely allege its loss but at least the substance of the lost ordinance must be set out. *Shenandoah Borough v. Bender*, 36 Pa. Co. Ct. 131.

20. *Mo.*—*Kansas v. Johnson*, 78 Mo. 661. *N. J.*—*Keeler v. Milledge*, 24 N. J. L. 142. *Wis.*—*Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554.

21. *N. C.*—*Hendersonville v. McMinn*, 82 N. C. 532. *Ore.*—*Pomeroy v. Lappeus*, 9 Ore. 363. *Pa.*—*Com. v. Chittenden*, 13 Pa. Co. Ct. 362. *Vt.* *State v. Cruickshank*, 71 Vt. 94, 42 Atl. 983.

22. *Green v. Indianapolis*, 22 Ind. 192.

[a] Only that portion or section which controls the matter in controversy need be set forth. *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706; *Green v. Indianapolis*, 25 Ind. 490. See *Whitson v. Franklin*, 34 Ind. 392.

23. *Ill.*—*Chicago v. Baranov*, 189 Ill. App. 25. *Ind.*—*Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802. *Mont.*

Philipsburg v. Weinstein, 21 Mont. 146, 53 Pac. 272. *N. J.*—*Keeler v. Milledge*, 24 N. J. L. 142.

24. *Vicksburg v. Briggs*, 85 Mich. 502, 48 N. W. 625.

25. *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16; *Shanfelter v. Baltimore*, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648.

26. *Chan Sing v. City of Astoria*, 79 Ore. 411, 155 Pac. 378, ordinance may be pleaded in full.

27. *Cal.*—*Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530. *Colo.*—*Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820.

Ind.—*Rowland v. Greencastle*, 157 Ind. 591, 62 N. E. 474; *Goshen v. Kern*, 63 Ind. 468, 30 Am. Rep. 234. *Minn.*

Fairmont v. Meyer, 83 Minn. 456, 86 N. W. 457. *Mont.*—*Miles City v. Kern*, 12 Mont. 119, 29 Pac. 720.

28. See *supra*, IV, C, 8.

29. See *supra*, V, J, 4, a.

30. *U. S.*—*Fortune v. Wilburton*, 142 Fed. 114, 73 C. C. A. 338, 4 L. R. A. (N. S.) 782. *Colo.*—*Lloyd v. Canon City*, 46 Colo. 195, 103 Pac. 288; *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. *Ill.*—*Chicago v. Williams*, 254 Ill. 360, 98 N. E. 666; *Chicago v. Knobel*, 232 Ill. 112, 83 N. E. 459; *Chicago v. Dunham Co.*, 175 Ill. App. 549; *Chicago v. Streeter*, 152 Ill. App. 463. *Ind.*—*Smith v. New Albany*, 175 Ind. 279, 93 N. E. 73; *Cannelton*

nal,³¹ and in still others as a criminal³² proceeding. In some cases it is held that such proceedings are of a civil nature,³³ except where the violation of the ordinance is also a misdemeanor under the statute,³⁴ or punishable by imprisonment only.³⁵

b. *Jurisdiction and Venue*.—By statutory and charter provisions, original jurisdiction of actions for the punishment of a violation of an ordinance is variously conferred upon justices of the peace,³⁶ police

v. Collins, 172 Ind. 193, 88 N. E. 66; *Brookville v. Gagle*, 73 Ind. 117. **Mo.** *East Prairie v. Greer* (Mo. App.), 186 S. W. 952; *Marble Hill v. Caldwell* (Mo. App.), 178 S. W. 226; *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 173 S. W. 11; *Hannibal v. Dudley*, 158 Mo. App. 261, 138 S. W. 552. **N. M.**—*Tucumcari v. Belmore*, 18 N. M. 331, 137 Pac. 585. **Ore.**—*Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295. **Pa.**—*Com. v. Weachter*, 33 Pa. Co. Ct. 420; *Philadelphia v. Duncan*, 4 Phila. 145. **Tenn.**—*Kelly & Co. v. Conner*, 122 Tenn. 339, 123 S. W. 622, 25 L. R. A. (N. S.) 201; *Sparta v. Lewis*, 91 Tenn. 370, 23 S. W. 182. **Wis.**—*Milwaukee v. Beatty*, 149 Wis. 349, 135 N. W. 873.

[a] **New Trial**.—"It has been uniformly held that prosecutions for violation of city ordinances are civil actions . . . and in all civil actions the right of a party to a new trial on account of errors committed against him is vouchsafed to all litigants." *Carthage v. Bird*, 146 Mo. App. 325, 129 S. W. 1054.

31. **Ala.**—*McKinstry v. Tuscaloosa*, 172 Ala. 344, 54 So. 629; *Barron v. Anniston*, 157 Ala. 399, 48 So. 58; *Bray v. State*, 140 Ala. 172, 37 So. 250; *Craig v. Birmingham*, 14 Ala. App. 630, 71 So. 983. **Ark.**—*Russellville v. Edwards*, 80 Ark. 314, 97 S. W. 57; *Duval v. Hot Springs*, 34 Ark. 560. **Ia.**—*Scranton v. Hensen*, 151 Iowa 221, 130 N. W. 1079. **Ky.**—*Williamson v. Com.*, 4 B. Mon. 146. **Mich.**—*In re Cox*, 129 Mich. 635, 89 N. W. 440. See *Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068. **N. D.**—*Liteville v. Hanson*, 19 N. D. 672, 124 N. W. 1119, Ann. Cas. 1912D, 876. **Ohio.**—*State v. Rouch*, 47 Ohio St. 478, 25 N. E. 59. **Okla.** *In re Simmons*, 4 Okla. Crim. 662, 112 Pac. 951. **S. D.**—*Centerville v. Olson*, 16 S. D. 526, 94 N. W. 414. **Tex.**—*Ex parte Fagg*, 38 Tex. Crim. 573, 44 S. W. 294, 40 L. R. A. 212. **Wis.**—*Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42; *Olson v. Hawkins*, 135 Wis.

394, 116 N. W. 18; *State v. Newman*, 96 Wis. 258, 71 N. W. 438. **Wyo.** *Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892.

32. **Cal.**—*People v. Pacific Gas & Elec. Co.*, 168 Cal. 496, 143 Pac. 727, Ann. Cas. 1917A, 328; *Ex parte Clark*, 24 Cal. App. 389, 141 Pac. 831. **Conn.** *State v. Keenan*, 57 Conn. 286, 18 Atl. 104. **Fla.**—*Atkins v. Phillips*, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158. **Ga.** *Porter v. State*, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730; *Webb v. Ellijay*, 15 Ga. App. 642, 83 S. E. 1099. **Ia.**—*Scranton v. Hensen*, 151 Iowa 221, 130 N. W. 1079. **La.**—*State v. Lochte*, 45 La. Ann. 1405, 14 So. 215. **Minn.**—*Madison v. Martin*, 109 Minn. 292, 123 N. W. 809; *State v. Nugent*, 108 Minn. 267, 121 N. W. 898. **Miss.**—*Water Valley v. Davis*, 73 Miss. 521, 19 So. 235. **Nev.**—*Gold Hill v. Brisacher*, 14 Nev. 52. **N. H.**—*State v. Stearns*, 31 N. H. 106. **Utah.**—*Nephi City v. Forrest*, 41 Utah 433, 126 Pac. 332; *Salt Lake City v. Robinson*, 39 Utah 260, 116 Pac. 442, Ann. Cas. 1913E, 61, 35 L. R. A. (N. S.) 610. **Vt.**—*State v. Soragan*, 40 Vt. 450. **Wash.**—*Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125. **W. Va.**—*Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152.

33. **Neb.**—*Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 126 Am. St. Rep. 651, 14 L. R. A. (N. S.) 292. **N. J.** *Stokes v. Schlaeter*, 66 N. J. L. 247, 49 Atl. 556; *White v. Neptune City*, 56 N. J. L. 222, 28 Atl. 378. **N. Y.**—*People ex rel. Kane v. Sloane*, 98 App. Div. 450, 90 N. Y. Supp. 762.

34. *Ruffing v. State*, 80 Neb. 555, 114 N. W. 583; *In re Simmons*, 4 Okla. Crim. 662, 112 Pac. 951.

35. *Unger v. Fanwood*, 69 N. J. L. 548, 55 Atl. 42; *Buffalo v. Preston*, 81 App. Div. 480, 80 N. Y. Supp. 851; *Hudson v. Granger*, 23 Misc. 401, 52 N. Y. Supp. 9.

36. *People v. District Court*, 33 Colo. 328, 80 Pac. 888; *State ex rel. Garland*

magistrates,³⁷ recorders,³⁸ town clerks,³⁹ mayors,⁴⁰ and similar local officers or courts.⁴¹ The jurisdiction so far as affected by the amount in controversy is discussed elsewhere in this work.⁴² The proceeding to punish for the violation of an ordinance must be instituted within the geographical boundaries of the municipality.⁴³ A change of venue may be awarded only where the statute expressly authorizes it.⁴⁴

c. *Parties*.—A prosecution for the violation of an ordinance must be instituted in the name of a municipality, unless otherwise provided by the statute.⁴⁵ Under some statutes such prosecutions must be in the name of the board of commissioners,⁴⁶ or the treasurer of the municipal corporation;⁴⁷ under other statutes they must be conducted in the name of the people.⁴⁸

v. Maughan, 35 Utah 426, 100 Pac. 934.

37. *Ill.*—*Windsor v. Cleveland*, etc. Ry. Co., 105 Ill. App. 46. *Kan.*—*Rolfs v. Shallcross*, 30 Kan. 758, 1 Pac. 523. *Mich.*—*In re Way*, 41 Mich. 299, 1 N. W. 1041. *Mo.*—*St. Louis v. Pahl*, 114 Mo. 32, 21 S. W. 448. *N. Y.*—*People v. Parelli*, 93 Misc. 692, 158 N. Y. Supp. 644.

38. *Ala.*—*Dowling v. Troy*, 1 Ala. App. 508, 56 So. 116. *Cal.*—*Denninger v. Recorders' Court*, 145 Cal. 629, 79 Pac. 360. *Ga.*—*Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501; *Reeves v. Atlanta*, 114 Ga. 851, 40 S. E. 1003. *La.*—*State v. Marmouget*, 111 La. 225, 35 So. 529. *Mich.*—*People v. Detroit Citizens' St. R. Co.*, 116 Mich. 132, 74 N. W. 520. *Ore.*—*Abraham v. City of Roseburg*, 55 Ore. 359, 105 Pac. 401, Ann. Cas. 1912A, 597; *Wong Sing v. Independence*, 47 Ore. 231, 83 Pac. 387.

39. *Chicago*, etc. Ry. Co. *v. Salem*, 166 Ind. 71, 76 N. E. 631.

40. *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423.

[a] *Mayor and Council*.—*Robinson v. Americus*, 121 Ga. 180, 48 S. E. 924.

41. See *Garland v. Denver*, 11 Colo. 534, 19 Pac. 460; *Lewis v. State*, 124 Ga. 62, 52 S. E. 81.

42. See the title "Jurisdiction."

43. *Hershoff v. Beverly*, 43 N. J. L. 139; *People ex rel. Davis v. Montgomery*, 18 Wend. (N. Y.) 633.

44. *Ia.*—*Zelle v. McHenry*, 51 Iowa 572, 2 N. W. 264. *Mo.*—*In re Jones*, 90 Mo. App. 318. *N. Y.*—*See People v. Prillen*, 173 N. Y. 67, 65 N. E. 947. *Wash.*—*State ex rel. Hall v. Wicker*, 60 Wash. 238, 110 Pac. 992.

See generally the title "Change of Venue."

45. *Ala.*—*Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944. *Ill.*—*Chicago v. Kenney*, 35 Ill. App. 57. *Ia.*—*Centerville v. Miller*, 51 Iowa 712, 2 N. W. 527. *Kan.*—*Emporia v. Volmer*, 12 Kan. 622. *La.*—*State v. Faber*, 50 La. Ann. 952, 24 So. 662. *Mont.*—*State ex rel. Streit v. Justice Court*, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156; *State ex rel. Butte v. District Court*, 37 Mont. 202, 95 Pac. 841. *N. J.*—*Greely v. Passaic*, 42 N. J. L. 429. *Okl.*—*Abbott v. City of McAlester*, 6 Okla. Crim. 587, 120 Pac. 668. *Pa.*—*Clauchs v. Pittsburg*, 31 Pa. Super. 331. *Wash.*—*Spokane v. Robison*, 6 Wash. 547, 3 Pac. 960. *Wyo.*—*Jenkins v. Cheyenne*, 1 Wyo. 287.

[a] Designating city by wrong name is fatal. *Shippensburg Borough v. Schoch*, 36 Pa. Co. Ct. 309.

[b] *Municipal Officers Not Proper Parties*.—*Chief Burgess v. Hiestand*, 15 Pa. Dist. 18.

46. *Yonkers Comrs. v. Glennon*, 21 Hun (N. Y.) 244.

47. *Com. v. Fahey*, 5 Cush. (Mass.) 408; *Watts v. Scott*, 12 N. C. 291.

48. *Cal.*—*People v. Pacific Gas & Elec. Co.*, 168 Cal. 496, 143 Pac. 727, Ann. Cas. 1917A, 328; *Matter of Clark*, 24 Cal. App. 389, 141 Pac. 831. *Mass.*—*In re Goddard*, 16 Pick. 504, 28 Am. Dec. 259. *Minn.*—*Faribault v. Wilson*, 34 Minn. 254, 25 N. W. 449. *Neb.*—*Brownville v. Cook*, 4 Neb. 101. *N. D.*—*Litchville v. Hanson*, 19 N. D. 672, 124 N. W. 1119, Ann. Cas. 1912D, 876. *S. C.*—*In re Oliver*, 21 S. C. 318, 53 Am. Rep. 681.

[a] But a constitutional provision declaring that all prosecutions shall be in the name of the state is not ap-

d. *Process*.—Process in accordance with the statutory and charter provisions pertaining thereto is generally essential to give a magistrate jurisdiction of a person charged with the violation of an ordinance,⁴⁹ unless by a voluntary appearance the defendant waives service of process.⁵⁰ Depending upon the local law, the process may consist either of summons⁵¹ or warrant,⁵² and where the defendant is in custody it is sufficient to enter the charge on the docket of the magistrate.⁵³

e. *Complaint or Information*.⁵⁴—It has been held that no written complaint is necessary in the absence of some statute or charter provision requiring it.⁵⁵ But generally a written accusation is required.⁵⁶ A defendant who proceeds to trial without a written charge against him waives the right thereto.⁵⁷ A statutory or charter method of enforcement of municipal ordinances is exclusive and must be followed.⁵⁸ The statutes variously provide for the commencement of a

pleable to prosecutions for violation of a municipal ordinance. **Ky.**—Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201. **S. C.**—Abbeville *v.* Leopard, 61 S. C. 99, 39 S. E. 248. **Wash.**—Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324.

49. Newark *v.* Murphy, 40 N. J. L. 145; Chief Burgess *v.* Hiestand, 15 Pa. Dist. 18.

50. **Ga.**—Douglas *v.* Kestler, 14 Ga. App. 612, 81 S. E. 803. **Ill.**—Chicago *v.* Baranov, 189 Ill. App. 25. **Mo.** *In re* Jones, 90 Mo. App. 318.

[a] Where the defendant appears before the magistrate and makes no objection to the process or the affidavit upon which the warrant is based, the objection to the process is waived. Lloyd *v.* Canon City, 46 Colo. 195, 103 Pac. 288.

51. **Colo.**—Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76, where no warrant for arrest is issued. **Ga.**—Douglas *v.* Kestler, 14 Ga. App. 612, 81 S. E. 803; Venable *v.* Atlanta, 7 Ga. App. 190, 66 S. E. 489. **Ky.**—Com. *v.* Price, 123 Ky. 163, 94 S. W. 32. **N. Y.** New York *v.* Eisler, 10 Daly 396, 2 Civ. Proc. 125.

[a] A printed summons with the name of the clerk printed therein is a sufficient summons in writing. Venable *v.* Atlanta, 7 Ga. App. 190, 66 S. E. 489.

52. **Ga.**—Williams *v.* Sewell, 121 Ga. 665, 49 S. E. 732. **Ill.**—Ewbanks *v.* Ashley, 36 Ill. 177. **Ind.**—Whiting *v.* Doob, 152 Ind. 157, 52 N. E. 759. **Mo.**—Kansas *v.* Zahner, 73 Mo. App. 396. **N. C.**—State *v.* Cainan, 94 N. C.

880. **S. C.**—Clinton *v.* Leake, 71 S. C. 22, 50 S. E. 541. **Tenn.**—McMinnville *v.* Stroud, 109 Tenn. 569, 72 S. W. 949.

53. State *v.* Olson, 115 Minn. 153, 131 N. W. 1034; Green City *v.* Holsinger, 76 Mo. App. 567.

54. See generally the title “Indictment and Information.”

55. Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501; Porter *v.* Atlanta, 18 Ga. App. 33, 88 S. E. 744; Norris *v.* Thomson, 15 Ga. App. 511, 83 S. E. 866. See also McConnell *v.* Booneville, 123 Ark. 561, 186 S. W. 82; Hobbs *v.* Hill, 157 Mass. 556, 32 N. E. 862; 12 STANDARD PROC. 286. But see Ala.—Birmingham *v.* O’Hearn, 149 Ala. 307, 42 So. 836. **Kan.**—Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423. **N. Y.**—People *v.* Bell, 148 N. Y. Supp. 753.

[a] Where the proceeding is regarded as civil in its nature, no information is necessary. Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; Billings *v.* Brown, 106 Mo. App. 240, 80 S. W. 322. As to nature of the proceedings, see *supra*, VI, D, 1, a.

56. Ala.—Birmingham *v.* O’Hearn, 149 Ala. 307, 42 So. 836. **Kan.**—Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423. **N. Y.**—People *v.* Bell, 148 N. Y. Supp. 753.

See 12 STANDARD PROC. 286; and also cases cited *infra*, this section.

57. McKinstry *v.* Tuscaloosa, 172 Ala. 344, 54 So. 629; Topeka *v.* Kersch, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29.

58. Blanchard *v.* Bristol, 100 Va. 469, 41 S. E. 948.

prosecution by filing a complaint,⁵⁹ or an affidavit,⁶⁰ or an information⁶¹ or indictment.⁶² Sometimes the municipal officer whose duty it is to institute proceedings, is designated.⁶³

The form and contents of the complaint depend somewhat upon whether the proceeding is regarded as a civil or as a criminal proceeding.⁶⁴ Where deemed a civil proceeding, less particularity is required in the complaint than in criminal proceedings,⁶⁵ and the general rules of pleading in civil actions apply.⁶⁶ A complaint which

59. *Ala.*—Case *v. Mobile*, 30 *Ala.* 538; *Little v. Attalla*, 4 *Ala. App.* 287, 58 *So.* 949; *Bell v. Jonesboro*, 3 *Ala. App.* 652, 57 *So.* 138. *Cal.*—Denninger *v. Recorders' Court*, 145 *Cal.* 638, 79 *Pac.* 364. *Colo.*—Saner *v. People*, 17 *Colo. App.* 307, 69 *Pac.* 76. *Conn.*—State *v. Carpenter*, 60 *Conn.* 97, 22 *Atl.* 497. *Ill.*—Chicago *v. Shreffler*, 175 *Ill. App.* 547. *Ind.*—Cannellton *v. Collins*, 172 *Ind.* 193, 88 *N. E.* 66; *Town of Whiting v. Doob*, 152 *Ind.* 157, 52 *N. E.* 759; *Hardenbrook v. Ligonier*, 95 *Ind.* 70. *Kan.*—Lincoln Center *v. Bailey*, 64 *Kan.* 885, 67 *Pac.* 455; *Kingman v. Berry*, 40 *Kan.* 625, 20 *Pac.* 527. *Mass.*—Com. *v. Cutter*, 156 *Mass.* 52, 29 *N. E.* 1146. *Mich.*—*In re Bushey*, 105 *Mich.* 64, 62 *N. W.* 1036. *Minn.*—State *v. Gill*, 89 *Minn.* 502, 95 *N. W.* 449. *Mo.*—St. Louis *v. Dorr*, 136 *Mo.* 370, 37 *S. W.* 1108; *Poplar Bluff v. Meadows*, 187 *Mo. App.* 450, 173 *S. W.* 11; *Koshkonong v. Boak*, 173 *Mo. App.* 310, 158 *S. W.* 874. *N. J.*—Mayor of Vineland *v. Kotok* (*N. J. L.*), 72 *Atl.* 959; *Bray v. Damato*, 70 *N. J. L.* 583, 57 *Atl.* 394. *Ore.*—Mayhew *v. Eugene*, 56 *Ore.* 102, 104 *Pac.* 727, *Ann. Cas.* 1912C, 33; *Wong Sing v. Independence*, 47 *Ore.* 231, 83 *Pac.* 387. *Pa.*—Com. *v. McKean*, 36 *Pa. Co. Ct.* 640. *S. D.*—Deadwood *v. Coe*, 34 *S. D.* 517, 149 *N. W.* 359. *Vt.*—State *v. Bosworth*, 47 *Vt.* 315, 52 *Atl.* 423. *Wash.*—*Spokane v. Robison*, 6 *Wash.* 547, 3 *Pac.* 960.

60. *Ark.*—Burrow *v. Hot Springs*, 85 *Ark.* 396, 108 *S. W.* 823. *La.*—New Orleans *v. Rinaldi*, 105 *La.* 183, 29 *So.* 484. *Miss.*—Telheard *v. Bay St. Louis*, 87 *Miss.* 580, 40 *So.* 326. *N. C.*—State *v. Wilson*, 106 *N. C.* 718, 11 *S. E.* 254.

61. *Ia.*—State *v. Wilson*, 109 *Iowa* 93, 80 *N. W.* 230. *La.*—Minden *v. McCrary*, 108 *La.* 518, 32 *So.* 468. *Mo.*—*St. Louis v. Ringold*, 235 *Mo.* 472, 139 *S. W.* 186. *N. Y.*—People *v. Bell*, 148

N. Y. Supp. 753. *Ohio.*—Larney *v. Cleveland*, 34 *Ohio St.* 599. *Pa.*—Plymouth Borough *v. Urbanick*, 15 *Pa. Dist.* 919. *S. C.*—*In re Oliver*, 21 *S. C.* 318, 53 *Am. Rep.* 681. *Tex.*—Curry *v. State* (*Tex. Crim.*), 24 *S. W.* 516.

62. *Com. v. Odenwall*, 156 *Mass.* 234, 30 *N. E.* 1022.

Necessity for indictment, see the title "Indictment and Information."

63. *Minn.*—State *v. Robitshek*, 60 *Minn.* 123, 61 *N. W.* 1023, 33 *L. R. A.* 33. *Mo.*—Kansas *v. Flanagan*, 69 *Mo.* 22. *Pa.*—Singer *v. Philadelphia*, 112 *Pa.* 410, 4 *Atl.* 23. *Tenn.*—Meaher *v. Chattanooga*, 1 *Head* 74.

[a] *Police Officer.*—Under some charters complaints for violations of municipal ordinances may be made by a police officer. *Morgenroth v. Milwaukee*, 125 *Wis.* 663, 105 *N. W.* 47.

[b] *A written report* (1) of the chief of police is required under some ordinances in order to give the court jurisdiction. *Ex parte Hollwedell*, 74 *Mo.* 395. (2) A proceeding is not invalidated by the fact that the report is signed by a subordinate officer in charge of the office of the chief. *St. Louis v. Vert*, 84 *Mo.* 204.

64. *Whether civil or criminal*, see *supra*, VI, D, 1, a.

65. *Chicago v. Williams*, 254 *Ill.* 360, 98 *N. E.* 666; *Chicago v. Baranov*, 189 *Ill. App.* 25; *St. Louis v. Weitzel*, 130 *Mo.* 600, 31 *S. W.* 1045; *Mexico v. Harris*, 115 *Mo. App.* 707, 92 *S. W.* 505; *Louisiana v. Anderson*, 100 *Mo. App.* 341, 73 *S. W.* 875.

66. *Hardenbrook v. Ligonier*, 95 *Ind.* 70; *Goshen v. Croxton*, 34 *Ind.* 239; *East Prairie v. Greer* (*Mo. App.*), 186 *S. W.* 952; *Koshkonong v. Boak*, 173 *Mo. App.* 310, 158 *S. W.* 874; *Trenton v. Devorss*, 70 *Mo. App.* 8.

[a] *A complaint may be amended* by order of court at any time before final judgment. *Chicago v. Shreffler*, 175 *Ill. App.* 547.

describes the act and pleads the ordinance violated is sufficient.⁶⁷ But where the proceedings are regarded as criminal or quasi-criminal in their nature, the rules pertaining to criminal prosecutions for misdemeanors are applicable.⁶⁸ The formal conclusion "against the form of the statute,"⁶⁹ or "against the peace and dignity of the state,"⁷⁰ is not required,⁷¹ but the conclusion should be "against the ordinance."⁷² The complaint as a rule must be verified.⁷³ The complaint must set forth the essential elements of the offense and must be sufficiently certain to inform the defendant of the nature of the charge and definite enough to constitute a bar to a subsequent prosecution for the same offense.⁷⁴ But in accordance with the general rules elsewhere treated,⁷⁵ where the ordinance defines the elements of the offense a charge which follows substantially the language of the ordinance is sufficient.⁷⁶ This rule, however, does not apply where the

67. *Cannelton v. Collins*, 172 Ind. 193, 88 N. E. 66; *Stutsman v. Cheyenne*, 18 Wyo. 499, 113 Pac. 322.

68. *Barron v. Anniston*, 157 Ala. 399, 48 So. 58; *Salt Lake City v. Robinson*, 39 Utah 260, 116 Pac. 442, Ann. Cas. 1913E, 61, 35 L. R. A. (N. S.) 610. See generally the title "Indictment and Information."

69. *State v. Gill*, 89 Minn. 502, 95 N. W. 449.

70. *Curry v. State* (Tex. Crim.), 24 S. W. 516.

71. See 12 STANDARD PROC. 287.

Contra, *State v. Cruickshank*, 71 Vt. 94, 42 Atl. 983.

72. *State v. Gill*, 89 Minn. 502, 95 N. W. 449. Compare *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258; *Com. v. Odenweller*, 156 Mass. 234, 30 N. E. 1022.

73. Ala.—*Ahlich v. Cullman*, 130 Ala. 439, 30 So. 415. Ia.—*Lovilla v. Cobb*, 126 Iowa 557, 102 N. W. 496. Mo.—*Clarence v. Patrick*, 54 Mo. App. 462. N. J.—*State v. Perth Amboy*, 51 N. J. L. 406, 17 Atl. 971. Tex.—*Curry v. State* (Tex. Crim.), 24 S. W. 516. See 12 STANDARD PROC. 289.

74. Ala.—*Case v. Mobile*, 30 Ala. 538. Cal.—*Denninger v. Recorders' Court*, 145 Cal. 638, 79 Pac. 364. Colo. *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. Conn.—*State v. Carpenter*, 60 Conn. 97, 22 Atl. 497. Ind.—*Whiting v. Doob*, 152 Ind. 157, 52 N. E. 759. Kan.—*Kingman v. Berry*, 40 Kan. 625, 20 Pac. 527. La.—*State v. Thompson*, 111 La. 315, 35 So. 582. Mass.—*Com. v. Cutter*, 156 Mass. 52, 29 N. E. 1146. Miss.—*Telheard v. Bay St. Louis*, 87 Miss. 580, 40 So. 326. Mo.—*St. Louis*

v. Liessing, 190 Mo. 464, 89 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. (N. S.) 918; *St. Louis v. Babcock*, 156 Mo. 154, 56 S. W. 731; *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 173 S. W. 11; *Mexico v. Harris*, 115 Mo. App. 707, 92 S. W. 505. N. J.—*Tyler v. Lawson*, 30 N. J. L. 120. N. C. *State v. Wilson*, 106 N. C. 718, 11 S. E. 254. Ore.—*Cunningham v. Berry*, 17 Ore. 622, 22 Pac. 115. Pa.—*Philadelphia v. Campbell*, 11 Phila. 163, 33 Leg. Int. 12. Vt.—*State v. Bosworth*, 74 Vt. 315, 52 Atl. 423. Wis.—*State v. Nohl*, 113 Wis. 15, 88 N. W. 1004.

[a] An information must set out every material requirement of the offense and matters necessary to establish the jurisdiction of the magistrate. *People v. Bell*, 148 N. Y. Supp. 753; *Plymouth Borough v. Urbanick*, 15 Pa. Dist. 919.

[b] Where the ordinance enumerates several acts in the alternative the doing of any of which constitutes the offense and the acts are distinct, a charge in the alternative is bad for uncertainty. *St. Paul v. Marvin*, 16 Minn. 102; *Wong Sing v. Independence*, 47 Ore. 231, 83 Pac. 387.

75. See 12 STANDARD PROC. 442.

76. Ala.—*Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603. Ark.—*Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675; *Burrow v. Hot Springs*, 85 Ark. 296, 108 S. W. 823. Conn.—*State v. Woolley*, 88 Conn. 715, 92 Atl. 662. Ill.—*Chicago v. Shreffler*, 175 Ill. App. 547. Ind.—*Smith v. New Albany*, 175 Ind. 279, 93 N. E. 73. Kan.—*Arkansas City v. Roberts*, 89 Kan. 680, 132 Pac. 152; *Lincoln Center v. Bailey*, 64 Kan.

language of the ordinance is not alone sufficient to advise the defendant of the offense sought to be charged.⁷⁷ The time⁷⁸ and place⁷⁹ and other matters essential to the statement of an offense,⁸⁰ must be alleged, pursuant to the general rules elsewhere treated.

Whether provisos or exceptions contained in the ordinance must be negatived in the complaint depends wholly upon the application of rules and principles elsewhere treated.⁸¹

Pleading Ordinance. — Where the court is one which is bound to take judicial notice of an ordinance,⁸² it would seem to be unnecessary to plead the ordinance violated either by setting it out or referring to it specifically by its title or number,⁸³ except perhaps where this may be necessary to advise the defendant of the charge against him.⁸⁴ Generally, however, either by virtue of statute or otherwise it is

885, 67 Pac. 455. **Mo.**—*St. Louis v. Ameln*, 235 Mo. 669, 139 S. W. 429; *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Trenton v. Devorss*, 70 Mo. App. 8.

[a] But where the ordinance specifies several different acts as constituting the offense the complaint should specify the specific act or acts with which the defendant is charged in order that he may prepare for trial. *State v. Swanson*, 106 Minn. 288, 119 N. W. 45.

77. *Com. v. Bean*, 14 Gray (Mass.) 52, where the ordinance prohibited permitting cattle to stop to feed in the streets. The purpose being to prevent "grazing" in the streets, a complaint though following the language of the ordinance was insufficient even after verdict. See 12 STANDARD PROC. 450.

78. **Ga.**—*Norris v. Thomson*, 15 Ga. App. 511, 83 S. E. 866. **Mo.**—*St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. (N. S.) 918. **N. J.**—*State v. Cadwalader*, 36 N. J. L. 283. **Wash.**—*Spokane v. Robison*, 6 Wash. 547, 3 Pac. 960.

Averments as to time, see generally 12 STANDARD PROC. 411, et seq.

79. **Ga.**—*Norris v. Thomson*, 15 Ga. App. 511, 83 S. E. 866. **Mo.**—*St. Louis v. Babcock*, 156 Mo. 148, 56 S. W. 732. **Ore.**—*Barton v. La Grande*, 17 Ore. 577, 22 Pac. 111.

Averments as to place generally, see 12 STANDARD PROC. 426, et seq.

80. See the title "Indictment and Information," and particular titles dealing with specific offenses.

[a] **Intent** (1) whenever it constitutes the gist of the offense must be averred. *Case v. Hall*, 21 Ill. 632. See

the title "Indictment and Information." (2) But a complaint for violation of an ordinance prohibiting any person to stop with any team in a public street near another team so as to obstruct public travel need not show that the defendant intended to obstruct the street. *Com. v. Derby*, 162 Mass. 183, 38 N. E. 440.

81. See 12 STANDARD PROC. 458, and the following cases: **Cal.**—*In re Wilcox*, 14 Cal. App. 164, 111 Pac. 374. **Ind.**—*Smith v. New Albany*, 175 Ind. 279, 93 N. E. 73. **Mo.**—*State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

[a] Where an ordinance excepts certain classes of persons from its operation the complaint must negative such exceptions. *Tarkio v. Loyd*, 109 Mo. App. 171, 82 S. W. 1127.

In prosecutions for sale of liquors, see 14 STANDARD PROC. 362.

In prosecution for not obtaining license, see 18 STANDARD PROC. 983.

82. See *supra*, VI, A.

83. *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258; *West v. Columbus*, 20 Kan. 633, opinion by Brewer, J.

[a] It is sufficient to plead that the offense charged is "contrary to the form of the ordinance in such cases made and provided, and against the peace and dignity of the people of the state (of California)." *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258. See also *Com. v. Odenweller*, 156 Mass. 234, 30 N. E. 1022. But see *Memphis v. O'Connor*, 53 Mo. 468, and cases *infra*, this section.

84. *Memphis v. O'Connor*, 53 Mo. 468; *Marshall v. Standard*, 24 Mo. App. 192. See also cases *infra*, this section.

necessary to plead the ordinance in some manner.⁸⁵ In some states it is sufficient to refer to the ordinance by its title or number and date of enactment,⁸⁶ or, in others the substance of the ordinance may be set forth,⁸⁷ though in some courts it is necessary to plead it in *haec verba*.⁸⁸ Where the ordinance is set forth it is only necessary to plead the portion or portions of the ordinance which relate to the offense charged.⁸⁹ In some states the adoption of the ordinance by the municipality must be alleged,⁹⁰ but this is not generally required,⁹¹ and neither due publication of the ordinance⁹² nor the corporate existence of the municipality⁹³ need be averred.

A prior conviction, where relied upon to increase the punishment, must be alleged.⁹⁴

Joinder of Offenses.—Separate and distinct offenses in violation of a municipal ordinance, as a rule, cannot be joined in one complaint,⁹⁵

85. See cases *infra*, this section, and *Deadwood v. Coe*, 34 S. D. 517, 149 N. W. 359.

86. See the following cases: **Ind.** *Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802. **Mich.**—*Vicksburg v. Briggs*, 85 Mich. 502, 48 N. W. 625. **Mo.** See *St. Louis v. Ringold*, 235 Mo. 472, 139 S. W. 186; *Kansas City v. Whitman*, 70 Mo. App. 630. **Mont.**—*Miles City v. Kern*, 12 Mont. 119, 29 Pac. 720. **Ore.**—See *Nodine v. Union*, 13 Ore. 587, 11 Pac. 298. **Wyo.**—*Stutsman v. Cheyenne*, 18 Wyo. 499, 113 Pac. 322.

See *supra*, VI, A.

[a] Where the ordinance (1) contains several sections the particular section violated must be stated. *Fink v. Milwaukee*, 17 Wis. 26. See also *Kansas City v. Whitman*, 70 Mo. App. 630; *Plymouth Borough v. Urbanick*, 15 Pa. Dist. 919. But see *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045. Compare *St. Louis v. Ringold*, 235 Mo. 472, 139 S. W. 186. (2) Where one section of the ordinance creates the offense and another imposes the penalty it is necessary to refer to both sections. *Whitson v. Franklin*, 34 Ind. 392.

[b] An error in the averment of the date of approval of the ordinance is not material. *Missouri Pac. Ry. Co. v. Chick*, 6 Kan. App. 481, 50 Pac. 605.

87. **Ala.**—*Rosenberg v. Selma*, 168 Ala. 195, 52 So. 742; *Wiggs v. State*, 5 Ala. App. 189, 59 So. 516. See *Case v. Mobile*, 30 Ala. 538. **Ia.**—*State v. Olinger*, 109 Iowa 669, 80 N. W. 1060. **Minn.**—*Faribault v. Wilson*, 34 Minn.

254, 25 N. W. 449. **Mo.**—*State v. Sherman*, 42 Mo. 210. **N. J.**—*Nicoulin v. Lowery*, 49 N. J. L. 391, 8 Atl. 513. **Pa.**—*Com. v. Chittenden*, 2 Pa. Dist. 804.

See *supra*, VI, A.

[a] An averment that the act charged was committed contrary to law is not sufficient to show that it was in violation of a municipal ordinance. *Rosenberg v. Selma*, 168 Ala. 195, 52 So. 742.

88. **N. Y.**—*Stuyvesant v. New York*, 7 Cow. (N. Y.) 588, 608. **N. C.**—*State v. Edens*, 85 N. C. 522. **Vt.**—*State v. Bosworth*, 74 Vt. 315, 52 Atl. 423; *State v. Cruickshank*, 71 Vt. 94, 42 Atl. 983.

89. *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706. See *Whitson v. Franklin*, 34 Ind. 392.

90. **Ala.**—See *Rosenberg v. Selma*, 168 Ala. 195, 52 So. 742. **N. Y.**—*People v. Bell*, 148 N. Y. Supp. 753. **Vt.** *State v. Bosworth*, 74 Vt. 315, 52 Atl. 423.

91. *Meyer v. Bridgeton*, 37 N. J. L. 160. See cases *supra*, this section.

92. *Lake Erie Ry. Co. v. Noblesville*, 16 Ind. App. 20, 44 N. E. 652.

93. *Trenton v. Devorss*, 70 Mo. App. 8.

94. *Larney v. Cleveland*, 34 Ohio St. 599.

See more fully the general rule in 12 STANDARD PROC. 354.

95. *Tiedke v. Saginaw*, 43 Mich. 64, 4 N. W. 627. See the title "Indictment and Information."

[a] A violation of two ordinances though relating to the same general subject but different as to the penalty

unless the ordinance expressly authorizes any number of violations thereof to be included in one charge.⁹⁶ But where an ordinance makes a continuance of the violation thereof a separate and substantive offense, cumulative penalties for the violation of the ordinance may be recovered in the same proceeding.⁹⁷ A person accused of violation of an ordinance and also of a distinct offense under a statute cannot be prosecuted in one proceeding for both offenses.⁹⁸

Amendment.—Generally, a complaint or information charging the violation of an ordinance may be amended in accordance with general principles and rules elsewhere treated.⁹⁹

f. *Defensive Pleading.*—The defensive pleadings follow the general rules fully treated elsewhere in this work.¹ Thus under appropriate circumstances the defendant may demur,² move to make the complaint more definite and certain,³ or move to quash.⁴ The fact that the complaint follows the form prescribed by ordinance does not prevent the accused from questioning its sufficiency in jurisdictional matters.⁵ It has been held that a defendant who seeks to avoid an ordinance on the ground that it is unequal and oppressive must plead the particular facts.⁶

The effect of interposing or failing to interpose particular pleas or objections is governed by the general rules.⁷

g. *Trial.*—While a formal arraignment of the defendant is not

imposed cannot be joined in one action. *Kensington v. Glenat*, 1 Phila. (Pa.) 251.

96. *Eldora v. Burlingame*, 62 Iowa 32, 17 N. W. 148.

97. *Hampton v. Chicago, M. & St. P. Ry. Co.*, 118 Ill. App. 621. And see *Lansdowne v. Springfield Water Co.*, 7 Del. Co. (Pa.) 509, wherein it is held that a license fee and the penalty for the omission to obtain a license may be exacted in the same proceeding.

98. *Com. v. Weachter*, 33 Pa. Co. Ct. 420.

99. See 12 STANDARD PROC. 555, 565, and the following cases: **U. S.**—*Virginia v. Smith*, 1 Cranch C. C. 22, 28 Fed. Cas. No. 16,965. **Ia.**—*Lovillia v. Cobb*, 126 Iowa 557, 102 N. W. 496. **N. C.**—*Washington v. Frank*, 46 N. C. 436. **Tenn.**—*Childress v. Nashville*, 3 Sneed 347.

[a] **After Appeal.**—*Lovillia v. Cobb*, 126 Iowa 557, 102 N. W. 496. But see *Kansas City v. Whitman*, 70 Mo. App. 630.

1. See the titles "Arraignment and Plea;" "Indictment and Information;" and titles dealing with particular pleas.

Right to copy of complaint, see the title "Service of Process and Papers."

2. **Cal.**—*Eureka v. Diaz*, 89 Cal. 467, 26 Pac. 961. **Minn.**—*State v. Reckards*, 21 Minn. 47. **Wis.**—*Fink v. Milwaukee*, 17 Wis. 26.

3. **Ill.**—*Chicago v. Williams*, 254 Ill. 360, 98 N. E. 666; *Chicago v. John Doe*, 195 Ill. App. 582. **Kan.**—*Johnson v. Winfield*, 48 Kan. 129, 29 Pac. 559. **Miss.**—*Giardina v. Greenville*, 70 Miss. 896, 13 So. 241.

4. *Smith v. New Albany*, 175 Ind. 279, 93 N. E. 73.

5. *Wong Sing v. Independence*, 47 Ore. 231, 83 Pac. 387.

6. *St. Louis v. United Rys. Co.*, 262 Mo. 387, 174 S. W. 78; *State ex rel. St. Louis v. Missouri Pac. Ry. Co.*, 260 Mo. 720, 174 S. W. 73.

7. See 12 STANDARD PROC. 661, et seq., and the title "Arraignment and Plea;" also titles dealing with particular pleas.

[a] **A plea of guilty waives any defect not jurisdictional.** *People v. Bell*, 148 N. Y. Supp. 753.

[b] **By proceeding to trial without raising any question as to the sufficiency of the charge made against him, the defendant waives any objection on that ground.** *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

[c] **Uncertainty.**—An objection to

necessary in prosecutions for the violation of a municipal ordinance,⁸ the defendant, especially where the offense charged is also an offense under the statute, is entitled to the privileges accorded in the trial of misdemeanors.⁹ The general rules pertaining to variance,¹⁰ to the giving and refusing of instructions,¹¹ and to questions of law and fact,¹² are applicable to proceedings for the violation of ordinances. The validity of an ordinance,¹³ and its reasonableness,¹⁴ are to be determined by the court, while the question as to whether the ordinance involved in the case had been violated is for the jury to determine from all the facts in evidence and under appropriate instructions of the court.¹⁵

h. *Sentence and Judgment.*—The sentence and judgment is governed in general by the rules applicable to such matters, elsewhere treated.¹⁶ Under some statutes the defendant may be imprisoned for failure to pay a fine imposed for violation of an ordinance.¹⁷

the charge on the ground of uncertainty cannot be raised for the first time on appeal. *Chicago v. Everleigh*, 162 Ill. App. 623; *New Castle v. Cummings*, 36 Pa. Super. 443.

[d] *Misjoinder.*—A motion to quash a complaint on the ground that several distinct violations of an ordinance are charged therein must be made prior to the entry of the plea or it comes too late. *Lead v. Klatt*, 13 S. D. 140, 82 N. W. 391.

8. *Columbia v. Samuels*, 164 Mo. App. 92, 147 S. W. 1132. See 2 *STANDARD PROC.* 865, notes 21 and 22.

9. *King City v. Duncan*, 238 Mo. 513, 142 S. W. 246; *Grant City v. Simmons*, 167 Mo. App. 183, 151 S. W. 187. See generally the title "Trial."

In summary proceedings, see the title "Summary Proceedings."

As to the right to trial by jury, see 16 *STANDARD PROC.* 911, 912.

10. See the title "Variance and Failure of Proof."

[a] *Charge Under Wrong Section of Ordinance.*—Where the defendant is charged with the violation of a certain section of an ordinance and the proof shows that another section of such ordinance was violated, the defendant must be discharged. *St. Louis v. Klausmeier*, 212 Mo. 724, 111 S. W. 507.

11. See the title "Instructions." See also *Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675.

[a] *Reasonable Doubt.*—(1) Where such prosecution is regarded as criminal or quasi-criminal, it is error to refuse an instruction that the law casts on plaintiff the burden of es-

tablishing the guilt of defendant beyond a reasonable doubt. *Ala.*—*Baron v. Anniston*, 157 Ala. 399, 48 So. 58. *Ill.*—*Waverly v. Goss*, 138 Ill. App. 68. *Mo.*—*Grant City v. Simmons*, 167 Mo. App. 183, 151 S. W. 187. (2) Where evil intent is involved it is proper to charge on reasonable doubt as in criminal cases. *Stanberry v. O'Neal*, 166 Mo. App. 709, 150 S. W. 1104.

12. See the title "Province of Judge and Jury."

13. *People v. Second Judicial Dist. Court*, 33 Colo. 328, 80 Pac. 888, 108 Am. St. Rep. 98; *Peoria v. Calhoun*, 29 Ill. 317.

14. *Me.*—*State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750. *Mass. Com. v. Worcester*, 3 Pick. 462. *Tex. Ex parte Vance*, 42 Tex. Crim. 619, 62 S. W. 568.

15. *Colo.*—*Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343. *Ill.*—*Pennsylvania Co. v. Chicago*, 107 Ill. App. 37. *Md.*—*Glenn v. Baltimore*, 5 Gill & J. 424. *N. J.*—*Sparks v. Stokes*, 40 N. J. L. 487. *N. C.*—*Washington v. Frank*, 46 N. C. 436.

16. See the title "Sentence and Judgment."

[a] *Punishment Fixed by Verdict.* Under a statute providing that the punishment for the violation of an ordinance may be assessed by the judge or jury, the court is not authorized to impose an additional punishment where the punishment is fixed by the verdict. *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725.

17. *Ark.*—*Ex parte Slattery*, 3 Ark. 484. *Ga.*—*Lyons v. Collier*, 125 Ga.

i. *Review.*—(I.) *In General.*—Prosecutions in municipal courts for the violation of ordinances are universally reviewable. A common law remedy may in some instances be invoked for that purpose,¹⁸ but generally the review is the creature of statutes which control the right thereto,¹⁹ the manner of proceeding,²⁰ and the disposition of the case in the higher court.²¹

(II.) *To Whom Available.*—It is a privilege extended without exception to the defendant,²² and very often to the municipality as well,²³

231, 54 S. E. 183. **Kan.**—*Arkansas City v. Roberts*, 89 Kan. 680, 132 Pac. 152. **La.**—*State v. Fisher*, 50 La. Ann. 45, 23 So. 92. **Neb.**—*Bailey v. State*, 30 Neb. 855, 47 N. W. 208.

[a] *Imprisonment for Debt.*—A penalty accruing from a breach of an ordinance of a municipal corporation is not a debt within the meaning of the constitution prohibiting imprisonment for a debt. *Hardenbrook v. Ligonier*, 95 Ind. 70.

18. See *infra*, VI, D, 1, i, (III).

19. **Ala.**—*Brighton v. Miles*, 153 Ala. 673, 45 So. 160; *Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704; *State v. Fort*, 12 Ala. App. 632, 67 So. 734. **Colo.**—*Hummel v. Ouray*, 38 Colo. 322, 88 Pac. 582. **Ky.**—*Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853. **La.**—*Hammond v. Badeau*, 137 La. 58, 68 So. 213. **Mich.**—*People v. Hymen*, 167 Mich. 216, 132 N. W. 516. **Miss.**—*Jackson v. Harland*, 112 Miss. 41, 72 So. 850. **Mo.**—*Marble Hill v. Caldwell* (Mo. App.), 178 S. W. 226; *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294. **Neb.**—*Ruffing v. State*, 80 Neb. 555, 114 N. W. 583. **N. J.**—*Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609; *Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217. **Ohio.**—*State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353. **Pa.**—*Mechanicsburg Boro v. Gray*, 61 Pa. Super. 95. **Utah.**—*Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353. **W. Va.**—*Ridgway v. Hinton*, 25 W. Va. 554.

20. **Colo.**—*Hummel v. Ouray*, 38 Colo. 322, 88 Pac. 582. **Minn.**—*Madison v. Martin*, 109 Minn. 292, 123 N. W. 809. **N. J.**—*Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217. **Ohio.**—*State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353.

See *infra*, VI, D, 1, i, (V).

[a] The common pleas has no jurisdiction to try de novo an appeal from the small cause court adjudging a de-

fendant guilty of violating the provisions of the sanitary code of a municipality. *Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217.

21. **Colo.**—*Braisted v. People*, 38 Colo. 49, 88 Pac. 150. **N. J.**—*Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217. **Wash.**—*State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

See *infra*, VI, D, 1, i, (VI).

22. **Ark.**—*Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675; *Ex parte Johnston*, 99 Ark. 201, 137 S. W. 803. **Cal.**—*Denninger v. Records' Court*, 145 Cal. 629, 79 Pac. 360. **Colo.**—*Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. **Ill.**—*City of Chicago v. Coleman*, 254 Ill. 338, 98 N. E. 521; *City of Chicago v. Wright*, 195 Ill. App. 578; *City of Chicago v. John Doe*, 195 Ill. App. 582. **Kan.**—*City of Salina v. Wait*, 56 Kan. 283, 43 Pac. 255. **Ky.**—*Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18. **La.**—*New Orleans v. Le Blanc*, 139 La. 113, 74 So. 248; *Hammond v. Badeau*, 137 La. 58, 68 So. 213; *State v. Zurich*, 49 La. Ann. 447, 21 So. 977. **Md.**—*Canton Co. v. State*, 126 Md. 352, 95 Atl. 53. **Minn.**—*Madison v. Martin*, 109 Minn. 292, 123 N. W. 809. **Miss.**—*Thomas v. State*, 101 Miss. 74, 57 So. 364. **Mo.**—*Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294. **Neb.**—*Ruffing v. State*, 80 Neb. 555, 114 N. W. 583. **N. J.**—*Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609. **Okla.**—*Oklahoma City v. Tucker*, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984. **S. C.**—*Spartanburg v. Willis*, 103 S. C. 331, 88 S. E. 16. **Utah.**—*Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353. **Wash.**—*State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

23. **Ala.**—*Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704; *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944. **Colo.**—*Durango v. Reins-*

but in no case is the corporation entitled to prosecute proceedings in review unless there exists express or implied statutory authorization for the same.²⁴

(III.) **Methods of Review.** — The particular method of review resorted to must be sanctioned by law. One or more of the usual remedies are as a rule available, such as appeal,²⁵ writ of error,²⁶ writ

berg, 16 Colo. 327, 26 Pac. 820. **Ill.** Knowles v. Wayne City, 31 Ill. App. 471. **Ky.**—Louisville v. Coalter, 171 Ky. 633, 188 S. W. 853; Keiper v. Louisville, 152 Ky. 691, 154 S. W. 18. **Miss.** Jackson v. Harland, 112 Miss. 41, 72 So. 850. **Mo.**—St. Louis v. Bender, 248 Mo. 113, 154 S. W. 88, 44 L. R. A. (N. S.) 1072; St. Louis v. Marchel, 99 Mo. 475, 12 S. W. 1050; Springfield v. Starke, 93 Mo. App. 70; Poplar Bluff v. Hill, 92 Mo. App. 17. **Ohio.**—State v. Rouch, 47 Ohio St. 478, 25 N. E. 59. **Wis.**—Milwaukee v. Ruplinger, 155 Wis. 391, 145 N. W. 42.

[a] Only where the validity of the ordinance is involved has the city the right of appeal. Birmingham v. Ridgeway, 164 Ala. 598, 51 So. 303.

24. **Ga.**—Cranston v. Augusta, 61 Ga. 572; Mayor of Macon v. Wood, 109 Ga. 149, 34 S. E. 322. **Kan.** Salina v. Wait, 56 Kan. 283, 43 Pac. 255. **Mich.**—Northville v. Westfall, 75 Mich. 603, 42 N. W. 1068. **Okla.** Oklahoma City v. Tucker, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984.

[a] A legislative act granting the state the right to appeal does not by implication grant the same right to municipalities existing under state law, unless such right is specifically conferred. Oklahoma City v. Tucker, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984.

[b] A decision of the superior court unfavorable to the municipality, is not subject to further review. Mayor of Macon v. Wood, 109 Ga. 149, 34 S. E. 322.

[c] Appeal of municipality dismissed because not authorized. Oklahoma City v. Tucker, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984.

[d] Where a judgment of conviction is reversed by the superior court on certiorari, a writ of error will not lie to the supreme court. Mayor of Ma-

con v. Wood, 109 Ga. 149, 34 S. E. 322.

25. **Ala.**—Puryear v. State *ex rel.* Wade (Ala. App.), 75 So. 704; Fealy v. Birmingham (Ala. App.), 73 So. 296. **Ark.**—Robinson v. Malvern, 118 Ark. 423, 176 S. W. 675; *Ex parte* Johnston, 99 Ark. 201, 137 S. W. 803; Searey v. Turner, 88 Ark. 210, 114 S. W. 472. **Cal.**—Thomas v. Hawkins, 12 Cal. App. 327, 107 Pac. 578. **Colo.** Braisted v. People, 38 Colo. 49, 88 Pac. 150; Saner v. People, 17 Colo. App. 307, 69 Pac. 76. **Ill.**—City of Chicago v. Coleman, 254 Ill. 338, 98 N. E. 521. **Kan.**—City of Salina v. Wait, 56 Kan. 283, 43 Pac. 255. **Ky.** Louisville v. Coalter, 171 Ky. 633, 188 S. W. 853. **La.**—New Orleans v. Le Blanc, 139 La. 113, 71 So. 248; Hammond v. Badeau, 137 La. 58, 68 So. 213; State v. Zurich, 49 La. Ann. 447, 21 So. 977. **Md.**—Canton Co. v. State, 126 Md. 352, 95 Atl. 58. **Mich.**—People v. Hymen, 167 Mich. 216, 132 N. W. 516. **Minn.**—Madison v. Martin, 169 Minn. 292, 123 N. W. 809. **Miss.** Thomas v. State, 101 Miss. 74, 57 So. 364. **Mo.**—Marble Hill v. Caldwell, 189 Mo. App. 286, 176 S. W. 294. **Neb.** Ruffing v. State, 80 Neb. 555, 114 N. W. 583. **Okla.**—Oklahoma City v. Tucker, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984. **Pa.**—Mechanicsburg Boro v. Gray, 61 Pa. Super. 95. **Utah.** Salt Lake City v. Larsen, 47 Utah 1, 151 Pac. 353. **Wash.**—State v. Hagimori, 57 Wash. 623, 107 Pac. 855. **W. Va.**—Ridgway v. Hinton, 25 W. Va. 554.

[a] In Oklahoma, §1451 of the Code regulates the right of appeal from convictions for municipal offenses in the absence of other provisions for such appeals, and in no way conflicts with §1217 of the Code of 1907. Puryear v. State *ex rel.* Wade (Ala. App.), 75 So. 704.

26. Webb v. Ellijay, 15 Ga. App. 642, 83 S. E. 1099; Chicago v. Richardson, 197 Ill. App. 594; Chicago v. John Doe, 195 Ill. App. 582.

of review,²⁷ certiorari,²⁸ prohibition,²⁹ and habeas corpus.³⁰

(IV.) By What Court. — The particular tribunal empowered to review these proceedings is variously designated by the statutes and sometimes as the municipal council,³¹ county court,³² circuit court,³³ common pleas,³⁴ court of quarter sessions,³⁵ district court,³⁶ and

27. *Ah Poo v. Stevenson*, 83 Ore. 340, 163 Pac. 822.

28. *Cal.*—*Denninger v. Recorders' Court*, 145 Cal. 629, 79 Pac. 360. *Ga.* *Stroup v. Pruden*, 104 Ga. 721, 30 S. E. 948; *Weatherly v. Athens*, 18 Ga. App. 734, 90 S. E. 494; *Douthitt v. Blue Ridge*, 13 Ga. App. 645, 79 S. E. 744. *N. J.*—*Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217; *Fruehwirth v. Borough of South Amboy*, 76 N. J. L. 63, 68 Atl. 1075; *Stokes v. Schlaeter*, 66 N. J. L. 247, 49 Atl. 556. *Pa.* *Bolivar Borough v. Coulter*, 10 Pa. Dist. 171. *Wyo.*—*Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892.

[a] Suspending sentence upon conviction will not so affect the finality of the proceedings as to prevent review by certiorari. *Blazier v. Keffer*, 79 N. J. L. 252, 75 Atl. 439.

[b] Conviction in recorders' court set aside on certiorari for insufficiency of complaint. *Denninger v. Recorders' Court*, 145 Cal. 629, 79 Pac. 360.

[c] But habeas corpus and not certiorari is the proper remedy where petitioner is sentenced and imprisoned by one who was a mere usurper of the mayor's office and therefore had no right whatever to try him. *Stroup v. Pruden*, 104 Ga. 721, 30 S. E. 948.

[d] The legal existence of the police court cannot be tested by a writ of certiorari. *Bass v. Milledgeville*, 122 Ga. 177, 50 S. E. 59.

[e] Proceedings are at least quasi-criminal and hence reviewable by certiorari. *Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892.

[f] A void judgment as distinguished from an irregular one is not reviewable by certiorari, as for example, where the ordinance is invalid on which the judgment is based. *Moore v. Thomasville*, 17 Ga. App. 285, 86 S. E. 641.

[g] In New Jersey. — *Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609.

29. See *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853.

30. *Denninger v. Recorders' Court*, 145 Cal. 629, 79 Pac. 360; *Stroup v. Pruden*, 104 Ga. 721, 30 S. E. 948.

[a] In Case of Actual Imprisonment.—*Stroup v. Pruden*, 104 Ga. 721, 30 S. E. 948.

31. *Knight v. Jesup*, 17 Ga. App. 557, 87 S. E. 814; *Hicks v. Hazlehurst*, 14 Ga. App. 813, 82 S. E. 354.

[a] Appeal from mayor's court to municipal council. *Knight v. Jesup*, 17 Ga. App. 557, 87 S. E. 814.

32. *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76; *Oklahoma City v. Tucker*, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984.

33. *Ala.*—*Purveyor v. State ex rel. Wade* (Ala. App.), 75 So. 704. *Ky.* *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853. *Miss.*—*Thomas v. State*, 101 Miss. 74, 57 So. 364. *Mo.*—*Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294. *Ohio.*—*Silverton v. Davis*, 10 Ohio Cir. Ct. (N. S.) 60. *S. C.*—*Spartanburg v. Willis*, 103 S. C. 331, 88 S. E. 16.

[a] A prior review by the common pleas though proper is not indispensable to a review by the circuit court. *State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353.

[b] Jurisdictional amount immaterial where the validity of the ordinance is drawn in question. *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853; *Franklin v. Lacey*, 157 Ky. 261, 162 S. W. 1126.

34. *Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609; *State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353.

35. *Mechanicsburg Boro v. Gray*, 61 Pa. Super. 95; *Com. v. Jackson*, 34 Pa. Super. 174.

[a] An appeal to the court of common pleas in such cases is not authorized. *Mechanicsburg Boro v. Gray*, 61 Pa. Super. 95.

36. *Kan.*—*Salina v. Wait*, 56 Kan. 283, 43 Pac. 255. *La.*—*Hammond v. Badeau*, 137 La. 58, 68 So. 213. *Wyo.* *Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892.

supreme court.³⁷

Further appeals to higher courts of review are in most cases authorized in accordance with general rules.³⁸

(V.) **Proceedings To Obtain Review.**—(A.) **IN GENERAL.**—In proceedings to obtain a review, the rules in civil³⁹ or criminal⁴⁰ cases are followed according as the prosecution is deemed civil or criminal.⁴¹ In some cases the review is granted on petition setting forth the alleged errors,⁴² the ordinance in question,⁴³ and sometimes the decision as to its validity,⁴⁴ and the fact that a proper bond or pauper's

37. *State v. Zurich*, 49 La. Ann. 447, 21 So. 977.

[a] **Proceedings of a criminal character** are not reviewable by the civil district court or court of appeals, but defendant's relief must be found in the supreme court if at all either through appeal or under its supervisory power. *State v. Zurich*, 49 La. Ann. 447, 21 So. 977.

38. Colo.—*Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. Ky.—*Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853. N. J.—*Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609. Okla.—*Oklahoma City v. Tucker*, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984.

39. *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294; *Hannibal v. Dudley*, 158 Mo. App. 261, 138 S. W. 552; *Caruthersville v. Palsgrove*, 155 Mo. App. 564, 134 S. W. 1032.

[a] "We think it may be fairly deducible from all of the authorities that prosecutions for violations of municipal ordinances are civil cases, governed by the procedure applicable thereto, except in such cases as that the jealous regard of personal liberty demands the application of the strict rules adhered to in trials of criminal cases." *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294.

40. Ark.—*Russellville v. Edwards*, 80 Ark. 314, 97 S. W. 57. Ga.—*Webb v. Ellijay*, 15 Ga. App. 642, 83 S. E. 1099. Minn.—*Madison v. Martin*, 109 Minn. 292, 123 N. W. 809. Ohio.—*State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353.

41. See *supra*, VI, D, 1, a.

42. *Ah Poo v. Stevenson*, 83 Ore. 340, 163 Pac. 822.

[a] **The recorder makes answer** (1) to a petition for certiorari (*Nobles v. Dublin*, 18 Ga. App. 498, 89 S. E. 605), (2) showing that there was an

ordinance authorizing the conviction complained of. *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354. (3) His answer, where not traversed, is controlling as to the facts and proceedings of the trial before him. *Nobles v. Dublin*, 18 Ga. App. 498, 89 S. E. 605.

43. *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354; *McDermott v. Savannah*, 18 Ga. App. 308, 89 S. E. 348; *Davis v. Dublin*, 17 Ga. App. 737, 88 S. E. 416; *Berry v. Milledgeville*, 17 Ga. App. 326, 86 S. E. 744; *Collins v. Mayor of Milledgeville*, 17 Ga. App. 817, 88 S. E. 716.

[a] **Presumptions.**—(1) When a petition for certiorari complaining of a conviction in a municipal court sets forth the charge against the petitioner, it may be assumed that the act embraced therein has been made the substance of a valid ordinance. *Chambers v. Barnesville*, 89 Ga. 739, 15 S. E. 634; *Carr v. Conyers*, 84 Ga. 287, 10 S. E. 630, 20 Am. St. Rep. 357. (2) But the rule is otherwise when the petition merely avers that the accused was arraigned for the violation of a given section of the city code, or of an ordinance passed in a certain year when there is nothing in the petition to indicate what were the provisions of the section of the city code or ordinance. *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354.

[b] **That the ordinance be literally copied** in the petition not required. *Grubbs v. Quitman*, 16 Ga. App. 503, 85 S. E. 678.

44. *Birmingham v. Ridgeway*, 164 Ala. 598, 51 So. 303.

[a] **On appeal by the city** the record must show that the ordinance was held invalid for only in that case is the city entitled to appeal. *Birmingham v. Ridgeway*, 164 Ala. 598, 51 So. 303.

affidavit have been filed.⁴⁵

(B.) **TIME TO TAKE.** — The appeal, writ of error or other revisory proceeding must be taken and perfected within the time prescribed by law.⁴⁶

(C.) **BOND OR AFFIDAVIT.** — As a prerequisite to review no bond or security is usually required of the municipality,⁴⁷ but unless the defendant furnishes an affidavit in forma pauperis,⁴⁸ he must give bond on appeal,⁴⁹ or on certiorari,⁵⁰ payable,⁵¹ conditioned,⁵² and approved⁵³ as required by statute.

Upon failure to make affidavit or give bond the court will not sanction⁵⁴

45. *Mitchell v. Thomasville*, 18 Ga. App. 781, 90 S. E. 721; *Hubert v. Thomasville*, 18 Ga. App. 756, 90 S. E. 720; *Carolis v. Atlanta*, 13 Ga. App. 662, 79 S. E. 752.

[a] The best way to show that a proper bond has been given is to attach to the petition a certified copy of the bond, with a certificate of approval by the proper officer, and allege affirmatively that the bond was given and approved as required by law. *Hubert v. Thomasville*, 18 Ga. App. 756, 90 S. E. 720.

[b] Where no certified copy of the bond is attached to the petition, the bond must in substance at least, be set forth in the petition. *Hubert v. Thomasville*, 18 Ga. App. 756, 90 S. E. 720.

46. *Ark.*—*Russellville v. Edwards*, 80 Ark. 314, 97 S. W. 57. *Colo.*—*Hummel v. Ouray*, 38 Colo. 322, 88 Pac. 582. *Ga.*—*Webb v. Ellijay*, 15 Ga. App. 642, 83 S. E. 1099. *Mo.*—*Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294. *Ohio.*—*State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353.

[a] **Transcript Filed Too Late.** *Russellville v. Edwards*, 80 Ark. 314, 97 S. W. 57.

[b] A belated bill of exceptions will justify dismissal of the writ of error. *Webb v. Ellijay*, 15 Ga. App. 642, 83 S. E. 1099.

47. *Hummel v. Ouray*, 38 Colo. 322, 88 Pac. 582. See *Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704.

48. *Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372; *Hubert v. Thomasville*, 18 Ga. App. 756, 90 S. E. 720; *Mitchell v. Thomasville*, 18 Ga. App. 781, 90 S. E. 721.

49. *Ala.*—*Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704; *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574. *Cal.*—*Thomas v. Hawkins*, 12 Cal.

App. 327, 107 Pac. 578. *Colo.*—*Braisted v. People*, 38 Colo. 54, 88 Pac. 151.

[a] The right to trial by jury is in no way impinged by this requirement that bond be given. *Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704.

50. *Detmering v. Fayetteville*, 19 Ga. App. 747, 92 S. E. 230; *Sams v. Fayetteville*, 19 Ga. App. 748, 92 S. E. 231; *Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372; *Hubert v. Thomasville*, 18 Ga. App. 756, 90 S. E. 720; *Mitchell v. Thomasville*, 18 Ga. App. 781, 90 S. E. 721; *Moon v. Jefferson*, 10 Ga. App. 572, 73 S. E. 854.

51. *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574.

[a] Payable to Mayor and Council. *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574.

52. *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574; *Thomas v. Hawkins*, 12 Cal. App. 327, 107 Pac. 578; *Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372; *Mitchell v. Thomasville*, 18 Ga. App. 781, 90 S. E. 721; *Hubert v. Thomasville*, 18 Ga. App. 756, 90 S. E. 720; *Carolis v. Atlanta*, 13 Ga. App. 662, 79 S. E. 752.

[a] The condition of the bond should be for defendant's personal appearance to abide the final order, judgment, or sentence in the case. *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574; *Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372.

53. *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574; *Moon v. Jefferson*, 10 Ga. App. 572, 73 S. E. 854.

[a] The recorder must approve the bond. *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574.

54. *Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372; *Roberts v. Colquitt*, 17 Ga. App. 557, 87 S. E. 816; *Moon v. Jefferson*, 10 Ga. App. 572, 73 S. E. 854.

the certiorari, nor will the appeal be certified to the higher court,⁵⁵ and the reviewing court may in some cases dismiss the proceedings.⁵⁶

(D.) RECORD. — The contents of the record are governed largely by the extent of the review, whether *de novo*⁵⁷ or revisory merely,⁵⁸ and by the nature of the proceedings in the municipal court, whether civil or criminal.⁵⁹ Where the hearing is *de novo* the record is necessarily simple,⁶⁰ but where the merits are not inquired into, the points of law relied on must be brought before the court by a proper transcript of the record or substitute therefor,⁶¹ and unless the necessity

[a] **An Insufficient Bond.**—*Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372.

55. *Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704.

[a] **Mandamus** to compel the certification of the appeal will not lie in such case. *Puryear v. State ex rel. Wade* (Ala. App.), 75 So. 704.

56. See *infra*, VI, D, 1, i, (V), (D).

57. See *infra*, VI, D, 1, i, (V), (A).

58. See *infra*, VI, D, 1, i, (V), (A).

59. See *supra*, VI, A.

60. *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

[a] The transcript, where the trial is *de novo*, is likely to contain nothing but the affidavit before the municipal court, with the judgment indorsed thereon, warrant of arrest, a few subpoenas indorsed thereon and the motion and bond of appeal. *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

61. *Chicago v. Moran*, 192 Ill. App. 57; *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

[a] **On certiorari (1) the record must show everything necessary to constitute a legal conviction.** It should show such facts as are necessary to constitute the statutory offense, that the defendant was convicted and the judgment of forfeiture. *Bridgeton v. Pierce*, 74 N. J. L. 220, 64 Atl. 693. See *Mattox v. Glennville*, 16 Ga. App. 568, 85 S. E. 765; *Elizabeth v. Central R. Co.*, 66 N. J. L. 568, 49 Atl. 682; *Jersey City v. Neihaus*, 66 N. J. L. 554, 49 Atl. 444. (2) A mere transcript of the steps taken in the proceedings, together with the complaint and summons, does not constitute a sufficient record. *Massinger v. Mill-*

ville, 63 N. J. L. 123, 43 Atl. 443.

[b] **Failure to file abstract** may result in dismissal of appeal. *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294.

[c] **A judgment of the municipal court** should be shown by the record. *Fruehwirth v. South Amboy*, 76 N. J. L. 63, 68 Atl. 1075.

[d] **Ordinances.**—Where the reviewing court does not take judicial notice of municipal ordinances, the ordinance in question must be incorporated in the record. Ga.—*Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354; *Nobles v. Dublin*, 18 Ga. App. 496, 497, 89 S. E. 604; *Davis v. Dublin*, 17 Ga. App. 737, 88 S. E. 416. Ill.—*Chicago v. Richardson*, 197 Ill. App. 594; *Chicago v. Quinn*, 192 Ill. App. 419. Ky.—*Owensboro v. McFall*, 152 Ky. 628, 153 S. W. 969. Miss.—*Thomas v. State*, 101 Miss. 74, 57 So. 364. Mo.—*St. Louis v. Young*, 248 Mo. 346, 154 S. W. 87. Pa.—*Scott v. Avonmore Borough*, 22 Pa. Dist. 1003; *Wilburn v. Derry Borough*, 18 Pa. Dist. 1062. As to judicial notice of ordinance, see *supra*, VI, D, 1, e.

[e] **Statement of Facts.**—*Chicago v. Moran*, 192 Ill. App. 57.

[f] **A motion for new trial** within the specified time must be shown in the abstract, otherwise there is nothing before the court for consideration save the record proper. *Marble Hill v. Caldwell* (Mo. App.), 178 S. W. 226.

[g] **A bill of exceptions** where necessary may be incorporated in the transcript. *State v. Mattingly* (Ohio), 86 N. E. 352; *Silverton v. Davis*, 10 Ohio Cir. Ct. (N. S.) 60. See generally the title "Bills of Exceptions."

[h] **Errors in the affidavit and warrant** are not reviewable unless by proper exceptions to the answer of the magistrate, they are incorporated in the record. *Mattox v. Glennville*, 16 Ga. App. 568, 85 S. E. 765.

therefor is obviated by statute,⁶² the party must assign errors⁶³ and file briefs⁶⁴ in accordance with the general rules governing such matters.

(E.) **STAY PENDING APPEAL.**—The city has authority to provide for the stay of proceedings on judgment of conviction in its police court, pending an examination into the same by the circuit court on appeal.⁶⁵

(VI.) **Proceedings in Reviewing Court.**—(A.) **IN GENERAL.**—Whether the proceedings in the higher court consist of a trial *de novo*,⁶⁶ or merely of a review of the action below,⁶⁷ depends entirely upon the statute, which sometimes provides for a summary proceeding without a jury.⁶⁸

(B.) **PLEADING.**—The pleading below is preserved in the record. Specific provisions relative to pleading in the higher court are sometimes found in the statutes, as for example, provisions dispensing with written pleadings on review⁶⁹ or requiring a brief statement of the cause of complaint.⁷⁰

62. See *infra*, this note.

[a] In criminal cases errors need not be assigned but this does not relieve the party from assigning errors in these police court proceedings which are quasi criminal. *Craig v. Birmingham*, 14 Ala. App. 630, 71 So. 983.

63. *Stadt v. Birmingham*, 14 Ala. App. 667, 70 So. 972; *Perry v. State*, 1 Ala. App. 253, 55 So. 1035; *Harvey v. Mayor, etc.*, 18 Ga. App. 54, 88 S. E. 798; *Mattox v. Glennville*, 16 Ga. App. 568, 85 S. E. 765; *Carswell v. Mayor*, 16 Ga. App. 483, 85 S. E. 676.

[a] **Failure To Prove Venue.**—An assignment that a judgment of conviction in a municipal court was "contrary to law" or "without evidence to support it" is not sufficiently specific to present the contention that there was a failure to prove the venue. *Harvey v. Mayor, etc.*, 18 Ga. App. 54, 88 S. E. 798.

[b] The validity of the ordinance is not presented by a general assignment of error. *Carswell v. Mayor*, 16 Ga. App. 483, 85 S. E. 676.

64. *Berkstein v. Atlanta*, 9 Ga. App. 303, 71 S. E. 432; *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294. See generally the title "Briefs."

[a] Errors assigned are deemed abandoned when not referred to in brief of counsel for plaintiff in error. *Sikes v. Sasser*, 17 Ga. App. 327, 86 S. E. 738. See also *Berkstein v. Atlanta*, 9 Ga. App. 303, 71 S. E. 432.

65. *Ex parte Johnston*, 99 Ark. 201, 137 S. W. 803.

As to stay generally, see the title "Supersedeas and Stay of Proceedings."

66. Ala.—*Worthington v. Jasper*, 197 Ala. 589, 73 So. 116; *Fealy v. Birmingham* (Ala. App.), 73 So. 296; *Harrison v. Anniston*, 156 Ala. 620, 46 So. 980. Ark.—*Searcy v. Turner*, 88 Ark. 210, 114 S. W. 472. Colo.—*Lloyd v. Canon City*, 46 Colo. 195, 103 Pac. 288; *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. Ill.—*Alton v. Kirsch*, 68 Ill. 261. Ia.—*Ottumwa v. Schaub*, 52 Iowa 515, 3 N. W. 529. La.—*Hammond v. Badeau*, 137 La. 58, 68 So. 213. S. C.—*Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632. Wash.—*State v. Hagimori*, 57 Wash. 623, 107 Pac. 855. W. Va.—*Rowlesburg v. Zelano*, 74 W. Va. 142, 81 S. E. 732.

[a] The court proceeds in such case as though the trial had commenced there. *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

67. *Owensboro v. McFall*, 152 Ky. 628, 153 S. W. 969; *Canton Co. v. State*, 126 Md. 352, 95 Atl. 58.

68. *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. See *Hammond v. Badeau*, 137 La. 58, 68 So. 213; *Fruehwirth v. South Amboy*, 76 N. J. L. 63, 68 Atl. 1075, generally the title "Summary Proceedings."

69. *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76.

70. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

[a] The complaint must be signed by the solicitor. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

[b] The purpose of such complaint is to definitely apprise the defendant of the nature and cause of the accusa-

(C.) AMENDMENTS ON APPEAL. — In some jurisdictions on appeal to the district court the complaint may be amended,⁷¹ even as to matters of substance.⁷²

(D.) DISMISSAL. — Where proper grounds therefor appear, the proceedings will be dismissed, as for example where the reviewing court has no jurisdiction,⁷³ or where the appeal or other remedy is improperly taken and perfected,⁷⁴ or where no questions are presented to the court for review,⁷⁵ or where the party abandons his appeal by failure to appear and prosecute it.⁷⁶

(E.) OBJECTIONS IN REVIEWING COURT. — Objections are sometimes permitted to be made for the first time in the court of review,⁷⁷ but as a rule objections or exceptions must be made in the trial court.⁷⁸

tion. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

[c] No verification of the complaint is necessary. *Fealy v. Birmingham* (Ala. App.), 73 So. 296.

[d] Motion or demurrer will lie to question the statement made in the circuit court. *Worthington v. Jasper*, 197 Ala. 589, 73 So. 116.

71. *Ruffing v. State*, 80 Neb. 555, 114 N. W. 583; *Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353.

[a] A complaint stating no public offense may be amended so as to state one. *Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353.

72. *Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353.

73. Ala.—*Roney v. Floral*, 10 Ala. App. 370, 65 So. 91. Ga.—*Mayor of Macon v. Wood*, 109 Ga. 149, 34 S. E. 322; *Mayor, etc. v. Ethridge*, 96 Ga. 326, 22 S. E. 985. Kan.—*Salina v. Wait*, 56 Kan. 283, 43 Pac. 255. Okla.—*Oklahoma City v. Tucker*, 11 Okla. Crim. 266, 145 Pac. 757, Ann. Cas. 1917D, 984.

74. Ala.—*Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574. Cal.—*Thomas v. Hawkins*, 12 Cal. App. 327, 107 Pac. 578. Ga.—*Flynn v. East Point*, 18 Ga. App. 729, 90 S. E. 372; *Webb v. Ellijay*, 15 Ga. App. 642, 83 S. E. 1699. Minn.—*Madison v. Martin*, 109 Minn. 292, 123 N. W. 809.

[a] Unless bond is given, no jurisdiction exists in the appellate court. *Thomas v. Hawkins*, 12 Cal. App. 327, 107 Pac. 578.

[b] An appeal as in civil actions in justice courts dismissed, since it should have been taken as required by appeals in criminal cases in that court. *Madison v. Martin*, 109 Minn. 292, 123 N. W. 809.

75. *Jackson v. Harland*, 112 Miss. 41, 72 So. 850.

76. *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

[a] A dismissal must be ordered in such case because the trial being de novo, the appellate court even if it were authorized so to do, which it is not, could find nothing upon which to predicate any judgment save one dismissing the appeal. *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

77. *Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353.

78. Ala.—*Fealy v. Birmingham* (Ala. App.), 73 So. 296; *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389; *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725. Colo.—*Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. Ga.—*Frazier v. Atlanta*, 14 Ga. App. 109, 80 S. E. 209.

[a] Objections to service of summons in police court, not permitted in county court. *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76.

[b] Defects in complaint must be taken advantage of in the municipal court. *Fealy v. Birmingham* (Ala. App.), 73 So. 296; *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76.

[c] Where no offense within the penalty of the ordinance is shown by the original affidavit in the recorder's court, the defendant can not avail of its deficiency in the circuit court. *Worthington v. Jasper*, 197 Ala. 589, 73 So. 116.

[d] Disqualification of a Member of the Council.—*Knight v. Jesup*, 17 Ga. App. 557, 87 S. E. 814.

[e] The Question of the Disqualification of the Mayor.—*McDonald v. Ludowici*, 17 Ga. App. 523, 87 S. E. 807.

(F.) REVIEW AND DECISION.—SCOPE OF REVIEW. — Unless the hearing is de novo⁷⁹ the supervisory power of the court will be confined to errors properly brought before it.⁸⁰ It will not scrutinize the proceedings of the municipal court with the same technicality as though the court were one of general jurisdiction.⁸¹ Where there is any evidence to support them neither the findings⁸² nor the verdict⁸³ will be disturbed, nor will errors that are harmless be reviewed.⁸⁴ The usual presumptions, moreover, will be indulged in favor of the proceedings below.⁸⁵

Instructions. — Upon review in the circuit court the defendant is entitled to an instruction that he must be believed guilty beyond a reasonable doubt although prosecutions for violations of municipal ordinances are civil actions.⁸⁶

Judgment on Review. — The superior court may under some circum-

[f] **Objections to the Mayor's Answer.**—*Jefferson v. Perry*, 18 Ga. App. 690, 90 S. E. 366.

79. *Ala.*—*Harrison v. Anniston*, 156 Ala. 620, 46 Atl. 980. *Colo.*—*Lloyd v. Canon City*, 46 Colo. 195, 103 Pac. 288. *Ill.*—*Alton v. Kirsch*, 68 Ill. 261. *Ia.*—*Ottumwa v. Schaub*, 52 Iowa 515, 3 N. W. 529. *S. C.*—*Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632. *W. Va.*—*Rowlesburg v. Zelano*, 74 W. Va. 142, 81 S. E. 732.

80. *Owensboro v. McFall*, 152 Ky. 628, 153 S. W. 969; *Canton Co. v. State*, 126 Md. 352, 95 Atl. 58.

[a] **Where the constitutionality and legality of any fine, forfeiture or penalty imposed by a municipal court is contested by appeal, the review is limited to a determination of that question, and to an examination of the particular facts necessary to be considered in order to reach a conclusion thereon, and does not extend to a decision upon the correctness of the judgment appealed from.** *State v. Zurich*, 49 La. Ann. 447, 21 So. 977.

[b] **Questions Raised Below.**—*Koshkonong v. Boak*, 173 Mo. App. 310, 158 S. W. 874.

81. *Ah Poo v. Stevenson*, 83 Ore. 340, 163 Pac. 822.

82. *Burley v. Atlanta*, 14 Ga. App. 815, 82 S. E. 357; *Jones v. Carrolton*, 13 Ga. App. 631, 79 S. E. 583; *Berkstein v. Atlanta*, 9 Ga. App. 303, 71 S. E. 432; *Whitley v. Atlanta*, 7 Ga. App. 441, 67 S. E. 108; *Greenville v. Green*, 93 S. C. 573, 77 S. E. 718.

[a] **Where the superior court approves findings of the recorder's court,**

the court of appeals will not disturb them if there is some evidence to support them. *Burley v. Atlanta*, 14 Ga. App. 815, 82 S. E. 357.

83. *Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675.

84. *Colo.*—*Saner v. People*, 17 Colo. App. 307, 69 Pac. 76. *Ky.*—*Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853. *Ore.*—*Portland v. Cook*, 48 Ore. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733.

[a] **Errors in instruction held harmless.** *Chicago v. Truax Greene & Co.*, 192 Ill. App. 524.

[b] **Errors in rulings on evidence held harmless.** *Chicago v. Truax Greene & Co.*, 192 Ill. App. 524.

[c] **That a pleading was filed in the municipal court where none was required in no sense affects the merits of the case.** *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76.

85. *Chicago v. Moran*, 192 Ill. App. 57; *Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609.

[a] **Presumed that judicial notice of ordinance was taken by municipal court.** *Chicago v. Moran*, 192 Ill. App. 57.

[b] **That facts omitted from statement in the record were sufficient to justify the ruling below.** *Chicago v. Moran*, 192 Ill. App. 57.

[c] **Recorder's certification of record presumed regular.** *Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609.

86. *Grant City v. Simmons*, 167 Mo. App. 183, 151 S. W. 187; *Stanberry v. O'Neal*, 166 Mo. App. 709, 150 S. W. 1104, in which, however, the offense was also a violation of the state criminal law.

stances, render a decision in vacation.⁸⁷ The scope of the decision is sometimes limited by statute.⁸⁸ No prejudicial error appearing, the judgment will be affirmed,⁸⁹ and on the other hand where sufficient error is disclosed to warrant it the cause will be reversed and remanded to the municipal court.⁹⁰

On de novo hearing the reviewing court renders judgment irrespective of what the decision of the municipal court may have been, and if convicted the defendant may be fined or sentenced,⁹¹ and the penalty may be even greater than that imposed by the lower court.⁹²

j. *Costs*.—Costs cannot be taxed against a city or county, in proceedings to enforce ordinances, unless the statute or charter so provides.⁹³

2. **Injunction To Prevent Violation of Ordinance.**—Enjoining the violation of ordinances is treated elsewhere in this article.⁹⁴

E. **INJUNCTION AGAINST ENFORCEMENT.**—This matter is treated elsewhere in this article.⁹⁵

VII. REVIEW OF DECISIONS AND ACTS OF BOARDS.—A. **GENERALLY.**—When a municipality transcends its powers, its acts are reviewable in a judicial proceeding.⁹⁶ But the acts of a municipality within the exercise of a power conferred upon it, in the absence of fraud or abuse of discretion, are conclusive upon the courts whether the attack thereon is direct or collateral.⁹⁷ A court will not disturb

87. *Mattox v. Glennville*, 16 Ga. App. 568, 85 S. E. 765, where by consent it reserves its decision on certiorari. See generally the title "Judicial Officers."

88. *Hicks v. Hazlehurst*, 14 Ga. App. 813, 82 S. E. 354.

[a] The power of the aldermen or council on appeal from mayor is limited to a mere affirmance or reversal of the judgment. Such restriction is constitutional. *Hicks v. Hazlehurst*, 14 Ga. App. 813, 82 S. E. 354.

89. *Ala.*—*Stadt v. Birmingham*, 14 Ala. App. 667, 70 So. 972. *Ark.*—*Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675. *Ga.*—*Langston v. Hazlehurst*, 18 Ga. App. 308, 89 S. E. 375; *Dean v. Atlanta*, 18 Ga. App. 311, 89 S. E. 379. *S. C.*—*Spartanburg v. Willis*, 103 S. C. 331, 88 S. E. 16.

[a] Where no assignment of errors is made affirmance will follow. *Stadt v. Birmingham*, 14 Ala. App. 667, 70 So. 972.

90. *Chicago v. Coleman*, 254 Ill. 338, 98 N. E. 521; *Chicago v. Wright*, 195 Ill. App. 578; *State v. Mattingly*, 79 Ohio St. 79, 86 N. E. 353.

[a] Satisfaction of the judgment by paying the fine will not prevent its reversal. See *Fruehwirth v. South Am-*

boy, 76 N. J. L. 63, 68 Atl. 1075.

91. *Braisted v. People*, 38 Colo. 49, 88 Pac. 150; *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

92. *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

93. See 5 STANDARD PROC. 772, and *Kan.*—*Mariner v. Mackey*, 25 Kan. 669. *Ky.*—*Owensboro v. McFall*, 153 Ky. 754, 156 S. W. 388. *Mich.*—*Horn v. People*, 26 Mich. 221. *N. H.*—*State v. Stearns*, 31 N. H. 106. *N. C.*—*Washington v. Frank*, 46 N. C. 436. *Wis.*—*Oshkosh v. Schwartz*, 55 Wis. 483, 13 N. W. 552; *Boscobel v. Bugbee*, 41 Wis. 59.

As to costs generally, see the title "Costs," and particular titles dealing with specific offenses.

In actions for penalties, see generally the title "Penalties, Forfeitures and Fines."

94. See *supra*, V, J, 4, d.

95. See *supra*, V, J, 4, c.

96. *Frostburg v. Wineland*, 98 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 399, 64 L. R. A. 627; *Walsh v. Town Council*, 18 R. I. 88, 25 Atl. 849.

97. *Ga.*—*McMaster v. Waynesboro*, 122 Ga. 231, 50 S. E. 122. *Ind.*—*Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 30 Am. St. Rep. 214, 14

the action of a municipal body acting within its discretion, even though it might arrive at an opposite conclusion on the same facts.⁹⁸ A municipal council in the exercise of its legislative powers is as free from judicial control as the state legislature,⁹⁹ but it has no such exemption in the exercise of its administrative or ministerial powers even though it may speak through ordinances.¹ Courts of equity have no general supervisory power over the acts and proceedings of the governing bodies of municipal corporations, and equity will not interfere unless the case is brought within some well defined head of equity jurisdiction.²

B. APPEALS FROM DECISIONS OF COUNTY BOARDS. — 1. Generally. The right to appeal from decisions of a county board does not obtain unless expressly conferred by statute,³ but the statutes generally provide for appeals from decisions of county boards involving the exercise of judicial discretion,⁴ thus giving the aggrieved party the

L. R. A. 268. **Minn.**—*Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981. **Mo.** *State ex rel. Abel v. Gates*, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163. **N. J.**—*Ryan v. Paterson*, 66 N. J. L. 533, 49 Atl. 587. **N. Y.** *Schanck v. Mayor of New York*, 10 Hun 124.

As to collateral attack, see *infra*, VII, G.

[a] The fraud that will authorize the court's interference in the matter of municipal action, is not that the power exercised or the ordinance passed has resulted in an individual hardship in its execution, but only in those cases when the act of the municipal body is so unreasonable, oppressive and subversive of the rights of the citizen in the general purpose declared, as to clearly indicate an abuse rather than a legitimate use of the power. *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

98. *Ryan v. Paterson*, 66 N. J. L. 533, 49 Atl. 587.

99. *State ex rel. Abel v. Gates*, 190 Mo. 540, 556, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Barhite v. Home Tel. Co.*, 50 App. Div. 25, 63 N. Y. Supp. 659.

Mandamus as to ordinances, see *supra*, IV, C, 8.

Injunction as to ordinances, see *supra*, V, J, 4.

1. *State ex rel. Abel v. Gates*, 190 Mo. 540, 556, 89 S. W. 881, 2 L. R. A. (N. S.) 152.

2. *Phelps v. Watertown*, 61 Barb. (N. Y.) 121.

Right of equity to enjoin municipal proceedings, see *supra*, V.

3. **Colo.**—*Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142. **Miss.**—*Bridges v. Clay*, 57 Miss. 252. **Neb.**—*State v. Bethea*, 43 Neb. 451, 61 N. W. 578.

[a] A constitutional provision that there shall be no appeal from the decision of the county board in reference to all claims against the counties, does not deprive the courts of their original jurisdiction, and an action may be maintained against a county for recovery of moneys illegally collected. *Endriss v. Chippewa*, 43 Mich. 317, 5 N. W. 632. See also *People ex rel. Manistee Mixer v. Board of Manistee County*, 26 Mich. 422.

4. **Idaho.**—*Reynolds v. Oneida*, 6 Idaho 787, 59 Pac. 730. **Ind.**—*Huntington County v. Beaver*, 156 Ind. 450, 60 N. E. 150; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175. **Ia.**—*Young v. Rann*, 111 Iowa 253, 82 N. W. 785; *Lippencott v. Allander*, 25 Iowa 445. **Kan.**—*Fulkerson v. Harper County*, 31 Kan. 125, 1 Pac. 261. **Md.**—*Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646. **Miss.**—*Monroe County v. Strong*, 78 Miss. 565, 29 So. 530; *Arthur v. Adam*, 49 Miss. 404. **Mont.**—*Hoffman v. Gallatin Co.*, 18 Mont. 224, 44 Pac. 973. **Neb.**—*Haskell v. Valley*, 41 Neb. 234, 59 N. W. 680. **N. C.**—*Brown v. Plott*, 129 N. C. 272, 40 S. E. 45. **Okla.** *Parker v. Board of Comrs. of Tillman County*, 41 Okla. 723, 139 Pac. 981; *Territory ex rel. Ridings v. Neville*, 10 Okla. 79, 60 Pac. 790. **Ore.**—*Carothers v. Wheeler*, 1 Ore. 194. **S. C.**—*Cun-*

choice of either prosecuting an appeal or bringing an independent action at law or in equity.⁵ No appeal lies, as a rule, from decisions of county boards made in the exercise of purely administrative or governmental powers,⁶ unless the statute in express terms authorizes an appeal in such cases.⁷

An appeal may be taken only from a final decision of a county board.⁸ A party having a claim against a county cannot split it so as to accept part of the amount allowed and appeal from the decision rejecting the balance.⁹

2. Parties.—While an appeal from a decision of a county board can be brought only by a party interested in the subject matter,¹⁰ it is held under statutes authorizing any person aggrieved by the decision of a county board to bring an appeal therefrom, that the ap-

ningham *v.* Clarendon County, 81 S. C. 201, 62 S. E. 212. **S. D.**—Hoyt *v.* Hughes County, 32 S. D. 117, 142 N. W. 471. **Tenn.**—Carey *v.* Campbell Co., 5 Sneed 515. **Tex.**—Polk *v.* Roebuck (Tex. Civ. App.), 184 S. W. 513. **Wash.** Baum *v.* Sweeney, 5 Wash. 712, 32 Pac. 778.

[a] **Construction of Statute.**—A statute giving generally the right of appeal from decisions of county boards is applicable only to decisions in matters of claims or demands against the county in its quasi corporate capacity. Bowersox *v.* Seneca, 20 Ohio St. 496.

[b] **An order allowing a claim is appealable.** McCollom *v.* Shaw, 21 Ind. App. 63, 51 N. E. 488.

[c] **The decision of a county board confirming an award upon a claim against the county and ordering the issuance of a warrant is one from which an appeal lies.** Myers *v.* Gibson, 147 Ind. 452, 46 N. E. 914.

5. Colo.—Wasson *v.* Hoffman, 4 Colo. App. 491, 36 Pac. 445. **Idaho.**—Ada *v.* Gess, 4 Idaho 611, 43 Pac. 71. **Ind.** Board of Comrs. of Lake County *v.* State, 179 Ind. 644, 102 N. E. 97; Western Constr. Co. *v.* County of Carroll, 178 Ind. 684, 98 N. E. 347. **Ia.** Curtis *v.* Cass, 49 Iowa 421. **Kan.** Leavenworth *v.* Brewer, 9 Kan. 307. **Minn.**—Gutches *v.* Todd, 44 Minn. 383, 46 N. W. 678. **Miss.**—Taylor *v.* Marion, 51 Miss. 731. **Mo.**—Reppy *v.* Jefferson, 47 Mo. 66. **Mont.**—Greeley *v.* Cascade, 22 Mont. 580, 57 Pac. 274. **Nev.** Waitz *v.* Ormsby, 1 Nev. 370. **Wyo.** Boswell *v.* Albany, 1 Wyo. 235.

As to remedy by mandamus, see *supra*, IV.

As to remedy by injunction, see *supra*, V.

6. Ind.—Huntington Co. *v.* Beaver, 156 Ind. 450, 60 N. E. 150. **Kan.** Hayes *v.* Rogers, 24 Kan. 143. **Neb.** Roberts *v.* Thompson, 82 Neb. 458, 118 N. W. 106.

[a] **Insurance Contract.**—The power exercised by a county board in entering into insurance contracts is purely ministerial or administrative in its character and the board in exercising it acts not as a court but as the county in its corporate capacity, and such acts cannot be reviewed and set aside on appeal. Potts *v.* Bennett, 140 Ind. 71, 39 N. E. 518.

[b] **The submission of the question of the sale of intoxicating liquors is a purely administrative act of a county board and no appeal lies, but certiorari is the proceeding to review the question of jurisdiction or authority of the board to call an election for that purpose.** State *v.* Board of Tripp County, 29 S. D. 358, 137 N. W. 354.

[c] **Setting Off New Township.** Where the board of county commissioners refuses to grant a petition to set off and organize a new township, one of the petitioners has no right to appeal from such refusal. Fulkerson *v.* Harper County, 31 Kan. 125, 1 Pac. 261.

7. Huntington Co. v. Beaver, 156 Ind. 450, 60 N. E. 150.

8. Washington County v. Murray, 45 Colo. 115, 100 Pac. 588; Collins *v.* Laybold, 182 Ind. 126, 104 N. E. 971; Nisius *v.* Chapman, 178 Ind. 494, 99 N. E. 785.

9. Clyne v. Bingham, 7 Idaho 75, 60 Pac. 76.

10. Chicot v. Tilghman, 26 Ark. 461; Morath *v.* Gorham, 11 Wash. 577, 40 Pac. 129.

pellant need not be a party to the proceedings before the board.¹¹ The county cannot be joined with the board as a party to the appeal from a decision of the board.¹²

3. Manner of Taking Appeal.—Where the mode of appealing from a judgment of a county board is prescribed by the statute, the terms of the statute must be strictly complied with.¹³ The party appealing must serve notice of appeal on the county board,¹⁴ and under some statutes must furnish an appeal bond¹⁵ to be approved by the clerk of the county board¹⁶ or the county auditor.¹⁷ But in some states no bond is required.¹⁸

In some jurisdictions a complete transcript of the proceedings of the county board must be transmitted to the clerk of the court to which the appeal is taken,¹⁹ while in others appellant under the statute may embody the facts and evidence in a bill of exceptions to be signed by the president of the board.²⁰

11. *Myers v. Gibson*, 147 Ind. 452, 46 N. E. 914; *Wilson v. Wallace*, 64 Miss. 13, 8 So. 128; *Deberry v. President Holly Springs*, 35 Miss. 385.

[a] **An affidavit showing the nature of appellant's interest** in the subject matter must be filed where the appeal is brought by an aggrieved person who was not a party to the proceedings before the board. *Matter v. Stout*, 93 Ind. 19; *Robinson v. Vanderburg*, 37 Ind. 333; *Robbins v. Board of Marshall*, 24 Ind. App. 341, 56 N. E. 729.

[b] **A taxpayer appealing from an allowance of a claim against a county** is an aggrieved party within the meaning of such statute. *Workman v. Bent*, 45 Ind. App. 75, 90 N. E. 85.

12. *Gorman v. Boise Co.*, 1 Idaho 627.

13. *Bridges v. Clay*, 57 Miss. 252.

14. *Carothers v. Wheeler*, 1 Ore. 194; *Morath v. Gorman*, 11 Wash. 577, 40 Pac. 129.

[a] **Under a statute declaring that an acknowledgment of service by the defendant shall be sufficient, an acknowledgment of service of notice of appeal, by the auditor, shows proper service, although the auditor technically speaking is not a defendant.** *Libbey v. McIntosh*, 60 Iowa 329, 14 N. W. 354.

15. **Ind.**—*Myers v. Gibson*, 147 Ind. 452, 46 N. E. 914; *Shirk v. Moore*, 96 Ind. 199. **Neb.**—*Cedar v. McKinney L. & I. Co.*, 1 Neb. (Unof.) 411, 95 N. W. 605. **Wash.**—*Morath v. Gorman*, 11 Wash. 577, 40 Pac. 129.

16. *Morath v. Gorman*, 11 Wash. 577, 40 Pac. 129.

[a] **Discretion of Clerk.**—Where the statute vests in the county clerk the authority to approve an appeal bond, the exercise of the clerk's discretion in the matter will not be interfered with by the court unless it is exercised in arbitrary manner. *Monroe v. Beebe*, 10 Okla. 581, 64 Pac. 10.

[b] **Where the appeal bond is not approved within the statutory period, the appeal must be dismissed.** *Cedar v. McKinney L. & I. Co.*, 1 Neb. (Unof.) 411, 95 N. W. 605.

17. *Moffit v. State*, 40 Ind. 217.

18. *Ravenscraft v. Blaine*, 5 Idaho 178, 47 Pac. 942; *Monroe County v. Strong*, 78 Miss. 565, 29 So. 530.

19. *Clyne v. Bingham*, 7 Idaho 75, 60 Pac. 76; *Shirk v. Moore*, 96 Ind. 199.

[a] **If the transcript is not filed the appeal will be dismissed.** *Clyne v. Bingham*, 7 Idaho 75, 60 Pac. 76. See *Shirk v. Moore*, 96 Ind. 199, dismissing appeal on the ground no bond and transcript were filed.

[b] **The omission of the county clerk to transmit the papers within the time prescribed by the statute does not deprive appellant of the benefits of his appeal.** *Humbird Lumber Co. v. Kootenai County*, 10 Idaho 490, 79 Pac. 396.

20. *Bridges v. Clay*, 57 Miss. 252.

[a] **A bill of exceptions not signed by the presiding officer of the board but simply certified by the county clerk cannot be considered by the court on appeal.** *Union, etc. Bank v. Board of Thurston Co.*, 65 Neb. 408, 91 N. W. 286, 92 N. W. 1022.

4. Hearing on Appeal.—An appeal vacates the order of the county board and the cause must be tried *de novo*.²¹ In some cases it is held that no pleadings are required to be filed on appeal,²² although the court in its discretion may order or permit formal pleadings to be filed.²³ But under some statutes providing for a trial *de novo* on appeal, pleadings must be filed and issues joined.²⁴ The appellate court is confined to the matters upon which the county board acted.²⁵ Issues of fact on appeal from a decision of a county board must be submitted to a jury in accordance with the general rules unless a jury trial is waived.²⁶

5. Disposition of Appeal.—The action of a county board will not be disturbed on appeal unless there is a clear abuse of discretion.²⁷ The court hearing the appeal may either direct the board to take the necessary legal steps or render a final judgment and make all necessary orders for the enforcement thereof.²⁸ Where the appeal is dismissed

21. Idaho.—*Ilo v. Ramey*, 18 Idaho 642, 112 Pac. 126; *Gardner v. Blaine County*, 15 Idaho 698, 99 Pac. 826. **Ind.**—*Myers v. Gibson*, 152 Ind. 500, 53 N. E. 646; *Sharp v. Malia*, 124 Ind. 407, 25 N. E. 9. **Ia.**—*Young v. Rann*, 111 Iowa 253, 82 N. W. 785. **Mo.**—*Scott County v. Leftwich*, 145 Mo. 26, 46 S. W. 963. **Mont.**—*State v. Minar*, 13 Mont. 1, 31 Pac. 723. **Neb.** *Loup County v. Wirsig*, 73 Neb. 505, 103 N. W. 56; *Box Butte Co. v. Noleman*, 54 Neb. 239, 74 N. W. 582. **S. C.** *Buttz v. Charleston*, 17 S. C. 586.

[a] An appeal from a nonjudicial order of the county board does not stay the order. *Hayes v. Rogers*, 24 Kan. 143.

[b] Findings of fact are required. *Reynolds v. Oneida*, 6 Idaho 787, 59 Pac. 730.

22. Jefferson v. Patrick, 12 Kan. 605. See *Gibson Co. v. Emmerson*, 95 Ind. 579.

[a] The verified claim presented to the county board serves as the complaint and the order of the board fulfills the functions of an answer thereto. *Orange v. Hon*, 87 Ind. 356; *Tarbox v. Adams*, 34 Wis. 558.

[b] A defective statement of demand may be amended on appeal. *Orange v. Hon*, 87 Ind. 356.

23. Tarbox v. Adams, 34 Wis. 558.

[a] Answer by County.—Where it does not appear from the order of the board upon what ground the claim was rejected it is proper to permit the county board to file an answer on appeal from its decision. *Baker v. Columbia*, 39 Wis. 444.

[b] Demurrer.—Where formal pleadings are filed by an order of the court, the complaint filed by claimant may be demurred to as in other cases. *Smith v. Barron*, 44 Wis. 686.

24. Box Butte v. Noleman, 54 Neb. 239, 74 N. W. 582.

[a] Form of Complaint.—Where the filing of a complaint is required it must be substantially identical with the demand as presented to the board. *Thomas v. Scott County*, 15 Minn. 324.

25. Parker v. Board of Comrs. of Tillman County, 41 Okla. 723, 139 Pac. 981; *Bostwick v. Board of County Comrs.*, 19 Okla. 92, 91 Pac. 1125.

[a] Affidavits on behalf of the county which were not before the county board when the claim was adjudicated by the board cannot be considered on appeal. *Cunningham v. Clarendon County*, 81 S. C. 201, 62 S. E. 212.

26. Fisher v. Bannock, 4 Idaho 381, 39 Pac. 552; *Orange Co. v. Hon*, 87 Ind. 356, the party has a constitutional right to jury trial.

As to right to trial by jury generally, see the title "Juries and Jurors."

27. Reynolds v. Oneida, 6 Idaho 787, 59 Pac. 730.

28. County Comrs. of Logan County v. State Capital Co., 16 Okla. 625, 86 Pac. 518.

[a] A default judgment against the county for want of appearance without an adjudication of the matter on the merits cannot be entered, however. *State v. Minar*, 13 Mont. 1, 31 Pac. 723.

for any cause the decision of the board again becomes effective as if no appeal had been taken.²⁹

6. Review of Appellate Decision.—Under some statutes the judgment of a court on appeal from a decision of a county board may be reviewed by appeal or on error.³⁰

C. APPEALS FROM DECISIONS OF CITY BOARDS.—Statutes sometimes authorize appeals to courts from the judgment or decision of the municipal authorities of a city, town or village,³¹ but no such right exists in the absence of statute.³²

D. MANDAMUS.—Where a municipal board acts judicially, mandamus does not lie to correct an erroneous decision.³³

E. INJUNCTION.—The remedy by injunction is not available where the municipal board acted within the limits of its statutory power.³⁴

F. CERTIORARI.—Certiorari will lie to review judicial or quasi-judicial acts of municipal corporations and their boards,³⁵ but not to

29. *State v. Burgett* (Ind.), 49 N. E. 884.

30. See generally the statutes and the following: *Miss.*—*Crump v. Board of Suprs. of Colfax County*, 52 Miss. 107, writ of error. *Ohio.*—*Mannix v. Hamilton*, 43 Ohio St. 210, 1 N. E. 322. *Wis.*—*Warner v. Board of Suprs. of Outagamie County*, 19 Wis. 611.

[a] Objections not raised at the trial in the circuit court are not looked on with favor when raised for the first time in the supreme court. *Warner v. Board of Suprs. of Outagamie County*, 19 Wis. 611.

31. *Polk v. Hattiesburg*, 109 Miss. 872, 69 So. 675; *Greenwood v. Henderson*, 84 Miss. 802, 37 So. 745 (bill of exceptions is necessary); *Yerger v. Greenwood*, 77 Miss. 378, 27 So. 620, appeal from judgment changing boundaries. See *Greenville v. Eichelberger*, 44 S. C. 351, 22 S. E. 345 (under statute giving mayor and aldermen power to try and punish persons violating ordinances); *City Council v. Brown*, 42 S. C. 184, 20 S. E. 56, distinguished in *Ex parte Evans*, 72 S. C. 547, 52 S. E. 419, holding no appeal lies from a refusal of a permit to build a house.

32. *Walsh v. Town Council*, 18 R. I. 88, 25 Atl. 849.

[a] **Statute Construed.**—A statute providing that any appeal may be taken within a designated time after a judgment or decree of a town council without naming any court to which the appeal may be taken, is a mere limitation on the time of appeal, should the right to appeal be granted. *Paw-*

catuck Valley S. R. Co. v. Town Council of Westerly, 22 R. I. 307, 47 Atl. 691; *Wash v. Town Council of Johnston*, 18 R. I. 88, 25 Atl. 849.

33. *People v. McCormick*, 106 Ill. 184; *People ex rel. Baldwin v. Livingston County Suprs.*, 26 Barb. (N. Y.) 118. See *supra*, IV; and generally the title "Mandamus."

[a] Mandamus does not lie to compel a county board to render a different decision, as within the limits of its jurisdiction such board is a court invested with power to pass upon questions involving judicial discretion. *State v. Board of Tippecanoe County*, 131 Ind. 90, 30 N. E. 892.

[b] **Non-judicial Action.**—But the decision of a county board on the question of the sufficiency of a notice of a meeting of the board to act upon a petition for the removal of the county seat is not judicial, and is subject to be reviewed by mandamus. *State v. Board Scott County*, 43 Minn. 322, 45 N. W. 614.

34. *Bailey v. Board, etc. of Sullivan County*, 57 Ind. App. 285, 107 N. E. 38. See *supra*, V.

35. *Cal.*—*Brown v. San Francisco*, 124 Cal. 274, 57 Pac. 82; *Robinson v. Sacramento*, 16 Cal. 208; *People v. Eldorado*, 8 Cal. 58. *Ga.*—*Carr v. Augusta*, 124 Ga. 116, 52 S. E. 300. *Mass.*—*Selectmen of Holliston v. New York C. & H. R. R. Co.*, 195 Mass. 299, 81 N. E. 204; *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. 554. *N. H.*—*Hagerty v. Shedd*, 75 N. H. 393, 74 Atl. 1055, 139 Am. St. Rep. 725. *N. Y.*

review acts which are simply ministerial, legislative, or executive.³⁶

G. COLLATERAL ATTACK.—The decisions of a county board cannot be collaterally impeached,³⁷ except where the board in making the decision exceeded its jurisdiction.³⁸

Gillespie *v.* Broas, 23 Barb. 370; *People ex rel. Moore v. Mayor of New York*, 5 Barb. 43; *Ex parte Elmendorf v. Mayor of New York*, 23 Wend. 693; *In re Mt. Morris Square*, 2 Hill 14.

See generally the title "Certiorari."

[a] The ratification of estimates and assessments reported by commissioners to the council is a judicial act reviewable by certiorari. *People ex rel. Moore v. Mayor of New York*, 5 Barb. (N. Y.) 43. See also *Foley v. Haverhill*, 144 Mass. 352, 11 N. E. 554, citing local cases.

[b] The allowance of claims and accounts is reviewable on certiorari. *Robinson v. Sacramento*, 16 Cal. 208; *People v. El Dorado*, 8 Cal. 58; *Gillespie v. Broas*, 23 Barb. (N. Y.) 370.

[c] An order changing grade of highway may be reviewed on certiorari. *Powers v. Springfield*, 116 Mass. 84; *Boston & A. R. Co. v. Hampden*, 116 Mass. 73.

Certiorari to review action in removing officers, see the title "Officers."

36. Cal.—*Brown v. San Francisco*, 124 Cal. 274, 57 Pac. 82; *Robinson v. Sacramento*, 16 Cal. 208. Ga.—*Carr v. Augusta*, 124 Ga. 116, 52 S. E. 300. Me.—*Harlow v. Pike*, 3 Me. 438. N. Y.—*People ex rel. Moore v. Mayor of New York*, 5 Barb. 43; *In re Mt. Morris Square*, 2 Hill 14.

[a] The passage of ordinances is not reviewable on certiorari. *Carr v. Augusta*, 124 Ga. 116, 52 S. E. 300.

[b] The revocation of a liquor license is not reviewable on certiorari unless the license is revoked for cause under an ordinance providing certain acts are cause for revocation. *Carr v. Augusta*, 124 Ga. 116, 52 S. E. 300.

37. Cal.—*County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Waugh v. Chauncey*, 13 Cal. 11. Ind.—*Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175; *Bailey v. Board, etc. of Sullivan County*, 57 Ind. App. 285, 107 N. E. 38. Ia.—*Bennett v. Hetherington*, 41 Iowa 142. Me.—*Blaisdell v. Inhab. of York*, 110 Me. 500, 87 Atl.

361. Md.—*Pettit v. Wicomico County*, 123 Md. 128, 90 Atl. 993, Ann. Cas. 1916C, 35. Mass.—*Brewer v. Boston, C. & F. R. Co.*, 113 Mass. 52. Miss.—*Hinton v. Perry County*, 84 Miss. 536, 36 So. 565; *Arthur v. Adam*, 49 Miss. 404. Neb.—*Lancaster County v. Lincoln Assn.*, 87 Neb. 87, 127 N. W. 226. Ohio.—*Blanchard v. Bissell*, 11 Ohio St. 96. S. C.—*Cunningham v. Clarendon County*, 81 S. C. 201, 62 S. E. 212. Tex.—*Polk v. Roebuck* (Tex. Civ. App.), 184 S. W. 513. Wis.—*Bartlett v. Eau Claire*, 112 Wis. 237, 88 N. W. 61.

[a] The decision of a county board "is conclusive upon all questions essential to the validity of the judgment pronounced by it, and these questions cannot be again litigated except in case of a direct attack upon the judgment." Bd. of Comrs. of *Knox County v. Montgomery*, 106 Ind. 517, 6 N. E. 915.

[b] Whether a public highway is demanded in any particular region, as well as its location and extent, are matters of a political or legislative character, and the board's determination is not subject to collateral attack. *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621.

[c] Presumption on Collateral Attack.—In the absence of averments clearly showing that the county board had no jurisdiction of the matters complained of, every presumption will be indulged in favor of orders and proceedings of such board in a collateral attack. *Stingley v. Nichols, Shepherd & Co.*, 131 Ind. 214, 30 N. E. 34; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487.

38. Idaho.—*Fremont County v. Brandon*, 6 Idaho 482, 56 Pac. 264. Ind.—*Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175. Ia.—*Bennett v. Hetherington*, 41 Iowa 142. Md.—*Pettit v. Wicomico County*, 123 Md. 128, 90 Atl. 993, Ann. Cas. 1916C, 35. Mass.—*Selectmen of Holliston v. New York C. & H. R. R. Co.*, 195 Mass. 299, 81 N. E. 204. Miss.—*Beaman v. Police Board of Leake County*, 42 Miss. 237.

H. REVIEW OF ANNEXATION PROCEEDINGS. — Taxpayers of a municipality generally may under the statute appeal from proceedings ordering the annexation of a territory to the municipality,³⁹ or denying a petition to exclude certain territory from its limits.⁴⁰ In a proper case equity will enjoin an illegal annexation or detachment of territory,⁴¹ or the collection of taxes assessed upon land illegally annexed.⁴²

VIII. CRIMINAL PROSECUTIONS AGAINST MUNICIPAL CORPORATIONS. — Municipal corporations are subject to criminal prosecution for misfeasance as well as non-feasance,⁴³ provided that

Ohio.—See *State v. McClymmon*, 7 Ohio Dec. (Reprint) 109, 1 Wkly. L. Bul. 116. Tex.—*Polk v. Roebuck* (Tex. Civ. App.), 184 S. W. 513.

[a] An allowance to a county officer of compensation to which he was not entitled by law is void for want of jurisdiction and is subject to collateral attack. *Kootenai County v. Dittmore*, 12 Idaho 758, 88 Pac. 232.

[b] But the fact that the clerk omitted to sign the minutes of the board before final adjournment of the meeting is not a sufficient ground to render the record subject to a collateral attack where the minutes were subsequently signed by the clerk and approved by the board. *Derosia v. Loree*, 158 Mich. 64, 122 N. W. 357.

39. Colo.—*Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092. Ind.—*Forsythe v. Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576. Kan.—*Nash v. Glen Elder*, 74 Kan. 756, 88 Pac. 62.

[a] Under a statute allowing appeal generally from decisions of a board of commissioners, a decision of such board in annexation proceedings is appealable although the statute pertaining to annexation proceedings does not expressly provide for an appeal. *Patterson v. Ft. Branch*, 62 Ind. App. 333, 113 N. E. 319.

[b] Parties who filed a protest in the county court against the annexation of a designated territory have the right to appeal from the judgment of such court, even though they were not made parties to the proceedings in the county court. *Barnwell v. Gravette*, 87 Ark. 430, 112 S. W. 973.

[c] Scope of Appeal.—An appeal in annexation proceedings should be distinguished from ordinary suits or proceedings and is permissible only to correct an abuse of discretion, or irreg-

ularity in the proceedings or mistake of law resulting in prejudice to public or private rights, although the statute provides for a hearing de novo. *Dodson v. Fort Smith*, 33 Ark. 508.

[d] Discretion not reviewed unless clearly abused. Ind.—*Windfall Mfg. Co. v. Emery*, 142 Ind. 456, 41 N. E. 814. La.—*Lawrence v. Mansfield*, 129 La. 672, 56 So. 633. Neb.—*Chapin v. College View*, 88 Neb. 229, 129 N. W. 297; *Bisenius v. Randolph*, 82 Neb. 520, 118 N. W. 127; *Gregory v. Franklin*, 77 Neb. 62, 108 N. W. 147. S. D. *Qualey v. Brookings*, 18 S. D. 581, 101 N. W. 713.

[e] Only that part of the decision which is judicial in its nature, will be reviewed. *Nash v. Glen Elder*, 74 Kan. 756, 88 Pac. 62.

40. Meek v. State, 172 Ind. 654, 88 N. E. 299, 89 N. E. 307; *Thomas v. Long Beach*, 111 Miss. 329, 71 So. 570.

41. *Paul v. Walkerton*, 150 Ind. 565, 50 N. E. 725; *Blanchard v. Bissell*, 11 Ohio St. 96. See *supra*, V, J, 3.

42. *Windman v. Vincennes*, 58 Ind. 480.

As to injunction against taxation, see the title "Taxation." And see *supra*, V, J, 3.

43. Ky.—*Com. v. Hopkinsville*, 7 B. Mon. 38. Me.—*State v. Portland*, 74 Me. 268, 43 Am. Rep. 586; *State v. Madison*, 63 Me. 546; *Davis v. Bangor*, 42 Me. 522. Mass.—*Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63. N. H. *State v. Dover*, 46 N. H. 452. N. J. *Lodi v. State*, 53 N. J. L. 259, 21 Atl. 457. Pa.—*Phillips v. Com.*, 44 Pa. 197; *Com. v. Lansford Borough*, 3 Pa. Dist. 365. Tenn.—*McCrowell v. Bristol*, 5 Lea 685; *State v. Murfreesboro*, 11 Humph. 217; *State v. Barksdale*, 5 Humph. 154. Vt.—*State v. Whitingham*, 7 Vt. 390. Wis.—*Saukville v. State*, 69 Wis. 178, 33 N. W. 88.

it is within their authority to prevent the act.⁴⁴ Thus, municipal corporations are liable to indictment for neglect to keep in repair highways, streets and bridges,⁴⁵ for failure to maintain schools as required under the statute,⁴⁶ for creating a nuisance,⁴⁷ and for failing to remove the same.⁴⁸ But a municipality cannot be indicted for the maintenance of a nuisance which is not occasioned by its officers but by private persons.⁴⁹ And generally a municipal corporation is not criminally liable for the acts of its officers in enforcing or for the failure to enforce the penal ordinances of the city in reference to abatement of nuisances.⁵⁰

The indictment should be against the municipality as a corporate body,⁵¹ and must follow the general rules of criminal pleading.⁵² It is not necessary to allege that the defendant is a duly organized corporation where that fact is judicially noticed.⁵³

[a] **For What Crimes Punishable.** In *Com. v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339, the rule that municipal corporations may be indicted for a misfeasance is stated in the following language: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them."

44. *Com. v. Paducah*, 6 Ky. L. Rep. 292.

45. See 11 STANDARD PROC. 116, et seq.

46. *Com. v. Dedham*, 16 Mass. 141.

47. *Com. v. New Bedford Bridge*, 2 Gray (Mass.) 339; *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921.

48. *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

49. *Davis v. Bangor*, 42 Me. 522; *State v. Burlington*, 36 Vt. 521.

50. *Georgetown v. Com.*, 115 Ky. 382, 73 S. W. 1011, 61 L. R. A. 673.

[a] But where a municipality by its charter is authorized to enact ordinances for the preservation of public

health and removal of nuisances, an indictment lies against it for neglect of public duty. *State v. Shelbyville*, 4 Sneed (Tenn.) 176.

51. *Com. v. Ephrata Council*, 2 Pa. Dist. 349.

[a] **Municipal officers cannot be indicted individually for a nuisance** consisting of acts done by them in compliance with an ordinance. *Com. v. Ephrata Council*, 2 Pa. Dist. 349.

[b] **Where municipal officers are named in an indictment against a municipality** they are not indicted as individuals but in their corporate capacity. *Com. v. Bredin*, 165 Pa. 224, 30 Atl. 921; *State v. Barksdale*, 5 Humph. (Tenn.) 154.

52. See generally the title "Indictment and Information."

[a] **In an indictment for failure to keep a highway in repair**, a general allegation that the highway was duly laid out and established is sufficient without a statement of authority to do so. *State v. Madison*, 63 Me. 546. See generally the title "Highways, Streets and Bridges."

[b] **In an indictment for maintaining a nuisance**, negligence not being an essential element of the offense need not be alleged. *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

53. *State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *Saukville v. State*, 69 Wis. 178, 33 N. W. 88.

MUNICIPAL SECURITIES. — See Municipal Corporations.

MURDER. — See **Homicide.**

MUSEUM. — See **Theaters and Shows.**

MUTUAL AID SOCIETIES. — See **Beneficial Associations.**

MUTUAL BENEFIT INSURANCE. — See **Insurance.**

NAMES

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CROSS-REFERENCES:

Abbreviations;	Judgments;
Amendments and Jeofails;	New Cause of Action or Defense;
Certainty in Pleading;	Officers;
Indictment and Information;	Parties;
	Process.

For further references and cross-references see the index to this work and the notes throughout this article.

I. HOW ALLEGED.—A person must be designated in the pleadings by name, and not merely by a general description, to become a party to an action.¹ Ordinarily a party should sue or be sued by his true name,² but a person may be sued by a fictitious name, the true name to be inserted by amendment when it becomes known,³ and an abbreviation for the Christian name may be used in the pleading under some circumstances.⁴ A person suing under an assumed or trade name, will afterwards, in his real name, be estopped from denying the validity of the judgment.⁵ The name of a party should be the same in the declaration as it is in the writ.⁶

1. **Ala.**—*Sossman v. Price*, 57 **Ala.** 204. **Ia.**—*Reynolds v. May*, 4 **G. Gr.** 283. **N. C.**—*Kerlee v. Corpening*, 97 **N. C.** 330, 2 **S. E.** 664. **W. Va.**—*Coal & Coke Ry. Co. v. Taylor*, 63 **W. Va.** 103, 59 **S. E.** 941, "Italian number 37, whose name is unknown," held a sufficient designation within the meaning of the statute.

As to designation and description of parties generally, see 6 **STANDARD PROC.** 648.

As to designation of parties in bills in equity, see 4 **STANDARD PROC.** 111.

As to allegation of names of beneficiaries in an action for death by wrongful act, see 6 **STANDARD PROC.** 414.

As to designation of names in the process, see the title "Process."

2. See 6 **STANDARD PROC.** 649, and *infra*, this section, the catch line "Actions Upon Contract."

3. See 4 **STANDARD PROC.** 839; 6 **STANDARD PROC.** 649.

Judgment against one by wrong name, see 14 **STANDARD PROC.** 863; 15 **STANDARD PROC.** 62.

In Indictment or Information.—As to amendment or entry of true name of accused, see 12 **STANDARD PROC.** 550.

As to whether service of the complaint is necessary after an amendment by the insertion of the true name, see

the title "Service of Process and Papers."

4. As to use of initials in civil cases, see 6 **STANDARD PROC.** 650; 4 **STANDARD PROC.** 839; 15 **STANDARD PROC.** 64.

In a Criminal Case.—As to use of abbreviations of Christian name of accused in criminal case, see 12 **STANDARD PROC.** 364, *et seq.*; of a third person, see 12 **STANDARD PROC.** 371, *et seq.*

As Ground for Demurrer.—As to whether designation of a party by initials instead of his Christian name is ground for demurrer, see 6 **STANDARD PROC.** 921.

5. See 6 **STANDARD PROC.** 650.

Former recovery as a bar to a subsequent suit between parties nominally different, see 15 **STANDARD PROC.** 511.

Judgment against one in fictitious or wrong name, see 15 **STANDARD PROC.** 62.

6. **Ala.**—*Beene v. Cahawba & Marion R. R. Co.*, 3 **Ala.** 660. **Ill.**—*Schoonhoven v. Gott*, 20 **Ill.** 46; *People v. Bruner*, 190 **Ill. App.** 299. **N. J.**—*Bowen v. Mulford*, 10 **N. J. L.** 230. **W. Va.**—*Hoffman v. Dickinson*, 31 **W. Va.** 142, 6 **S. E.** 53; *Hoffman v. Bircher*, 22 **W. Va.** 537.

Conformity of process with pleading, see the title "Process."

As to necessity of declaration con-

The anglicized spelling of a foreign name may be used in the pleadings of an action or other proceeding.⁷

Action Upon Contract.—Where an instrument is executed to a party by a wrong name, he must sue in his true name⁸ and allege in his declaration that the instrument was executed to him in the name given in the instrument.⁹ So if a party brings an action upon an instrument wherein he is designated by his initials, he must aver in his pleading what his name really is.¹⁰ In some jurisdictions, it is provided by statute that a person may sue or be sued in the same name by which he is designated in the written instrument upon which the action is brought.¹¹ And where a judgment has been recovered against a person under an erroneous name, in future litigation thereon his true name may be stated, and he may be connected with the judgment by proper averments.¹²

II. IDEM SONANS.—A. IN GENERAL.—The law does not regard the spelling of names so much as their sound,¹³ and by the doc-

forming to the writ, generally, see 6 STANDARD PROC. 668; variance as ground of demurrer, see 6 STANDARD PROC. 910.

As to necessity of setting out the writ in a plea in abatement which avers a variance between it and the declaration, see 1 STANDARD PROC. 52.

7. **U. S.**—Miller v. Petrocelli, 236 Fed. 846, 150 C. C. A. 108. **Mont.** State v. Thompson, 10 Mont. 549, 27 Pac. 349. **Pa.**—Alexander v. Com., 105 Pa. 1, Sabato Alexander for Sabato D'Allessandro. **Tex.**—Cerde v. State, 33 Tex. Crim. 458, Philip for Felipe.

[a] When the name is a foreign one, the variance of a letter which, according to the pronunciation of that language, does not vary the sound, is not a misnomer. Hart v. Lindsey, 17 N. H. 235, 239, 43 Am. Dec. 597. As to idem sonans, see *supra*, II.

8. **Ill.**—Pinckard v. Milmine, 76 Ill. 453; Northwestern Distill. Co. v. Brant, 69 Ill. 658, 661, 18 Am. Rep. 631; Steinfeld v. Taylor, 51 Ill. App. 399. **Mass.** Medway Cotton Mfg. Co. v. Adams, 10 Mass. 360. **N. J.**—Alloways Creek v. String, 10 N. J. L. 323; Middletown v. McCormick, 3 N. J. L. 92. **N. Y.**—New York African Society v. Varick, 13 Johns. 38. **Tenn.**—McMinn Academy v. Reneau, 2 Swan 94.

As to necessity of suing in true name generally, see 6 STANDARD PROC. 649, et seq.; also 4 STANDARD PROC. 839.

9. **Ill.**—Pinckard v. Milmine, 76 Ill. 453; Northwestern Distilling Co. v. Brant, 69 Ill. 658, 661, 18 Am. Rep.

631. **N. J.**—Alloways Creek v. String, 10 N. J. L. 323; Middletown v. McCormick, 3 N. J. L. 92. **N. Y.**—New York African Society v. Varick, 13 Johns. 38. **Tenn.**—McMinn Academy v. Reneau, 2 Swan 94. **Eng.**—Abbot of York, 10 Coke 125, 77 Eng. Reprint 1115.

10. Curtis v. Valiton, 3 Mont. 153; Wiebold v. Hermann, 2 Mont. 609.

11. **Neb.**—Gillian v. McDowall, 66 Neb. 814, 92 N. W. 991. **N. J.**—Elberston v. Richards, 42 N. J. L. 69. **Eng.** Kinnersley v. Knott, 7 C. B. 980, 62 E. C. L. 980, 137 Eng. Reprint 388; Lomax v. Landells, 6 C. B. 577, 60 E. C. L. 577, 136 Eng. Reprint 1374; Gould v. Barnes, 3 Taunt. 504, 128 Eng. Reprint 200.

As to allegation of name of payee in action upon bills and notes, see 4 STANDARD PROC. 249, et seq.

12. **U. S.**—Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451. **Minn.**—Casper v. Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604. **S. C.**—Waldrop v. Leonard, 22 S. C. 118.

As to judgment against one by wrong name, see 14 STANDARD PROC. 863; 15 STANDARD PROC. 62.

13. **U. S.**—Alexis v. United States, 129 Fed. 60, 63 C. C. A. 502. **Ala.** Golson v. State (Ala. App.), 73 So. 753. **Ark.**—Taylor v. State, 72 Ark. 613, 82 S. W. 495. **Ga.**—Roland v. State, 127 Ga. 401, 56 S. E. 412. **Ill.** Tomeczak v. Bergman, 269 Ill. 330, 109 N. E. 1003. **Ind.**—Selby v. State, 161 Ind. 667, 69 N. E. 463; James v. State, 7 Blackf. 325, Adamson and Adanson. **Mo.**

trine of idem sonans, if the attentive ear finds difficulty in distinguishing between the names when they are pronounced, they will be regarded as the same, although spelled differently,¹⁴ and no variance will result if the proof shows a difference merely in the spelling of the name.¹⁵

B. PROVINCE OF COURT AND JURY.—If two names, spelled differently, necessarily sound alike, the court may, as a matter of law, pronounce them to be idem sonans,¹⁶ but if they do not necessarily sound

Scurry v. Lumber Co., 233 Mo. 686, 136 S. W. 294; *Silvey v. Silvey* (Mo. App.), 180 S. W. 1071. **N. H.**—*State v. Perkins*, 70 N. H. 330, 47 Atl. 268. **N. Y.**—*Sporza v. German Sav. Bank*, 119 App. Div. 172, 104 N. Y. Supp. 260. **Okla.**—*Maine v. Edmonds*, 160 Pac. 483. **Ore.**—*Smith v. Dwight*, 80 Ore. 1, 148 Pac. 477, 156 Pac. 573. **Pa.**—*Jones' Est.*, 27 Pa. 336. **Tex.**—*Henry v. State*, 7 Tex. App. 388. **Wash.**—*State v. Johnson*, 36 Wash. 294, 78 Pac. 903.

14. U. S.—*Alexis v. United States*, 129 Fed. 60, 63 C. C. A. 502. **Ala.**—*Howard v. State*, 151 Ala. 22, 44 So. 95 (Ravier and Reveal); *Edmundson v. State*, 17 Ala. 179, 52 Am. Dec. 169; *Golson v. State* (Ala. App.), 73 So. 753; *Culliver v. State* (Ala. App.), 73 So. 556; *Taylor v. State* (Ala. App.), 72 So. 557. **Ark.**—*Taylor v. State*, 72 Ark. 613, 82 S. W. 495. **Cal.**—*Galliano v. Kilfoy*, 94 Cal. 86, 29 Pac. 416, *Rosa and Rose*. **Ga.**—*Roland v. State*, 127 Ga. 401, 56 S. E. 412; *Veal v. State*, 116 Ga. 589, 42 S. E. 705. **Ill.**—*O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639; *Gahan v. People*, 58 Ill. 160. **Ind.**—*Selby v. State*, 161 Ind. 667, 69 N. E. 463; *Pinney v. State*, 156 Ind. 167, 59 N. E. 383; *Smurr v. State*, 88 Ind. 506; *Cleveland, C. C. & St. L. Ry. Co. v. Peirce*, 34 Ind. App. 188, 72 N. E. 604. **Ind. Ter.**—*Willis v. United States*, 6 Indian Ter. 424, 98 S. W. 147. **Kan.**—*Armstead v. Jones*, 71 Kan. 142, 80 Pac. 56. **Ky.**—*Gaither v. Com.*, 28 Ky. L. Rep. 1345, 91 S. W. 1124, *Vester and Vister*. **Minn.**—*State v. Provencher*, 129 Minn. 409, 152 N. W. 775. **Mo.**—*Scurry v. Lumber Co.*, 233 Mo. 686, 136 S. W. 294; *Silvey v. Silvey* (Mo. App.), 180 S. W. 1071; *Burge v. Burge*, 94 Mo. App. 15, 67 S. W. 703. **Mont.**—*State v. Thompson*, 10 Mont. 549, 27 Pac. 349. **N. H.**—*Hart v. Lindsey*, 17 N. H. 235, 239, 43 Am. Dec. 597. **N. Y.**—*Sporza v. German Sav. Bank*, 119 App. Div. 172, 104 N. Y. Supp. 260. **Okla.**—*Maine v.*

Edmonds, 160 Pac. 483. **Ore.**—*Smith v. Dwight*, 80 Ore. 1, 148 Pac. 477, 156 Pac. 573. **Pa.**—*Jones' Est.*, 27 Pa. 336; *Paul v. Johnson*, 9 Phila. 32, 29 Leg. Int. 4. **Tex.**—*Lunsford v. State* (Tex. Crim.), 190 S. W. 157; *Henry v. State*, 7 Tex. App. 388. **Wash.**—*State v. Johnson*, 36 Wash. 294, 78 Pac. 903.

[a] **Question of Pronunciation.** "The question whether one name is idem sonans with another is not a question of spelling, but of pronunciation, depending less upon rule than upon the usage." *Galliano v. Kilfoy*, 94 Cal. 86, 29 Pac. 416; *Com. v. Donovan*, 13 Allen (Mass.) 571. See generally 12 STANDARD PROC. 368, et seq.; and also 4 STANDARD PROC. 839.

15. U. S.—*Alexis v. United States*, 129 Fed. 60, 63 C. C. A. 502. **Ala.**—*Leath v. State*, 132 Ala. 26, 31 So. 108. **Ark.**—*Power v. Woolley*, 21 Ark. 462, *Woolley and Wolley*. **Ill.**—*O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639. **Ind.**—*Selby v. State*, 161 Ind. 667, 69 N. E. 463; *Pinney v. State*, 156 Ind. 167, 59 N. E. 383; *Cleveland, C. C. & St. L. Ry. Co. v. Peirce*, 34 Ind. App. 188, 72 N. E. 604. **Kan.**—*Rowe v. Palmer*, 29 Kan. 337, *Shaffer and Shafer*. **Md.**—*Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519, *Penryn and Pennyryne*. **Mo.**—*Cato v. Hutson*, 7 Mo. 142, 147, *Hutson and Hudson*. **Pa.**—*Bergman's Appeal*, 88 Pa. 120 (*Heckman and Hackman*); *Myer v. Fegaly*, 39 Pa. 429, 80 Am. Dec. 534, *Bupp and Bopp*. **Tex.**—*Thompson v. State* (Tex. Crim.), 97 S. W. 316 (*Morris and Maurice*); *Hall v. State*, 32 Tex. Crim. 594, 25 S. W. 292; *Ex parte Sawyers* (Tex. Crim.), 48 S. W. 512, *Sawyer and Sawyers*. **Wash.**—*State v. Johnson*, 36 Wash. 294, 78 Pac. 903. **W. Va.**—*Hoffman v. Bireher*, 22 W. Va. 537. **Wyo.**—*Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006.

16. Ga.—*Veal v. State*, 116 Ga. 589, 42 S. E. 705. **Mo.**—*State v. Havelly*,

alike, the question of whether they are idem sonans is one for the jury.¹⁷

III. PRESUMPTION OF IDENTITY.—Identity of person will ordinarily be presumed from identity of name,¹⁸ unless the facts or circumstances are such as to make such inference improper.¹⁹

IV. VARIANCE.²⁰—Ordinarily the pleading should conform to the proof in respect to names, as in all other material matters.²¹ Where the name of a third party is necessary to the description of the offense, proof of a different name than the one alleged in the indictment makes a variance.²² But the variance is not fatal if the identity of the party in the evidence is established with the one named in the indictment,²³ or if the defendant has not been misled or prejudiced in his defense.²⁴ If the name of a person is immaterial

21 Mo. 493. **Tex.**—Spoonemore v. State, 25 Tex. App. 358, 8 S. W. 280.

[a] **Idem Sonans Arising on Demurrer.**—Where the question of idem sonans arises on a demurrer to the plea of misnomer, it becomes a question of law for the court. *Munkers v. State*, 87 Ala. 94, 6 So. 357. And see also 12 STANDARD PROC. 368.

17. **Ala.**—See *Underwood v. State*, 72 Ala. 220. **Cal.**—*People v. Fick*, 89 Cal. 144, 26 Pac. 759, *Toy Fong and Choy Fong. Ga.*—*Veal v. State*, 116 Ga. 589, 42 S. E. 705. **Ill.**—*Amann v. People*, 76 Ill. 188. **Ind.**—*Siebert v. State*, 95 Ind. 471. **Mass.**—*Com. v. Warren*, 143 Mass. 568, 10 N. E. 178; *Com. v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249; *Com. v. Donovan*, 13 Allen 571; *Com. v. Mehan*, 11 Gray 321. **Mont.**—*State v. Thompson*, 10 Mont. 549, 27 Pac. 349. **N. H.**—*State v. Perkins*, 70 N. H. 330, 47 Atl. 263. **Tex.**—*Weitzel v. State*, 28 Tex. App. 523, 13 S. W. 864, 19 Am. St. Rep. 855; *Henry v. State*, 7 Tex. App. 388; *Spoonemore v. State*, 25 Tex. App. 358, 8 S. W. 280.

[a] **Waiver of Right To Submit Question to Jury.**—By failing to ask that the question whether two names are idem sonans be submitted to the jury, the right is waived. *Com. v. Gill*, 14 Gray (Mass.) 400.

18. **Ala.**—*Wilson v. Holt*, 83 Ala. 528, 3 So. 321. **Cal.**—*Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; *Douglas v. Dakin*, 46 Cal. 49; *Thompson v. Manrow*, 1 Cal. 428; *Bruschi v. Cooper*, 30 Cal. App. 682, 159 Pac. 728, 734. **Mich.**—*Goodell v. Hibbard*, 32 Mich. 47, 55. **Minn.**—*Morris v. McClary*, 43 Minn. 346, 46 N. W.

238. **Mo.**—*State v. Moore*, 61 Mo. 276; *Gitt v. Watson*, 18 Mo. 274; *State v. Black*, 12 Mo. App. 531. **Mont.**—*Stapleton v. Pease*, 2 Mont. 550. **N. J.**—*Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698. **N. Y.**—*People ex rel. Haines v. Smith*, 45 N. Y. 772; *Hatcher v. Rocheleau*, 18 N. Y. 86. **Pa.**—*Kelly v. Valney*, 5 Clark 300.

See 6 ENCY. OF EV. 913.

19. See 6 ENCY. OF EV. 913.

[a] **This presumption will not be applied to a case wherein a plaintiff sues a defendant having the same name as that of the plaintiff.** *Wilson v. Benedict*, 90 Mo. 208, 213, 2 S. W. 283. But see 6 ENCY. OF EV. 917.

20. See generally the title "**Variance and Failure of Proof.**"

21. See the title "**Variance and Failure of Proof,**" and 12 STANDARD PROC. 368; 11 STANDARD PROC. 1048.

22. **Ark.**—*Bennett v. State*, 84 Ark. 97, 104 S. W. 928. **Colo.**—*Moynahan v. People*, 3 Colo. 367. **Ga.**—*Lewis v. State*, 90 Ga. 95, 15 S. E. 697. **Ind.**—*Smurr v. State*, 88 Ind. 504. **Miss.**—*McBeth v. State*, 50 Miss. 81.

[a] **Variance Held Fatal.**—*Com. v. McAvoy*, 16 Gray (Mass.) 235 (Nathan Hoard and Nathan S. Hoard); *Com. v. Pope*, 12 Cush. (Mass.) 272, B. & W. Railroad Company and B. & W. Railroad Corporation.

As to necessity for and how name of third person alleged, see 12 STANDARD PROC. 369, et seq.

23. **Ark.**—*Bennett v. State*, 84 Ark. 97, 104 S. W. 928. **Mass.**—*Com. v. Shearman*, 11 Cush. 546. **Miss.**—*McBeth v. State*, 50 Miss. 81.

24. **Cal.**—*People v. Main*, 114 Cal. 632, 46 Pac. 612. **Ia.**—*State v. Craw-*

to constitute the offense, and may be rejected as surplusage, a variance in the name is not fatal.²⁵ Where an addition to a name is a mere matter of description and constitutes no part of the name, no material variance results where the name is averred in a pleading with such addition and given in the proof without it,²⁶ or where the averment is without the addition and the proof shows that the person is known with it,²⁷ nor is there any variance if the averment of the addition and the proof thereof is different.²⁸

V. ALLEGATION UNDER ALIAS.—Where a person is known by several names, he may be designated in legal proceedings by an alias.²⁹ Where the defendant is designated in the indictment under several names, it is unnecessary to prove that he was known and called by all such names.³⁰

VI. OBJECTIONS TO AND WAIVER OF MISNOMER.—A. OBJECTIONS.—A misnomer of the accused in an indictment or information is a ground for a plea in abatement,³¹ and has sometimes been made a ground of a motion to quash,³² or of demurrer.³³ But a

ford, 66 Iowa 318, 23 N. W. 684; *State v. Carr*, 43 Iowa 418. **Kan.**—*State v. Johnson*, 70 Kan. 861, 79 Pac. 732. **Mo.**—*State v. Harl*, 137 Mo. 252, 38 S. W. 919. **N. Y.**—*People v. Johnson*, 104 N. Y. 213, 10 N. E. 690.

As to necessity and sufficiency of name where corporation or partnership is injured party in embezzlement charge, see 8 STANDARD PROC. 236.

25. *Mayo v. State*, 7 Tex. App. 342, 346.

26. **Cal.**—*San Francisco v. Randall*, 54 Cal. 408. **Ind.**—*Ross v. State*, 116 Ind. 495, 19 N. E. 451; *Geraghty v. State*, 110 Ind. 103, 11 N. E. 1; *Allen v. State*, 52 Ind. 486. **Ia.**—*State v. Dankwardt*, 107 Iowa 704, 77 N. W. 495. **Me.**—*Whitney v. Dolloff*, 74 Me. 235; *State v. Grant*, 22 Me. 171. **Mass.** *Com. v. Parmenter*, 101 Mass. 211. **N. C.**—*State v. Best*, 108 N. C. 747, 12 S. E. 907. **Va.**—*O'Bannon v. Saunders*, 24 Gratt. (65 Va.) 138. **Wyo.**—*Harris v. State*, 23 Wyo. 487, 153 Pac. 881.

[a] But see *Boyden v. Hastings*, 17 Pick. (Mass.) 200, wherein the name was alleged as S. B. and the proof was S. B., Jr., and it was held to be a variance, fatal if plaintiff did not amend and pay costs. *Kincaid v. Howe*, 10 Mass. 203.

As to alleging name of defendant with addition, see 12 STANDARD PROC. 365, et seq.

As to necessity of alleging and proving addition of third person, see 12 STANDARD PROC. 374.

As to effect upon judgment of omis-

sion or addition of description, see 15 STANDARD PROC. 64.

27. **Ala.**—*Teague v. State*, 144 Ala. 42, 40 So. 312. **Ill.**—*Headley v. Shaw*, 39 Ill. 354. **Me.**—*State v. Grant*, 22 Me. 171. **Wyo.**—*Harris v. State*, 23 Wyo. 487, 153 Pac. 881.

[a] **Presumption From Use of Addition.**—(1) In *State v. Vittum*, 9 N. H. 519, the court, acting upon the general presumption that where two persons have the same name, the elder is intended, refused to allow the admission of evidence proving that the defendant had committed adultery with L. W., Jr., where she was charged with having committed it with L. W. See 6 ENCY. OF EV. 921. (2) But the presumption that the elder is intended may be overcome by evidence identifying the younger person as the one intended. *State v. Grant*, 22 Me. 171; *Harris v. State*, 23 Wyo. 487, 153 Pac. 881.

28. *Com. v. Parmenter*, 101 Mass. 211; *State v. Guest*, 100 N. C. 410, 6 S. E. 253.

29. *O. L. Packard Mach. Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

As to designating accused by an alias in the indictment or information, see 12 STANDARD PROC. 366.

30. *Evans v. State*, 62 Ala. 6.

As to averment of defendant's name in indictment or information, see 12 STANDARD PROC. 362, et seq.

31. 1 STANDARD PROC. 33.

32. See 12 STANDARD PROC. 627.

33. See 12 STANDARD PROC. 649.

mistake in a middle name, or its entire omission, will not support a plea of misnomer,³⁴ nor will the absence of an addition which is no part of the name, support a plea in abatement.³⁵ Misnomer may be objected to by setting it up in the answer.³⁶ A pleading is not subject to demurrer for misspelling the name of a party where the name as alleged is idem sonans with the correct name.³⁷ An objection to the name in which suit is brought cannot be raised by an objection to the jurisdiction of the court.³⁸ Misnomer cannot be taken advantage of by a motion to dismiss,³⁹ nor is it ground for a motion to arrest,⁴⁰ or for a reversal of the judgment.⁴¹ A pleading giving only the initials of the Christian names of the parties is not subject to a demurrer.⁴²

It is a ground of demurrer to the plea of misnomer if the names are idem sonans,⁴³ or if the true name precedes the alleged alias,⁴⁴ or if the ground of the plea is that the middle name of the defendant is not stated.⁴⁵ In some jurisdictions the state, in a criminal case, may file a replication to a plea of misnomer.⁴⁶

B. WAIVER AND CURE OF.—An objection going to the averment of the names in the pleadings cannot be taken for the first time on appeal.⁴⁷ But where the trial is had de novo on appeal, the fact that

34. *Ala.*—*Rooks v. State*, 83 *Ala.* 79, 3 *So.* 720; *Pace v. State*, 69 *Ala.* 231, 44 *Am. Rep.* 513 (*affirmed*, 106 *U. S.* 583, 1 *Sup. Ct.* 637, 27 *L. ed.* 207); *Edmundson v. State*, 17 *Ala.* 179. *Ark.*—*State v. Smith*, 12 *Ark.* 622, 56 *Am. Dec.* 287. *Colo.*—*Doane v. Glenn*, 1 *Colo.* 495, 502. *Fla.*—*Burroughs v. State*, 17 *Fla.* 643, 654.

35. *Clark v. Gilbert*, 1 *Pin.* (Wis.) 354.

36. *Small v. Sandall*, 48 *Neb.* 318, 67 *N. W.* 156 (motion to require the misnomer to be corrected is more appropriate remedy); *Bank of Havana v. Magee*, 20 *N. Y.* 355.

Misnomer as a defense which must be pleaded, see 2 *STANDARD PROC.* 41, note 99.

37. *Maine v. Edmonds* (Okla.), 160 *Pac.* 483.

As to idem sonans, see *supra*, II.

38. *Smelt v. Knapp*, 16 *Neb.* 53, 20 *N. W.* 20.

39. *Ga.*—*Comrs. of McIntosh County v. Aiken Canning Co.*, 123 *Ga.* 647, 51 *S. E.* 585. *Minn.*—*Kenyon v. Semon*, 43 *Minn.* 180, 45 *N. W.* 10. *Mo.*—*Kronski v. Missouri Pacific Ry. Co.*, 77 *Mo.* 362, 370.

40. See 2 *STANDARD PROC.* 1022.

41. *Kenyon v. Semon*, 43 *Minn.* 180, 45 *N. W.* 10.

42. *Minn.*—*Gardner v. McClure*, 6 *Minn.* 250. *N. M.*—*Pearce v. Albright*,

12 *N. M.* 202, 76 *Pac.* 286. *Wyo.*—*Perkins v. McDowell*, 3 *Wyo.* 328, 23 *Pac.* 71.

[a] Where plaintiff gives only the initials of his Christian name, a motion to require him to set out his full Christian name is the proper remedy. *Walgamood v. Randolph*, 22 *Neb.* 493, 35 *N. W.* 217.

43. *Howard v. State*, 151 *Ala.* 22, 44 *So.* 95; *Munkers v. State*, 87 *Ala.* 94, 6 *So.* 357; *Rooks v. State*, 83 *Ala.* 79, 3 *So.* 720; *Veal v. State*, 116 *Ga.* 589, 42 *S. E.* 705.

44. *Barnesciotta v. People*, 10 *Hun* (N. Y.) 137.

45. *Pace v. State*, 69 *Ala.* 231, 44 *Am. Rep.* 513, *affirmed*, 106 *U. S.* 583, 1 *Sup. Ct.* 637, 27 *L. ed.* 207.

46. See *infra*, this note, and generally the title "Replication and Reply."

[a] Where a special replication is filed to a plea of misnomer, alleging that the defendant is as well known by the name alleged in the indictment as by the name set up in his plea, it raises a question for the jury to determine whether at the time the indictment was preferred, such were the facts. *Noble v. State*, 139 *Ala.* 90, 36 *So.* 19.

47. *U. S.*—*Monroe Cattle Co. v. Becker*, 147 *U. S.* 47, 13 *Sup. Ct.* 217, 37 *L. ed.* 72; *Breedlove v. Nicolet*, 7

the misnomer was not presented in the lower court does not constitute a waiver.⁴⁸ An amendment of the name of a party may be made to cure a mistake therein,⁴⁹ and may be made after plea and before trial, upon leave of court.⁵⁰ An error in or insufficiency of the names of the parties is cured by the verdict,⁵¹ or it may be cured by the subsequent pleading of the adverse party,⁵² and a voluntary general appearance may waive misnomer.⁵³

Effect Upon Judgment.—The use of the initials instead of the Christian name will not render the judgment void,⁵⁴ and by failing to object, a party may be concluded though he is misnamed in the judgment.⁵⁵

VII. DESIGNATION OF PARTIES ON APPEAL.—Upon appeal, the parties should generally be designated by the same name as in the proceedings in the trial court,⁵⁶ but a mistake in the notice of appeal in the name of a party will not support a motion to dismiss the appeal, the notice being otherwise duly entitled and intelligible.⁵⁷ In those jurisdictions where the use of the initials, instead of the full Christian name, is not permissible in pleadings,⁵⁸ an assignment of errors must contain the full names, and not merely the initials of the Christian names of the parties.⁵⁹

VIII. CHANGE OF NAME PENDING ACTION.—A change in the name of a party pending the action or proceeding will not affect the merits,⁶⁰ and the action will proceed in the original name.⁶¹

Pet. 413, 8 L. ed. 413. **Ala.**—*Welsh v. State*, 96 Ala. 92, 11 So. 450. **Ark.**—*Merchants & Planters Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406. **Ind.**—*Bauman v. Grubbs*, 26 Ind. 419. **Kan.**—*State v. Watson*, 30 Kan. 281, 1 Pac. 770. **Ky.**—*Brashear v. Stothard*, 4 Bibb 265. **Md.**—*Keech v. Baltimore & Washington R. Co.*, 17 Md. 32. **Mass.**—*Com. v. Dacey*, 12 Allen 539. **Mont.**—*Boyd v. Platner*, 5 Mont. 226, 2 Pac. 346.

48. *Small v. Sandall*, 48 Neb. 318, 67 N. W. 156.

[a] **Not a Defense to the Merits.** Permitting the question of misnomer to be raised for the first time in the appellate court does not violate the rule which requires a defendant to try his cause upon the same defenses in the appellate court as in the court of original jurisdiction, as such rule has reference only to defenses interposed to the merits of the controversy. *Small v. Sandall*, 48 Neb. 318, 67 N. W. 156.

49. See the title "Parties;" and also 1 STANDARD PROC. 906.

Amendment of corporate name, see 1 STANDARD PROC. 907; 5 STANDARD PROC. 605; and the title "New Cause of Action or Defense."

50. *State v. McDonald*, 57 Kan. 537, 46 Pac. 966.

51. See 12 STANDARD PROC. 700.

52. **Ind.**—*Sherrod v. Shirley*, 57 Ind. 13. **Mont.**—*Ramsey v. Cortland Cattle Co.*, 6 Mont. 498, 13 Pac. 247; *Nichols v. Dobbins*, 2 Mont. 540. **Okla.**—*City of Kingfisher v. Pratt*, 4 Okla. 284, 43 Pac. 1068.

See generally the title "Pleading."

53. See 2 STANDARD PROC. 544.

Waiver of misnomer by corporation, see 5 STANDARD PROC. 604.

Entering plea of not guilty as waiver of objection of misnomer, see 12 STANDARD PROC. 666.

54. 15 STANDARD PROC. 64.

55. See 15 STANDARD PROC. 62.

56. See 2 STANDARD PROC. 216.

57. *Butler v. Ashworth*, 100 Cal. 334, 34 Pac. 780.

58. See 6 STANDARD PROC. 650.

59. *Gunn v. Haworth*, 159 Ind. 419, 64 N. E. 911.

60. *Beavers v. Baucum*, 33 Ark. 722.

As to effect of change in corporate name, see 5 STANDARD PROC. 602.

Change by amendment, see the title "Parties."

61. *Com. v. Phillipsburg*, 10 Mass. 78, name of town altered.

IX. PROCEEDING TO CHANGE NAME. — A. RIGHT TO CHANGE NAME. — 1. At Common Law. — At common law, a man could change his name at will, and sue or be sued by such adopted name,⁶² and this is still true, in the absence of a restrictive statute;⁶³ nor do statutes providing a procedure for the change of name, abrogate the common-law rule.⁶⁴ But the common-law rule does not apply to a corporation, which cannot change its name, either directly or by user, except as authorized by law.⁶⁵

2. Under Statutes. — a. In General. — Statutes in many jurisdictions provide a proceeding for the change of names, either of individuals or of corporations.⁶⁶

62. U. S.—*Christianson v. King County*, 190 Fed. 791; *In re McUta*, 189 Fed. 250; *Linton v. First Nat. Bank*, 10 Fed. 894, 897. **Cal.**—*Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17, 129 Am. St. Rep. 141, 19 L. R. A. (N. S.) 983, 16 Ann. Cas. 792. **Ill.**—*Union Brew. Co. v. Interstate Bank & Trust Co.*, 240 Ill. 454, 88 N. E. 997; *Graham v. Eiszner*, 28 Ill. App. 269. **Ind.**—*Schofield v. Jennings*, 68 Ind. 232. **Ia.**—*Loser v. Plainfield Sav. Bank*, 149 Iowa 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112, 1 Am. Rul. Cas. 28. **Minn.**—*Scanlan v. Grimmer*, 71 Minn. 351, 74 N. W. 146, 70 Am. St. Rep. 326. **Miss.**—*Coplin v. Woodmen of the World*, 105 Miss. 115, 62 So. 7; *Haywood v. State*, 47 Miss. 3. **N. Y.**—*Smith v. United States Casualty Co.*, 197 N. Y. 420, 90 N. E. 947, 18 Ann. Cas. 701; *McGary v. People*, 45 N. Y. 160; *Matter of Burstein*, 69 Misc. 41, 124 N. Y. Supp. 989; *England v. The New York Pub. Co.*, 8 Daly 375; *Petition of Snook*, 2 Hilt. 567, reported also in 2 Pitts. (Pa.) 26, 7 Pa. Law J. 49. **S. C.**—*Brayton v. Beall*, 73 S. C. 308, 53 S. E. 641; *City Council v. King*, 4 McCord 487. **Eng.**—*Doe ex dem. Luscombe v. Yates*, 5 Barn. & Ald. 544, 7 E. C. L. 298, 106 Eng. Reprint 1289.

63. U. S.—*In re M'Uta*, 189 Fed. 250. **Ala.**—*Milbra v. Sloss-Sheffield Steel & Iron Co.*, 182 Ala. 622, 62 So. 176; *Morris v. State*, 144 Ala. 81, 39 So. 973, cannot change name for purpose of defrauding or avoiding payment of any debt, or to conceal the identity. **Ia.**—*Loser v. Plainfield Sav. Bank*, 149 Iowa 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112, 1 Am. Rul. Cas. 28. **Ore.**—*Mutual Benefit Life Ins. Co. v. Cummings*, 66 Ore. 272, 126 Pac. 982, 133 Pac. 1169, 47 L. R. A. (N. S.) 252.

64. U. S.—*In re M'Uta*, 189 Fed. 250. **N. Y.**—*Smith v. United States Casualty Co.*, 197 N. Y. 420, 90 N. E. 947, 18 Ann. Cas. 701; *Matter of Burstein*, 69 Misc. 41, 124 N. Y. Supp. 989; *Petition of Snook*, 2 Hilt. 567, reported also in 2 Pitts. (Pa.) 26, 7 Pa. Law J. 49. **Pa.**—*Lafin & Rand Co. v. Steytler*, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690. **S. C.**—*Brayton v. Beall*, 73 S. C. 308, 53 S. E. 641.

[a] The statute does not repeal the common law by implication or otherwise, but gives an additional method of effecting a change of name. The statutory method has some advantages, because it is speedy, definite and a matter of record, so as to be easily proved even after the death of all contemporaneous witnesses. *Matter of Burstein*, 69 Misc. 41, 124 N. Y. Supp. 989.

[b] But under a statute providing that after a person has been legally authorized to change his name, he shall be known by that and by no other name, it has been held that he cannot thereafter change the name so acquired, except by again resorting to the courts. *Smith v. United States Casualty Co.*, 197 N. Y. 420, 90 N. E. 947, 18 Ann. Cas. 701; *Matter of Burstein*, 69 Misc. 41, 124 N. Y. Supp. 989.

65. McGary v. People, 45 N. Y. 153, 160; *Matter of United States Mortgage Co.*, 83 Hun 572, 32 N. Y. Supp. 11, 65 N. Y. St. 134; *Queen v. Registrar of Joint Stock Companies*, 10 Q. B. 839, 116 Eng. Reprint 318.

66. U. S.—*In re M'Uta*, 189 Fed. 250, discussing Pennsylvania statute. **Cal.**—*Petition of Los Angeles Trust Co.*, 158 Cal. 605, 112 Pac. 57; *Matter of La Societe Francaise*, 123 Cal. 525,

Character of Proceeding. — A proceeding to change a name is a judicial one, although no controversy nor actual or threatened denial of petitioner's rights is involved.⁶⁷

b. *Jurisdiction.* — The court of the county of the residence of the person who petitions for a change of name, has jurisdiction to hear and determine such application.⁶⁸

c. *Form and Sufficiency of Petition.* — The petition for a change of name must be in the form prescribed by the statutes and rules of court.⁶⁹ Thus it must specify the present name of the person or corporation,⁷⁰ and also the name it is proposed to assume.⁷¹ And it must specify the reason for such change of name.⁷²

d. *Order To Show Cause.* — Upon the filing of the petition, the court makes an order to show cause, designating the time and place of the hearing,⁷³ which order is published or posted for such time as is prescribed by the statute.⁷⁴

e. *Objections to Application.* — Any person interested may appear at the time designated in the order for the hearing to show cause why the application for change of name should not be granted.⁷⁵

56 Pac. 458, 787. **Pa.**—*In re Bank of North America*, 2 Pa. Co. Ct. 97.

Effect of statute on common law, see *supra*, IX, A, 1.

67. Title and Document Restoration Co. v. Kerrigan, 150 Cal. 289, 320, 88 Pac. 356; Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458.

68. **U. S.**—*In re M'Ulta*, 189 Fed. 250, Pennsylvania statute. **Cal.**—Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 57; Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787. **N. Y.**—Matter of Burstein, 69 Misc. 41, 124 N. Y. Supp. 989.

69. Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 57; Matter of Burstein, 69 Misc. 41, 124 N. Y. Supp. 989.

[a] **Contents of Petition.**—In Matter of Hamilton, 10 Abb. N. C. (N. Y.) 79, the court said: "It is our rule in these matters to require evidence by affidavit or by verified petition whether the applicant is married or single; whether he is now a party to any and what action or proceeding in the courts; whether there are any judgments against him; whether there is any outstanding bond or commercial paper, made, indorsed or accepted by him in the name which he wishes to abandon; of his age and birth place and the name of his parents." The petitioner must also allege that he is a citizen of the United States for at least six months prior to mak-

ing the application and give the place, county where he resides, by street and number, and the length of time he has been such resident, before his application will be granted. Matter of Burstein, 69 Misc. 41, 124 N. Y. Supp. 989.

70. Matter of United States Mortgage Co., 83 Hun 572, 32 N. Y. Supp. 11, 65 N. Y. St. 134.

71. Matter of United States Mortgage Co., 83 Hun 572, 32 N. Y. Supp. 11, 65 N. Y. St. 134.

72. Petition of Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56; Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787; Matter of Burstein, 69 Misc. 41, 124 N. Y. Supp. 989.

73. Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 56.

[a] **Judge Issuing Order Disqualified.**—The fact that the order to show cause is issued by a judge disqualified to act, will not cause the proceedings to fail, where all subsequent steps were had before a qualified judge. Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 56.

74. Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 57; Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787.

75. Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 57; Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787.

f. *Hearing*.—The hearing upon such application is conducted as in other civil actions.⁷⁶

g. *Judgment and Findings*.—After the hearing, the court may make an order changing the name,⁷⁷ or dismissing the application,⁷⁸ as to the court may seem proper.

Formal findings of fact are not required in a proceeding of this character.⁷⁹

76. Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787.

77. Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787; Matter of United States Mortgage Co., 83 Hun 572, 32 N. Y. Supp. 11, 65 N. Y. St. 134.

78. Matter of La Societe Francaise, 123 Cal. 525, 56 Pac. 458, 787; Matter of United States Mortgage Co., 83 Hun 572, 32 N. Y. Supp. 11, 65 N. Y. St. 134.

79. Petition of Los Angeles Trust Co., 158 Cal. 605, 112 Pac. 57.

NATIONAL BANK.—See **Banks and Banking.**

NATIONAL GOVERNMENT.—See **United States.**

NATURALIZATION

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CROSS-REFERENCES:

Immigration.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

Scope of Article. — This title includes procedure in judicial proceedings only, excluding matter as to the acquisition of citizenship by legislative grant or by reason of residence in territory ceded by one sovereignty to another.

I. DEFINITIONS. — Citizenship is membership in a political society,¹ and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society.²

Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen.³

1. *Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101.

2. *Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101.

[a] A citizen, in the popular and appropriate sense of the term, is one who by birth, naturalization or otherwise, is a member of an independent political society called a state, kingdom, or empire, and as such is subject to its laws and entitled to its protection in all his rights incident to that relation. *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809, 69 Am. St. Rep. 228.

3. *Boyd v. Thayer*, 143 U. S. 135, 162, 12 Sup. Ct. 375, 36 L. ed. 103; *In re Minook*, 2 Alaska 200. And see *Minneapolis v. Reum*, 56 Fed. 576, 6 C. C. A. 31.

[a] "Naturalization is the admission of a foreign subject or citizen into the political body of a nation, and the bestowal upon him of the quality of a citizen or subject." *Minneapolis v. Reum*, 56 Fed. 576, 6 C. C. A. 31.

[b] **Another Definition.**—"It is the removal of the disabilities of alienage." *State v. Manuel*, 20 N. C. 20, 25.

II. JURISDICTION OF COURTS.—A. GENERALLY.—What courts have jurisdiction in naturalization proceedings, whether original or appellate, must be determined by the laws enacted by congress.⁴

B. FEDERAL COURTS.—United States district courts in any state, for the territories of Hawaii and Alaska, the supreme court of the District of Columbia, and formerly the United States courts for the Indian Territory, have jurisdiction of naturalization proceedings.⁵

C. STATE COURTS.—Acts regulating the naturalization of aliens have always authorized such proceedings in the state as well as federal courts.⁶ The present federal statute on the subject gives naturalization jurisdiction to all state or territorial courts of record,⁷

4. *State v. Superior Court*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

[a] "To hold otherwise would be to ignore the requirements of the 'uniform rule' found in the federal constitution." *State v. Superior Court*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

5. Act June 29, 1906, §3, 34 St. at L. 596, Comp. St., 1916, §4351. See also *Ill.—People v. Witzeman*, 191 Ill. App. 277. *Mass.—Inhabitants of County of Hampden v. Morris*, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815. *Utah.—Eldredge v. Salt Lake County*, 37 Utah 188, 106 Pac. 939.

[a] The district court of the United States for the district of Porto Rico has jurisdiction to naturalize aliens. *In re Bonnet y Jaspard*, 2 Porto Rico Fed. 70.

Jurisdiction of federal courts generally, see the title "United States Courts."

6. See the following: **U. S.**—*Holmgren v. United States*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 778; *Croesus M. M. & S. Co. v. Colorado Land & Min. Co.*, 19 Fed. 78. **Ark.**—*State v. Penney*, 10 Ark. 621. **Ill.**—*People v. Witzeman*, 191 Ill. App. 277. *Mass.—Inhabitants of County of Hampden v. Morris*, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815. **Pa.**—*Rump v. Com.*, 30 Pa. 475. **Utah.**—*Eldredge v. Salt Lake County*, 37 Utah 188, 106 Pac. 939. **Wash.**—*State v. Superior Court*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

[a] "The naturalization acts of the United States from the first one in 1790 have conferred authority upon state courts to admit aliens to citizenship. *Van Dyne on Naturalization*, p.

11, and the following. It is undoubtedly true that the right to create courts for the states does not exist in congress. The constitution provides (Art. III, §1) that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish. But it does not follow that congress may not constitutionally authorize the magistrates or courts of a state to enforce a statute providing for a uniform system of naturalization, and defining certain proceedings which, when complied with, shall make the applicant a citizen of the United States. This congress had undertaken to do in making provision for the naturalization of aliens to become citizens of the United States in a certain class of state courts—those of record having common law jurisdiction, a clerk and a seal. *Rev. Stat. U. S.*, §2165 (since superseded by the Act of June 29, 1906, c. 3592, 34 Stat. 596)." *Holmgren v. United States*, 217 U. S. 509, 517, 30 Sup. Ct. 588, 54 L. ed. 861.

7. Act June 29, 1906, §3, 34 St. at L. 596, Comp. St., 1916, §4351.

[a] **A court of record** is (1) not simply one that has a recording officer and a seal, and in fact keeps a permanent record of its proceedings. It must be an organized judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it. *In re Dean*, 83 Me. 489, 495, 22 Atl. 385. See also *Ex parte Gladhill*, 8 Mete. (Mass.) 168. (2) Only a court of record for general, and not special, purposes, is included within the meaning of such an act. *Mills v. McCabe*, 44 Ill. 194, decided under similar provision in act of 1802. (3)

having a seal,⁸ a clerk,⁹ and jurisdiction in actions at law or equity, or law and equity,¹⁰ in which the amount in controversy is unlimited.¹¹ Formerly, the statute contained the added limitation that the state court must be one of "common law jurisdiction."¹²

Effect of State Laws or Absence Thereof.—While it is doubtful if the courts of a state could be compelled by act of congress to take jurisdiction of naturalization proceedings,¹³ there is no doubt that such courts, at least with the consent of the constitution or laws of the state, may exercise this jurisdiction when conferred upon them by a law of the United States.¹⁴ And it has been held that state courts may exercise such jurisdiction, notwithstanding the absence of specific

The court of *nisi prius* in Pennsylvania is a court of record. *Moran v. Rennard*, 3 Brewst. (Pa.) 601; *Com. v. Lee*, 1 Brewst. (Pa.) 273. (4) So is the common pleas court of Ohio. *State v. Weber*, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630.

[b] Circuit court of Illinois included. *People v. Witzeman*, 191 Ill. App. 277.

8. See the statute, and *Moran v. Rennard*, 3 Brewst. (Pa.) 601; *Com. v. Lee*, 1 Brewst. (Pa.) 273.

9. See the statute.

[a] The clerk must (1) be a person other than the presiding judge or justice, and who is duly authorized to record the proceedings of the court. **U. S.**—*Ex parte Cregg*, 2 Curt. 98, 6 Fed. Cas. No. 3,380. **Me.**—*In re Dean*, 83 Me. 489, 22 Atl. 385. **Neb.**—*State v. Webster*, 7 Neb. 469. **N. H.**—*State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196. (2) The requirement is not that the court shall have an officer denominated a "clerk," but that it shall have a recording officer, charged with the duty of keeping a true record of its doings, and afterwards of authenticating them. *Ex parte Gladhill*, 8 Mete. (Mass.) 168.

10. See the statute.

11. See the statute.

12. Rev. St. U. S., §2165 (since superseded by the act of June 29, 1906, c. 3592, 34 St. at L. 596). See also *State v. Weber*, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630.

[a] **Common Law Jurisdiction.**—(1) Under Rev. St., §2165 (superseded by the present Act) using the words "common law" jurisdiction, the cases held that what was meant was some, and not necessarily general or unlimited, common law jurisdiction. **U. S.** *In re Wolf* (C. C. A.), 188 Fed.

519; *United States v. Neelman*, 183 Fed. 783; *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476. **Cal.**—*Matter of Conner*, 39 Cal. 98, 2 Am. Rep. 427; *Ex parte Knowles*, 5 Cal. 300. **Ill.**—*Beardstown v. Virginia*, 81 Ill. 541; *Dale v. Irwin*, 78 Ill. 170; *People ex rel. Brackett v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. **Minn.**—*State v. Weber*, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630. **Tex.**—*Ex parte Burkhardt*, 16 Tex. 470. (2) Where a court had appellate jurisdiction only, it was not a court of common law jurisdiction. *Ex parte Knowles*, 5 Cal. 300. (3) But a court having common law jurisdiction was not deprived of naturalization jurisdiction because it had, in addition, appellate jurisdiction in certain cases. *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476.

13. See upon this point: **Ark.**—*State v. Penney*, 10 Ark. 621. **Ill.**—*People v. Witzeman*, 191 Ill. App. 277. **Me.** *In re Gilroy*, 88 Me. 199, 33 Atl. 979, 51 Am. St. Rep. 392. **Mass.**—*Inhabitants of Hampden County v. Morris*, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815; *Stephens, Petitioner*, 4 Gray 559. **N. J.**—*Passaic v. Slater*, 85 N. J. L. 621, 90 Atl. 377. **Pa.**—*Lab's Petition*, 3 Pa. Dist. 728. **Wash.**—*State v. Libby*, 47 Wash. 481, 92 Pac. 350. See also the cases cited *infra*, note 16.

14. See the following: **U. S.**—*Holmgren v. United States*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 788, affirming 156 Fed. 439, 84 C. C. A. 301. **Ark.**—*State v. Penney*, 10 Ark. 621. **Cal.**—*Ex parte Knowles*, 5 Cal. 300. **Ill.**—*People v. Witzeman*, 191 Ill. App. 277. **Mass.**—*Inhabitants of Hampden County v. Morris*, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815; *Stephens, Petitioner*, 4

authority from the state constitution or laws.¹⁵ But if the state constitution or laws forbid the courts, or any certain courts of the state, to exercise such jurisdiction,¹⁶ or if the jurisdiction conferred upon them by such constitution or laws is so limited as not to include naturalization proceedings,¹⁷ they cannot act under congressional enactments.

D. RESIDENCE OF APPLICANT.—The jurisdiction of all courts in naturalization cases extends only to aliens resident within the respective judicial districts of such courts.¹⁸ However, an applicant may con-

Gray 559; *Ex parte* Gladhill, 8 Mete. 168. **N. J.**—Freeholders of Passaic v. Slater, 85 N. J. L. 621, 90 Atl. 377. **N. Y.**—Matter of Ramsden, 13 How. Pr. 429, 435. **Pa.**—Rump v. Com., 30 Pa. 475. **Utah.**—Eldredge v. Salt Lake County, 37 Utah 188, 106 Pac. 939. **Wash.**—State v. Superior Court, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425; State v. Libby, 47 Wash. 481, 92 Pac. 350.

15. Levin v. United States, 128 Fed. 826. See also Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 778 (where in the court said: "Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by congress under such laws. Stephens, Petitioner, 4 Gray 559."); United States v. Nisbet, 168 Fed. 1005; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735. Compare *Ex parte* Knowles, 5 Cal. 300.

16. See the following: **U. S.**—Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060. **Me.**—*In re* Gilroy, 88 Me. 199, 33 Atl. 979. **Mass.**—Stephens, Petitioner, 4 Gray 559. **N. H.**—*In re* Beavins, 33 N. H. 89. **N. J.**—Passaic v. Slater, 85 N. J. L. 621, 90 Atl. 377; Rushworth v. Judges, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761.

[a] "The act of congress does not attempt to compel the state courts in naturalization cases to exercise the jurisdiction which it permits. The very interesting and important question therefore which has been left undecided by the United States Supreme Court (*Prigg v. Pennsylvania*, 16 Pet. 539; *Robertson v. Baldwin*, 165 U. S. 275), whether state officers can be compelled by act of congress to act in their official capacity is not now before us. The case is in the same situation as that of *Alexander Stephens*, Petitioner, 4 Gray 559; *Rushworth v.*

Judges of Hudson Pleas, 29 Vroom 97; *In re* Gilroy, 88 Me. 199. In all these cases the right of the state to confine the jurisdiction permitted by the act of congress to such of the state courts as the state legislature might select was sustained. Those cases arose indeed under a different act of congress, but the new act of 1906 is no more compulsory upon the state tribunals than the former. The right of the state to limit the exercise of the jurisdiction involves the right to select the court which may act or to forbid any to act. This is a right most important for the state if it is to preserve its own sovereignty and prevent the regular work of courts created by the state and sustained at its expense from being hampered by duties imposed upon them by an independent sovereignty. The reasons are sufficiently stated by Mr. Justice Van Syckel in the case above cited. We need only suggest, in addition, the embarrassment to the administration of justice in New Jersey if petitioners should insist on their applications to be naturalized being heard before this court, as the act of congress would permit. Congress recognized the difficulty, and by failing to make action by the state courts compulsory, necessarily left those courts and their officers to the control of such regulations as the legislature might make." *Freeholders of Passaic v. Slater*, 85 N. J. L. 621, 90 Atl. 377.

17. State *ex rel.* Moreci v. Baker, 51 La. Ann. 1243, 26 So. 102; *Ex parte* McKenzie, 51 S. C. 244.

18. Act June 29, 1906, §3, 34 St. at L. 596; Comp. St., 1916, §4351; *United States v. Johnson* (C. C. A.), 181 Fed. 429; *In re* Von Bernhardt, 247 Fed. 129; *United States v. Stoller*, 180 Fed. 910; *United States v. Anderson*, 169 Fed. 201; *United States v. Schurr*,

tinue with and complete his case in the court in which he first filed his application, notwithstanding his removal into another district before the hearing and rendition of judgment.¹⁹

III. PROCEEDINGS.—A. NATURE OF, AND LAW GOVERNING. While a proceeding for the naturalization of an alien is in a certain sense a judicial proceeding,²⁰ being conducted in a court of record and made a matter of record therein,²¹ yet it is not in any sense an adversary proceeding.²² It is generally regarded as a proceeding in rem.²³ The jurisdiction of the courts to naturalize aliens being conferred by special statute,²⁴ it is to be exercised in a special and summary manner,²⁵ and not according to the rules governing courts in plenary proceedings.²⁶ Naturalization proceedings are liberally construed, every intendment being in their favor.²⁷ But all the provisions of law prescribing the procedure necessary to be followed in such proceedings are mandatory,²⁸ and should be strictly followed.²⁹

163 Fed. 648; *United States v. Wayer*, 163 Fed. 650.

[a] The court is without jurisdiction, when at the hearing it plainly appears that the applicant was not a resident of the district of the court in which he filed his application, at the time of such filing. *In re Pearlman*, 226 Fed. 60.

[b] When the court's district comprises several counties the applicant may choose one in which he does not reside, if he so desires (*United States v. Stoller*, 180 Fed. 910), unless the court's jurisdiction is limited to the county in which it is then sitting. *United States v. Schurr*, 163 Fed. 648.

19. *United States v. Breen*, 135 App. Div. 824, 120 N. Y. Supp. 304; *In re Burke*, 58 Misc. 3, 110 N. Y. Supp. 36.

20. *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; *Spratt v. Spratt*, 4 Pet. (U. S.) 393, 7 L. ed. 897; *In re Symanowsski* (C. C. A.), 168 Fed. 978; *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140; *In re Bodek*, 63 Fed. 813. Pa.—*Macoluss's Naturalization*, 237 Pa. 132, 85 Atl. 149, Ann. Cas. 1914B, 226.

[a] "Naturalization is a judicial act.—It is made so by positive law, and is essentially so in its nature; for it is a cause to be heard and decided on evidence, and involves a question of legal right." *Rump v. Com.*, 30 Pa. 475. See also *United States v. Janke*, 183 Fed. 277; *Matter of Christer*, 56 How. Pr. (N. Y.) 5, 11 Jones & S. 523.

21. *Johannessen v. United States*,

225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066.

22. *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; *United States v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471, even though a representative of the naturalization board was present and participated in the hearing. See also *Ex parte Lange*, 197 Fed. 769.

[a] Government Not a Party.—"It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the government a party nor to give any notice to its representatives." *Johannessen v. United States*, 225 U. S. 227, 237, 32 Sup. Ct. 613, 56 L. ed. 1066.

23. *In re O'Sullivan*, 137 Mo. App. 214, 117 S. W. 651.

24. See *supra*, II.

25. *Ex parte Lange*, 197 Fed. 769.

26. *Ex parte Lange*, 197 Fed. 769.

27. *In re Symanowsski*, 168 Fed. 978. See also *Ex parte Lange*, 197 Fed. 769.

28. *In re Liberman*, 193 Fed. 301.

29. *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. ed. 853; *In re Hollo*, 206 Fed. 852; *In re Liberman*, 193 Fed. 301 (both holding certificate of arrival necessary);

What Law Governs.—Since the state courts act as national governmental agencies in naturalization proceedings, they are controlled therein exclusively by the federal law so far as such law extends;³⁰ and where the federal statutes and state statutes conflict, the former will govern.³¹

B. THE DECLARATION OF INTENTION.—**1. Necessity.**—The filing of a declaration of intention is a jurisdictional necessity in most cases under the present Naturalization Act.³² But persons having exercised the rights of citizenship in good faith, though in fact not citizens, are under certain circumstances allowed to be naturalized without having filed a declaration.³³

United States *v.* Daly, 32 App. Cas. (D. C.) 525.

[a] "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." United States *v.* Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. ed. 853.

30. See the following: **U. S.**—United States *v.* Nisbet, 168 Fed. 1005. **Ill.** People *v.* Witzeman, 191 Ill. App. 277. **Mass.**—Inhabitants of Hampden County *v.* Morris, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815; *Ex parte* Gladhill, 8 Mete. 168. **N. Y.**—Matter of Christern, 56 How. Pr. 5, 11 Jones & S. 523 (are to be deemed quoad hoc courts of the United States); People *v.* Sweetman, 3 Park. Crim. 358. **Utah.** Eldredge *v.* Salt Lake County, 37 Utah 188, 106 Pac. 939. **Wash.**—State *v.* Superior Court, 75 Wash. 239, 134 Pac. 916; State *ex rel.* Newman *v.* Libby, 47 Wash. 481, 92 Pac. 350.

See also United States *v.* Rodiek, 162 Fed. 469, 89 C. C. A. 389; *Ex parte* Lange, 197 Fed. 769; *In re* Kolbel, 84 Misc. 475, 146 N. Y. Supp. 885.

[a] The capacity in which state courts act in naturalization proceedings is well stated by Justice Frick in Eldredge *v.* Salt Lake County, 37 Utah 188, 106 Pac. 939, as follows: "It seems to us too obvious to require either argument or the citation of authorities that in naturalization proceedings the United States government exercises functions which exclusively belong to that government, and, further, that, in authorizing the state courts to act in such proceedings, the national government selects such courts and the clerks thereof as government agencies through whom said

government is discharging one of its peculiar functions of national sovereignty. Whatever may have been the theory of some courts regarding the power of congress to confer such authority upon the state courts in the past, the question is now settled that congress has such power, and that state courts may constitutionally exercise the same when authorized by congress to do so. . . . The question as to whether the state courts continue or cease to be state courts while acting in naturalization cases, while interesting, is not material. It is enough for the present to know that in so doing such courts are merely agencies of the national government." Quoted in State *ex rel.* Gorelick *v.* Superior Court, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

31. **Mass.**—Inhabitants of Hampden County *v.* Morris, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A, 815. **Utah.** Eldredge *v.* Salt Lake County, 37 Utah 188, 106 Pac. 939. **Wash.**—State *ex rel.* Newman *v.* Libby, 47 Wash. 481, 92 Pac. 350.

Compare Freeholders of Passaic *v.* Slater, 85 N. J. L. 621, 90 Atl. 377.

32. Act June 29, 1906, c. 3592, §4, 34 St. at L. 596; Comp. St., 1916, §4352; United States *v.* Rodiek, 162 Fed. 469, 89 C. C. A. 389 (special act dispensing with the declaration of intention in territory of Hawaii repealed by act of June 29, 1906); *In re* Lee, 236 Fed. 987; United States *v.* Nopoulos, 225 Fed. 656; *In re* Poirot, 168 Fed. 456.

Necessity for declaration of intention accompanying petition, see *infra*, III, C, 5.

33. Act June 25, 1910, §3, 36 St. at L. 830; Comp. St., 1916, §4352.

[a] **Persons Who Need Not File**

The widow and minor children of a deceased declarant who had died before being naturalized, may, by complying with the provisions of the statute in all other respects, be naturalized without making a declaration of intention.³⁴

Soldiers, Sailors, etc. — The necessity for aliens in the service of the army,³⁵ navy, marine corps, coast guard, or merchant marine,³⁶ filing a declaration depends upon the naturalization act in force at the time of the application.

2. Before Whom. — The declaration must be before the clerk of a court having naturalization jurisdiction.³⁷ The declaration cannot be taken out of the court house, and the clerk should not carry records therefrom to take a declaration.³⁸

3. Contents and Sufficiency. — a. *Generally.* — A declaration filed upon a form other than that prescribed and furnished to courts by the bureau of naturalization, is a nullity.³⁹ The declaration must conform

Declaration.—Under this act, the following class of persons need not file a declaration: *First.* Persons who under existing laws might become citizens. *Second.* Who have resided in the United States continuously from May 1, 1905, to May 1, 1910. *Third.* Who have in good faith exercised the rights of citizenship, under a mistaken belief that they had a right to so act. *Fourth.* Who make a showing of these facts satisfactory to the trial court. *In re Ross*, 223 Fed. 366; *In re Center*, 218 Fed. 975.

[b] This act, however, does not apply to persons who were not of age at least five years prior to May 1, 1910. *In re Peters*, 213 Fed. 541; *In re Urdang*, 212 Fed. 557.

[c] The misinformation on which the alien relied in exercising the rights of citizenship must have been received from a source which ordinarily could be considered authentic. *In re Mondelli*, 228 Fed. 920.

34. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352.

[a] A step-son living in the United States with his step-father, receives the benefit of the latter's declaration, under this statute. *In re Robertson*, 179 Fed. 131.

35. See the Naturalization Act, and *In re Loftus*, 165 Fed. 1002; *In re McNabb*, 175 Fed. 511. See also *Scott v. Strobach*, 49 Ala. 477; *Berry v. Hull*, 6 N. M. 643, 30 Pac. 936.

[a] The widow of a soldier who has not declared his intention, cannot

be naturalized without filing a declaration. *United States v. Meyer*, 170 Fed. 983.

36. See the Naturalization Act.

[a] The (1914) Act applied only to those actually serving in or about to re-enlist in such service at the time naturalization was sought. *In re Giralde*, 226 Fed. 826; *In re Sterbuck*, 224 Fed. 1013; *In re Schrape*, 217 Fed. 142.

[b] Under the Act of 1894 one honorably discharged for disability before the completion of the term of enlistment, is not relieved of the necessity of filing a declaration. *United States v. Plaistow*, 189 Fed. 1006.

37. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352.

[a] A justice of the peace is without authority to take declarations, even on regular forms previously signed by the clerk for that purpose. *State v. Stumpf*, 23 Wis. 630.

[b] Deputy clerks, if vested by statute with all the powers of the principal clerk, may lawfully take declarations. *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

As to jurisdiction of courts, see *supra*, II.

38. *In re Langtry*, 31 Fed. 879. *Contra*, *Andres v. Circuit Judge*, 77 Mich. 85, 43 N. W. 857, 6 L. R. A. 238.

39. Act June 29, 1906, §3, 34 St. at L. 596, Comp. St., 1916, §4351; *In re Brefo*, 217 Fed. 131.

[a] "To be a valid paper, a dec-

both in form and substance to the requirements of the statute.⁴⁰ It should state the declarant's bona fide intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to the foreign sovereignty of which he may be at the time a citizen or subject.⁴¹ The declaration must be under oath.⁴²

b. *Amending Declaration.*—A declaration may be amended before final hearing to correct a mistake in naming the monarch whose allegiance is renounced.⁴³ But the declaration may not be changed as to the name of the applicant, unless the fact of error in the record clearly appears from the evidence and also the state of the record as it should be.⁴⁴

4. *Place and Time of Filing.*—The declaration must be filed in a court in the district where applicant resides.⁴⁵ It may not be filed until after the applicant has reached the age of eighteen years.⁴⁶ It

laration of intention must be filed on the form furnished for that purpose by the government. If filed on a form other than that furnished by the government, it is a legal nullity. Otherwise there is an end to uniformity, and government control and supervision cannot exist. If filed on some form other than that furnished by the government, why is it necessary for a declaration to be filed on any form at all? It becomes apparent that to permit this would destroy this most wise provision of the naturalization law." *In re Brefo*, 217 Fed. 131.

40. *In re Poirot*, 168 Fed. 456, must comply with the law as it exists at the time it is made.

[a] The statute provides that the declaration shall set forth the name, age, personal description, place of birth, last foreign residence, and allegiance, date of arrival, name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of the alien. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352.

For form, see Act June 29, 1906, §27, 34 St. at L. 596; Comp. St., 1916, §4382.

41. Act June 29, 1906, §4, 34 St. at L. 596, Comp. St., 1916, §4352; *In re Symanowsski*, 168 Fed. 978; *In re Stack*, 200 Fed. 330; *Ex parte Lange*, 197 Fed. 769; *In re Poirot*, 168 Fed. 456.

[a] This does not require a renunciation of allegiance to the foreign sovereign, or the actual declaration of allegiance to this government. All

that is necessary is a declaration on oath that it is the present intention of the declarant to become a citizen, and his present intention to renounce allegiance to his foreign sovereign at some future time. *In re Symanowsski*, 168 Fed. 978.

[b] *Naming Foreign Sovereign.* Citizenship cannot be conferred where the declaration fails to name specifically the sovereign to whom allegiance will be renounced (*Ex parte Lange*, 197 Fed. 769), or where the monarch named is not the one to whom the alien owed allegiance. *In re Lewkowicz*, 169 Fed. 927. But see *In re Denny*, 240 Fed. 845.

42. Act June 29, 1906, §4, St. at L. 596, Comp. St., 1916, §4352; *In re Fronascone*, 99 Fed. 48; *United States v. Walsh*, 22 Fed. 644.

43. *In re Markowitz*, 233 Fed. 715; *United States v. Orend*, 221 Fed. 777; *United States v. Viaropulos*, 221 Fed. 485. *Contra, In re Friedl*, 202 Fed. 300; *In re Stack*, 200 Fed. 330.

44. *In re Schwarz*, 236 Fed. 146.

[a] *Intentional Error.*—Where the error is not clerical or innocent but intentional, an amendment will not be allowed and a new declaration must be filed. *In re Boorvis*, 205 Fed. 401.

[b] *Subsequent change of name* obtained by applicant in another court cannot be shown by amendment to the declaration. *In re Perkins*, 204 Fed. 350.

45. Act June 29, 1906, §4, 34 St. at L. 596, Comp. St., 1916, §4352. See also *supra*, II, D.

46. Act June 29, 1906, §4, 34 St.

should be filed at least two years prior to his admission.⁴⁷

5. Effect of Declaration. — The declaration is simply the first step in the process required by law. It is in no sense a complete or binding act, and carries no full right of citizenship before the final act of admission.⁴⁸

C. THE PETITION. — 1 Generally. — The naturalization law requires every applicant to file a petition with the clerk of a court authorized to act upon it.⁴⁹ The petition may be filed either in term time or vacation,⁵⁰ and not less than two years,⁵¹ nor more than seven years after the declaration.⁵² A petition cannot be filed during the minority of the applicant.⁵³

It is the clerk's duty to file a petition for naturalization which contains all proper allegations, regardless of his personal opinion of the lack of qualifications of the applicant.⁵⁴

A copy of the petition and the affidavits supporting it must also be filed in the department at Washington.⁵⁵

2. Contents and Sufficiency. — The petition must allege the existence of all facts and the fulfillment of all conditions, upon the existence and fulfillment of which the statutes which confer the right to naturalization have made it dependent.⁵⁶ The requisites of the petition are fully described by the statute.⁵⁷

at L. 596; Comp. St., 1916, §4352. See *In re Cordaro*, 246 Fed. 735.

47. See the statute.

48. *In re Polsson*, 159 Fed. 283; *Wallenburg v. Missouri Pac. R. Co.*, 159 Fed. 217; *Minneapolis v. Reum*, 56 Fed. 576; *Berry v. Hull*, 6 N. M. 643, 30 Pac. 936.

49. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352; *In re Lee*, 236 Fed. 987; *In re Liberman*, 193 Fed. 301; *United States v. Janke*, 183 Fed. 277; *In re Bodek*, 63 Fed. 813; *United States v. Breen*, 135 App. Div. 824, 120 N. Y. Supp. 304.

Jurisdiction of courts, see *supra*, II.

[a] The requirement that the petition be filed in duplicate is directory only. *United States v. Stoller*, 180 Fed. 910. Compare *supra*, III, A, note 29.

50. Act June 29, 1906, §6, 34 St. at L. 596; Comp. St., 1916, §4354; *Jaynes v. United States*, 47 Ct. Cl. 523.

51. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352.

[a] A petition filed within two years after the declaration is not saved by the fact that the hearing occurred after the two years had elapsed. *United States v. Van Der Molen*, 163 Fed. 650.

52. See the statute, and *United*

States v. Morena, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. ed. —; *United States v. Mueller*, 246 Fed. 679, 158 C. C. A. 635 (time cannot be extended though applicant filed two petitions in courts without jurisdiction within seven years); *Harmon v. United States*, 223 Fed. 425, 139 C. C. A. 19; *Yunghauss v. United States*, 218 Fed. 168, 134 C. C. A. 67; *In re Lee*, 236 Fed. 987; *In re Goldstein*, 211 Fed. 163.

[a] Rule Applies to Petition by One Declaring Prior to Act of 1906. *United States v. Morena*, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. ed. —.

53. *In re Cordaro*, 246 Fed. 735.

54. *In re Halladjian*, 174 Fed. 834.

[a] Absence of filing entry and endorsement by the clerk are not material, when the fact of actual filing sufficiently appears from the evidence. *United States v. Erickson*, 188 Fed. 747.

Contents and sufficiency of petition, see *infra*, III, C, 2.

55. *United States v. Janke*, 183 Fed. 277.

56. *Ex parte Lange*, 197 Fed. 769; *In re Liberman*, 193 Fed. 301; *In re Bodek*, 63 Fed. 813; *Cummings, Petitioner*, 41 N. H. 270.

57. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352.

Change of name must be applied for and made as a part of the naturalization proceedings and cannot be obtained thereafter by means of a motion to amend the record.⁵³

The petition must be signed by the applicant in his own handwriting.⁵⁹

3. Verification by Witnesses.—The petition must be verified by the affidavits of at least two credible citizens,⁶⁰ as to the residence required of the applicant by the statute,⁶¹ and as to his good moral character,⁶² and his qualification for citizenship.⁶³ If the petition is properly verified before posting, the fact that witnesses verified on different days is immaterial.⁶⁴

4. Certificate of Arrival.—A certificate from the department of commerce and labor showing the date, place and manner of arrival of applicant in the United States, should accompany the petition.⁶⁵ Failure to attach such certificate is an irregularity, which may be cured

For form of petition, see §27 of the Act; Comp. St., 1916, §4382.

58. *In re Holland*, 237 Fed. 735; Act June 29, 1906, §6, 34 St. at L. 596; Comp. St., 1916, §4354.

59. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352; *In re Martinovsky*, 171 Fed. 601.

60. *United States v. Martorana*, 171 Fed. 397, 96 C. C. A. 353; *In re O'Dea*, 158 Fed. 703; *In re Liberman*, 193 Fed. 301; *United States v. Erickson*, 188 Fed. 747; *United States v. Janke*, 183 Fed. 277; *In re Martorana*, 159 Fed. 1010; *United States v. Daly*, 32 App. Cas. (D. C.) 525.

[a] If one of the two witnesses is incompetent, the petition is void and cannot be amended. *United States v. Martorana*, 171 Fed. 397, 96 C. C. A. 353 (*reversing In re Martorana*, 159 Fed. 1010). *Contra*, *United States v. Erickson*, 188 Fed. 747. See *In re Wolf*, 188 Fed. 519, which holds that such a defective petition should be dismissed without prejudice to petitioner's right to file a new application.

[b] **Number of Witnesses.**—Each witness need not have known applicant for the entire five years, provided the entire period is satisfactorily covered by the combined affidavits. *In re Godlover*, 181 Fed. 731.

[c] **Form of Affidavit.**—See Act June 29, 1906, §27, 34 St. at L. 596; Comp. St., 1916, §4382.

61. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352; *In re Godlover*, 181 Fed. 731; *United*

States v. Janke, 183 Fed. 277; *United States v. Daly*, 32 App. Cas. (D. C.) 525.

[a] **Residence in State.**—Where applicant has resided in the state more than a year, the affidavits must cover the full period of such residence. *In re Manning*, 209 Fed. 499.

62. See the statute and *United States v. Daly*, 32 App. Cas. (D. C.) 525.

63. See the statute, and *United States v. Janke*, 183 Fed. 277.

64. *In re Freeze*, 189 Fed. 1022; *United States v. Erickson*, 188 Fed. 747.

65. Act June 29, 1906, §4, 34 St. at L. 596, Comp. St., 1916, §4352; *In re Schmidt*, 207 Fed. 678; *In re Page*, 206 Fed. 1004; *In re Hollo*, 206 Fed. 852; *In re Liberman*, 193 Fed. 301; *In re Kolbel*, 84 Misc. 475, 146 N. Y. Supp. 885.

[a] **Filing the certificate of arrival being a matter of substance**, it is clear that no power is vested in the naturalization court to dispense with it. *United States v. Ness*, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. ed. —, holding that naturalization granted without the certificate having been filed, is "illegally procured."

[b] **If the certificate has been lost after being filed in court**, the applicant may present a copy thereof for use at the hearing, even though such copy is not sanctioned by the regulations of the department. *In re Pick*, 209 Fed. 999.

[c] Where the alien is actually in the military or naval service of the

by the actual filing of it before the date of the hearing, however.⁶⁵ When the department has no record from which to make such certificate, and therefore could not furnish one, the applicant may be naturalized upon proving at the hearing every fact necessary to be shown by the certificate.⁶⁷ The certificate to be filed need not necessarily be the same certificate required to be kept by the department under Sec. 1 of the Act of 1906,⁶⁸ and may be made from information obtained by the department otherwise than from the record of entry itself.⁶⁹

5. **The declaration of intention** must be attached to the petition as a part thereof, when the latter is filed.⁷⁰

6. **Posting.**—Immediately upon the filing of the petition, notice is given, as in the case of a judicial proceeding, setting forth that the application has been made, and that the hearing will be had before a court of record at a time specified therein.⁷¹ The law specifically requires that the names of the witnesses shall be posted in a public and conspicuous place for a designated period before the hearing.⁷²

D. **THE HEARING UPON THE PETITION.**—The final hearing on the petition must be in open court,⁷³ and before a judge or judges there-

United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed." Act June 29, 1906, §4, as amended by Act May 9, 1918, c. —, §§1-3.

66. *In re Titone*, 233 Fed. 175. *Contra, In re Kolbel*, 84 Misc. 475, 146 N. Y. Supp. 885.

67. *United States v. Ness*, 230 Fed. 950, 145 C. C. A. 144, Ann. Cas. 1917C, 41. *Contra, In re Hollo*, 206 Fed. 852.

Proof upon hearing, see *infra*, III, D.

68. *In re McPhee*, 209 Fed. 143; *In re Schmidt*, 207 Fed. 678.

69. *In re Page*, 206 Fed. 1004. *Contra, In re Hollo*, 206 Fed. 852.

70. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352; *In re Liberman*, 193 Fed. 301.

As to declaration of intention, see *supra*, III, B.

71. *United States v. Janke*, 183 Fed. 277. See Act June 29, 1906, §5, 34 St. at L. 596; Comp. St., 1916, §4353, requiring the clerk to post in a public and conspicuous place in his office or building, the name, nativity and residence of the alien, the date and place of his arrival in the United States, the approximate date of the final hearing, and the names of applicant's witnesses.

[a] **One seeking naturalization under Act of July 26, 1894** (34 St. at L.

596), must have his petition regularly posted, notwithstanding an honorable discharge from the naval or marine service. *United States v. Peterson*, 182 Fed. 289, 104 C. C. A. 571.

[b] **But under the Act of June 30, 1914** (38 St. at L. 395), such certificate of honorable discharge relieves from the necessity of posting. *In re Sterbuck*, 224 Fed. 1013.

[c] **The presumption, until disproved or denied in a cancellation proceeding**, is that the clerk performed his duty and regularly posted the petition. *United States v. Erickson*, 188 Fed. 747.

72. See the statute, and *United States v. Daly*, 32 App. Cas. (D. C.) 525.

[a] **"This is a condition precedent to the qualification of a witness to testify in the naturalization proceeding."** *United States v. Daly*, 32 App. Cas. (D. C.) 525.

73. Act June 29, 1906, §9, 34 St. at L. 596; Comp. St., 1916, §4368; *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. ed. 853, the term "open court" is used in the statute in contradistinction to a judge sitting in chambers. "Its plain language repels the idea that any part of a final hearing may take place in chambers, whether adjoining the court room or elsewhere."

of,⁷⁴ and the applicant and witnesses must be examined under oath before the court and in the presence of the court.⁷⁵ Representatives of the United States government may appear.⁷⁶

In addition to the oath of allegiance, which the applicant must take in open court before being admitted to citizenship,⁷⁷ the testimony of at least two witnesses,⁷⁸ who are citizens of the United States,⁷⁹ as to the facts of residence at least five years continuously in the United States preceding the date of his application, and within the particular state or territory at least one year,⁸⁰ good moral character of the ap-

74. See the statute.

75. See the statute.

76. Act June 29, 1906, §11, 34 St. at L. 596; Comp. St., 1916, §4370. The United States attorney, if present, has the right to cross-examine petitioner and to call witnesses, produce evidence, and be heard in opposition to the petition.

[a] A representative of the Bureau of Naturalization may appear as amicus curiae, to present to the court such facts relative to the personal history of the applicant as the bureau's investigation may have disclosed. *United State v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471.

77. Act June 29, 1906, §4, 34 St. at L. 596; Comp. St., 1916, §4352.

[a] Alien in military service, not within jurisdiction of court shall not be required to take oath of allegiance in open court. Act June 29, 1906, §4, as amended by Act May 9, 1918, c. —, §§1-3.

78. See the statute.

[a] The witnesses should not be professionals, who habitually act as such for compensation. *In re Lipshitz*, 97 Fed. 584.

[b] Substitution of Witnesses.—In case any of the witnesses who verified the petition cannot be produced, the applicant may summon others, subject to the right of the court to make any orders necessary to enable the government to investigate as to the character and qualifications of such witnesses. *United States v. Doyle*, 179 Fed. 687, 103 C. C. A. 233; *In re Schatz*, 161 Fed. 237; *In re Neugebauer*, 172 Fed. 943. *Contra*, *United States v. Gulliksen*, 244 Fed. 727, 157 C. C. A. 175; *In re O'Dea*, 158 Fed. 703; *United States v. Daly*, 32 App. Cas. (D. C.) 525.

79. See the statute.

[a] Since an American woman loses

her American citizenship by marriage to an alien, she is incompetent as a witness for her husband. *In re Martorana*, 159 Fed. 1010, followed on this point in *United States v. Martorana*, 171 Fed. 397, 96 C. C. A. 353.

80. See the statute.

[a] Continuously resident does not mean (1) that the applicant must be actually and physically present in the United States every day of the five-year period. A temporary absence, not unduly extended, with intention of returning, is not a fatal interruption of the required residence. *United States v. Deans*, 230 Fed. 957, 961, 145 C. C. A. 151 (absence of six months); *United States v. Cantini*, 212 Fed. 925, 129 C. C. A. 445; *United States v. Rockteschell*, 208 Fed. 530, 125 C. C. A. 532; *United States v. Jorgenson*, 241 Fed. 412 (temporary absences on business or pleasure permitted); *In re Cook*, 239 Fed. 782; *In re Reichenburg*, 238 Fed. 859; *In re Brash*, 235 Fed. 1003; *United States v. Timourian*, 225 Fed. 570, absence of eighteen months on a business trip. See also *In re Willis*, 169 N. Y. Supp. 261. (2) But there must be such a residence as to satisfy the court that it was the intention of the petitioner to make this country his permanent home. *In re Willis*, 169 N. Y. Supp. 261. (3) A lengthy absence invalidates the declaration previously filed. *United States v. Simon*, 170 Fed. 680 (absence of seven months during which the alien applied for foreign citizenship); *United States v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471 (absence of about two and one-half years); *United States v. Cantini*, 212 Fed. 925, 129 C. C. A. 445 (absence of about two years); *In re Cook*, 239 Fed. 782; *United States v. Griminger*, 236 Fed. 285 (absence of about two years); *In re Brash*, 235 Fed. 1003 (absence of

plicant,⁸¹ and attachment to the principles of the constitution,⁸² shall ordinarily be required.⁸³ Certain exceptions are made in the cases

twenty years); *In re Pearlman*, 226 Fed. 60, absence of about four and one-half years.

[b] **Intention** (1) is an important element in determining validity of residence (*United States v. Shanahan*, 232 Fed. 169. See *In re Willis*, 169 N. Y. Supp. 261); and (2) one who leaves the country with the intention not to return, annuls his declaration of intention previously filed. *In re Cameron*, 165 Fed. 112.

[c] **A residence aboard a foreign vessel** ten months of the year, only two months being spent ashore, is not a continuous residence in the United States within meaning of act. *In re Willis*, 169 N. Y. Supp. 261.

[d] **Question of Fact**.—The question whether an alien has resided continuously in the United States for the required five years is one of fact to be determined from all the facts and circumstances in each particular case. *United States v. Jorgenson*, 241 Fed. 412; *In re Cook*, 239 Fed. 782; *In re Brash*, 235 Fed. 1003.

[e] **Witnesses must have known applicant at least five years** preceding the filing of the petition as distinguished from the time of the hearing. *In re Welsh*, 159 Fed. 1014.

81. See the statute, and *United States v. Leles*, 236 Fed. 784.

[a] **The word character in the statute is not synonymous with reputation.** It means what the person really is. *United States v. Hrasky*, 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288, 16 Ann. Cas. 279. See also *United States v. Leles*, 236 Fed. 784.

[b] **A person has not "behaved as a man of good moral character,"** who has habitually, unlawfully sold liquor on Sunday (*United States v. Hrasky*, 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288, 16 Ann. Cas. 279, distinguished in *In re Hopp*, 179 Fed. 561 [holding that, where the public authorities made no effort to enforce the Sunday closing law and it was a general custom of saloonkeepers in the community to disregard it without secrecy, applicant was not disqualified for following such custom]), or (2) has been convicted of the crime of illegal liquor selling within

the five-year period (*In re Trum*, 199 Fed. 361), or (3) who has knowingly made use of a certificate of citizenship illegally obtained (*In re Di Clerico*, 158 Fed. 905), or (4) has been guilty of falsehood in answering questions of the naturalization examiner preliminary to the hearing in court. *In re Talarico*, 197 Fed. 1019.

[c] **Manslaughter**.—One who has pleaded guilty to, and served his sentence for manslaughter, cannot be naturalized despite good conduct for more than five years preceding his application. *In re Ross*, 188 Fed. 685.

[d] **Presumption**.—Good character once proved is, in the absence of countervailing evidence, presumed to continue. *United States v. Deans*, 230 Fed. 957, 145 C. C. A. 151.

82. See the statute.

[a] **The applicant (1) should have sufficient knowledge and understanding of the constitution** to indicate that he is desirous of supporting it. *In re Bodek*, 63 Fed. 813. However, (2) an uneducated man, though unable to elucidate and define the principles of the constitution, may, by his life as a good man, peaceable, industrious, of good moral character and law abiding, indicate satisfactorily his attachment to such principles. *In re Rodriguez*, 81 Fed. 337, 355; *Ex parte Johnson*, 79 Miss. 637, 31 So. 208, 89 Am. St. Rep. 665. (3) But the applicant should have a knowledge of and attachment to the principles of the constitution, ability to read and write sufficiently well to intelligently make up his ballot, and a general knowledge of the government, customs, history and geography of the nation. Northumberland County Naturalizations, 18 Pa. Co. Ct. 270. (4) A person who cannot read or write the English language, though he stated he had read the constitution in his own foreign language, and who in 1889 spoke of George Washington as president, should not be naturalized as it does not appear that he has sufficient intelligence to understand the principles of the government. *In re Kanakaian*, 6 Utah 259, 21 Pac. 993, 4 L. R. A. 726.

83. See the statute.

of soldiers,⁸⁴ persons in the naval or marine service,⁸⁵ and seamen.⁸⁶ The name, place of residence, and occupation of each witness must be set forth in the record.⁸⁷ The witnesses must have personally known the applicant during the time about which they testify, using the words in a reasonable sense.⁸⁸ Subpoenas may be obtained for the witnesses.⁸⁹

Use of Depositions.—The proof of residence in the state for one year or more must be by witnesses in open court and in the presence of the judge;⁹⁰ but depositions may be taken to prove such portion of the necessary five-years' residence in the United States, as has been outside the particular state.⁹¹ As a soldier is not required to prove residence in any state for one year, he may use depositions to show his necessary year's residence in the United States.⁹² Depositions,⁹³

84. See the Naturalization Act.

[a] A soldier honorably discharged was relieved by Rev. St., §2166, from the necessity of producing witnesses. *In re Loftus*, 165 Fed. 1002; *In re McNabb*, 175 Fed. 511.

[b] He may prove good character by his certificate of honorable discharge and his own testimony in open court. *In re McNabb*, 175 Fed. 511.

[c] Soldiers with certificates of honorable discharge (1) need not prove residence in the state one year prior to filing of petition. *In re Leichtag*, 211 Fed. 681; *In re McNabb*, 175 Fed. 511. But (2) a certificate of furlough obtained before the service of the term of enlistment, is not sufficient for this purpose. *In re Markun*, 232 Fed. 1018. Compare Naturalization Act as amended by Act May 9, 1918, c. —, §§1-3.

85. See the Naturalization Act.

86. See the Naturalization Act.

[a] A seaman who produced a certificate of discharge under Rev. St., §2174, and made due declaration of intention, was entitled to citizenship without producing witnesses. *In re Lind*, 192 Fed. 209; *In re Tancred*, 227 Fed. 329; *In re Sutherland*, 197 Fed. 841.

[b] He could prove good character by his certificate of discharge and good conduct. Rev. St., §2174. The certificate might be made either by a master or a shipping commissioner. *In re Lind*, 192 Fed. 209.

[c] The law applied (1) to seamen on lake going vessels (*In re Sutherland*, 197 Fed. 841), and (2) on vessels engaged in local coastwise trade. *In re Lind*, 192 Fed. 209.

87. Act June 29, 1906, §4, 34 St.

at L. 596; Comp. St., 1916, §4352.

88. See *infra*, this note.

[a] **Knowledge Defined.**—Witnesses need not see the applicant every day and their knowledge is sufficient if appropriate to applicant's employment, so that in the case of a sailor, if they know that he lived here before he went to sea, that he returned home from voyages from time to time, and corresponded with him, they know all that can reasonably be expected of a sailor's witnesses. *In re Schneider*, 164 Fed. 335. Compare *In re Toomey*, 111 N. Y. Supp. 600, holding that information gained from correspondence is insufficient.

89. Act June 29, 1906, §5, 34 St. at L. 596; Comp. St., 1916, §4353.

90. Act June 29, 1906, §§4, 9 and 10, 34 St. at L. 596; *United States v. Kolodner*, 204 Fed. 240, 124 C. C. A. 1; *United States v. Leles*, 230 Fed. 784, 787; *United States v. Nisbet*, 168 Fed. 1005.

[a] **Depositions Not Permissible.** So that when applicant has resided in the state five years continuously prior to the hearing, he cannot be allowed to produce depositions to prove any portion of such residence. *United States v. Kolodner*, 204 Fed. 240, 124 C. C. A. 1; *United States v. Nisbet*, 168 Fed. 1005.

91. Act June 29, 1906, §10, 34 St. at L. 596; Comp. St., 1916, §4369; *In re McNabb*, 175 Fed. 511.

[a] As to notice of the proposed taking of depositions, see Act June 29, 1906, §10, 34 St. at L. 599, as amended by Act May 9, 1918, c. —, §1.

92. *In re McNabb*, 175 Fed. 511.

93. See *infra*, this note.

[a] **Testimony before a commissioner appointed by the court and re-**

however, are not permissible unless specifically authorized by the statute.

IV. THE JUDGMENT OR DECREE.⁹⁴ — A. NATURE GENERALLY. A judgment of a court admitting an alien to citizenship is of the same dignity as any other judgment of a court having jurisdiction.⁹⁵ However, since it is in its essence an instrument granting political privileges, it is, like other public grants, open to be revoked if and when it shall be found to have been unlawfully or fraudulently procured.⁹⁶

B. REQUISITES AND RECORD. — A judgment or decree granting naturalization is not required to be in any particular form.⁹⁷

The naturalization law provides that every final order must be under the hand of the court,⁹⁸ and entered in full upon a record kept for that purpose.⁹⁹ The record, however, need not show the facts in evidence, such as residence,¹ or good moral character of the applicant.² It need not show jurisdiction, or that all the legal requisites have been complied with, in order to import validity.³ Every reasonable intendment of construction should be allowed to give effect to a record of naturalization, that would be allowed to sustain a record in an ordinary case, and immaterial omissions or inadvertences of the clerk in making up the record should not be considered as of importance.⁴ The record may be amended *nunc pro tunc* so as to correct an error of the clerk and make it conform to the truth.⁵

ported by such commissioner to the court, cannot be considered. The error is not cured by the testimony of the trial judge, in a cancellation proceeding, that his decision was uninfluenced by the testimony so illegally taken. *United States v. Leles*, 236 Fed. 784. See also *United States v. Nisbet*, 168 Fed. 1005.

94. See generally the title "Judgments."

95. **U. S.**—*Stark v. Chesapeake Ins. Co.*, 7 Cranch 420, 3 L. ed. 391; *Campbell v. Gordon & Wife*, 6 Cranch 175, 3 L. ed. 190; *United States v. Stoller*, 180 Fed. 910. **Cal.**—*Tinn v. United States District Attorney*, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354. **Mo.**—*In re O'Sullivan*, 137 Mo. App. 214, 117 S. W. 651.

See also *United States v. Gleason*, 78 Fed. 396, *affirmed*, 90 Fed. 778, 33 C. C. A. 272, and *infra*, IV, C, 1.

96. *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066.

Opening and vacating judgments generally, see 15 STANDARD PROC. 151, et seq.

Cancellation proceedings, see *infra*, VI.

97. *In re O'Sullivan*, 137 Mo. App. 214, 117 S. W. 651.

[a] **Form of Judgment.**—See *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140.

98. Act June 29, 1906, §9, 34 St. at L. 596; Comp. St., 1916, §4368; *United States v. Stoller*, 180 Fed. 910.

99. Act June 29, 1906, §9, 34 St. at L. 596; Comp. St., 1916, §4368; *United States v. Stoller*, 180 Fed. 910; *In re Bodek*, 68 Fed. 813.

1. *Rockland v. Hurricane Isle*, 106 Me. 169, 76 Atl. 286.

2. *Campbell v. Gordon*, 6 Cranch (U. S.) 176, 3 L. ed. 190.

3. *In re Symanowsski*, 168 Fed. 978, record need not show requisite previous declaration of intention to become a citizen.

4. *Rockland v. Hurricane Isle*, 106 Me. 169, 76 Atl. 286; *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

5. *State v. Macdonald*, 24 Minn. 48; *Matter of Christern*, 56 How. Pr. (N. Y.) 5, 11 Jones & S. 523.

[a] **Correction of the record cannot be allowed** (1) to conform to a certificate, if there is no entry or record to assist the certificate. *In re O'Sullivan*, 137 Mo. App. 214, 117 S. W. 651. (2) Nor can the record be amended so as to change the name of one naturalized, so as to add a family name not used at time of naturaliza-

C. EFFECT OF.—1. Generally.—The judgment of admission to citizenship is ordinarily conclusive as to all matters necessarily before the court and actually litigated therein.⁶ Such judgments can be impeached only as other judicial judgments may be.⁷ But the order entered in a naturalization proceeding in which the United States is represented is not *res judicata* as to matters actually litigated therein so that the certificate of naturalization cannot be set aside as having been procured by fraud or illegality.⁸ One who has been legally naturalized cannot maintain proceedings to obtain a second judgment.⁹ A judgment denying naturalization for lack of good character, is a bar to a second application until applicant can prove that he has been of good moral character for at least five years.¹⁰

2. As to Applicant.—Naturalization operates prospectively, in the future, and not retroactively.¹¹ It confers only civil rights, not necessarily political rights, such as suffrage.¹² Naturalized citizens, while in foreign countries, are entitled to the protection of the United States.¹³

3. As to Family of Applicant.—An alien woman capable of citizenship becomes a citizen by marriage to a citizen,¹⁴ or upon her husband's becoming a citizen.¹⁵ But a wife does not attain citizenship through her husband's status until she has actually gained admission to the United States.¹⁶

A child born outside the United States, of alien parents, acquires

tion. *In re Holland*, 237 Fed. 735.

6. *United States v. Nechman*, 183 Fed. 788; *In re Symanowsski*, 168 Fed. 978; *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140.

7. **U. S.**—*Spratt v. Spratt*, 4 Pet. 393, 406, 7 L. ed. 897; *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140. **Cal.**—*Tinn v. U. S. Dist. Attorney*, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354. **N. Y.**—*In re Mesa's Estate*, 172 App. Div. 467, 159 N. Y. Supp. 59.

See generally the title "Judgments."

Vacation of judgment, see *infra*, IV, D.

Cancellation proceedings, see *infra*, VI.

8. *United States v. Ness*, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. ed. —, holding that §§11 and 15 of naturalization act were designed to afford cumulative protection against fraudulent or illegal naturalization. See also *United States v. Leles*, 236 Fed. 784.

Cancellation proceedings, see *infra*, VI.

9. *In re Buck*, 204 Fed. 701.

10. *In re Hartman*, 232 Fed. 797; *In re Centi*, 217 Fed. 833; *In re Talarico*, 197 Fed. 1019.

[a] **Motion To File.**—Where applicant has recently been denied naturalization and it is doubtful whether a second petition will be successful, he has been allowed to have the matter considered on a preliminary motion, without payment of fees, requesting leave to file the petition. *In re Guliano*, 156 Fed. 420.

[b] **Withdrawal of the application** cannot be permitted, after the court has entered an unfavorable judgment. *In re Bodek*, 63 Fed. 813.

11. *Henry v. Brooklyn Ben. Soc.*, 39 N. Y. 333, holding that one who, because of alienage, could not inherit at the time of the ancestor's death, did not acquire that right upon becoming a citizen subsequently.

12. *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809, 69 Am. St. Rep. 228.

13. Rev. St., §§2000, 2001.

14. Rev. St., §1994; *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809, 69 Am. St. Rep. 228.

15. *Kelly v. Owen*, 7 Wall. (U. S.) 496, 19 L. ed. 283; *Renner v. Muller*, 12 Jones & S. (N. Y.) 535.

16. *In re Rustigian*, 165 Fed. 980.

citizenship by the naturalization of its parents during its minority.¹⁷ This rule benefits the children whether the naturalized parent be a step-father,¹⁸ or a widow.¹⁹ Children living outside the United States at the time of parents' naturalization, do not become citizens until they begin to reside permanently in this country.²⁰

D. VACATION OF JUDGMENT. — The trial court may within the term revoke or cancel naturalization papers for good cause.²¹ After the term, however, the judgment cannot be vacated, corrected or set aside, as the control of the trial court over the judgment has expired.²²

E. APPELLATE REVIEW. — As to whether the circuit court of appeals has appellate jurisdiction over naturalization proceedings in a federal district court is a question as to which there is considerable conflict in the decisions, jurisdiction being denied by some,²³ and affirmed in others.²⁴ Such jurisdiction has been exercised, apparently without being questioned, in many cases.²⁵ It has been held that since

17. U. S.—Act Mar. 2, 1907, §5, 34 St. at L. 1229; Rev. St., §2172; Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. ed. 428; Boyd v. United States, 6 Cranch 176, 3 L. ed. 190; Campbell v. Gordon, 6 Cranch 176, 3 L. ed. 190; Gribble v. Pioneer Press Co., 15 Fed. 689. Ark.—State v. Penney, 10 Ark. 621. Ill.—Behrensmeier v. Kreitz, 135 Ill. 591, 26 N. E. 704. Md.—Brown v. Shilling, 9 Md. 74. Mich.—Crane v. Reeder, 25 Mich. 303. Minn.—Minnesota v. Mims, 26 Minn. 183, 2 N. W. 494, 683. Mo.—Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312. N. Y.—Young v. Peck, 21 Wend. 389; People v. Newell, 38 Hun 78. Tex.—Schrimpf v. Settegast, 38 Tex. 96.

[a] Adults do not attain citizenship by the naturalization of the parent. Behrensmeier v. Kreitz, 135 Ill. 591, 26 N. E. 704; Berry v. Hull, 6 N. M. 643, 30 Pac. 936.

18. U. S.—United States *ex rel.* Fisher v. Rodgers, 144 Fed. 711. Ill. Behrensmeier v. Kreitz, 135 Ill. 591, 26 N. E. 704. N. Y.—People v. Newell, 38 Hun 78.

19. Brown v. Shilling, 9 Md. 74.

20. Act Mar. 2, 1907, §5, 34 St. at L. 1229; Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. ed. 428.

[a] If debarred from entry by the immigration authorities, the child does not become a citizen because residence here is impossible. Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. ed. 428; United States *ex rel.*

De Rienzo v. Rodgers, 185 Fed. 334, 107 C. C. A. 452.

21. See *infra*, this note.

[a] False testimony as to a material matter is cause for vacation of the judgment. United States v. Kornmehl, 89 Fed. 10.

22. Tinn v. U. S. District Attorney, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354; *In re* O'Sullivan, 137 Mo. App. 214, 117 S. W. 651. See generally the title "Judgments."

This rule does not prevent cancellation proceedings in equity, see *infra*, VI.

23. Appeal of Cook, 242 Fed. 932, 155 C. C. A. 520; United States v. Neugebauer, 221 Fed. 938, 137 C. C. A. 508 (third circuit), following United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665, holding that such proceedings are not a "case" as the word is used in the court of appeals act.

24. *In re* Hartman, 232 Fed. 797; United States v. Lenore, 207 Fed. 865, both district court decisions, however.

25. Dow v. United States, 226 Fed. 145, 140 C. C. A. 549; Yunghaus v. United States, 218 Fed. 168, 134 C. C. A. 67; United States v. Cantini, 212 Fed. 925, 129 C. C. A. 445; United States v. Kolodner, 204 Fed. 240, 124 C. C. A. 1; United States v. Ojala, 182 Fed. 51, 104 C. C. A. 491; United States v. Balsara, 180 Fed. 694, 103 C. C. A. 660; United States v. Doyle, 179 Fed. 687, 103 C. C. A. 233; United States v. Poslusny, 179 Fed. 836, 103 C. C. A. 324; Bessho v. United States, 178 Fed. 245, 101 C. C. A. 605; United

the act conferring jurisdiction upon state courts provides for no appeal, that there is no right to an appeal from such courts,²⁶ though the weight of authority seems to be to the contrary.²⁷

V. THE CERTIFICATE OF NATURALIZATION.—The naturalization act provides for the issuance of a certificate of citizenship to those duly admitted.²⁸ The form of the certificate is prescribed by the statute.²⁹ A misnomer in the certificate does not vitiate it; the identity of the owner may be shown by parol.³⁰

Lost records and certificates must be restored by proper proceedings in the court which granted citizenship, not by application for citizenship a second time.³¹

VI. CANCELLATION PROCEEDINGS.—A. NATURE OF.—A suit to cancel a certificate of naturalization is a suit in equity and must be considered and decided in accordance with the rules and principles of equity jurisprudence applicable to such cases.³²

Laches cannot be urged as a defense to a cancellation suit.³³ Nor is the government estopped from cancellation proceedings by the fact that a representative of the bureau of naturalization was present at and participated in, the naturalization hearing.³⁴

States v. Martorana, 171 Fed. 397, 96 C. C. A. 353; *United States v. George*, 164 Fed. 45, 90 C. C. A. 463; *United States v. Rodiek*, 162 Fed. 469, 89 C. C. A. 389. See also *United States v. Daly*, 32 App. Cas. (D. C.) 525.

[a] In all cases where the court of appeals for the second circuit has reviewed naturalization proceedings, the court emphasizes the fact that the United States attorney has appeared in opposition to applicants' petition at the hearing and a record has been made of the testimony and proceedings. *United States v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471, citing *Yunghauss v. United States*, 218 Fed. 168, 134 C. C. A. 67; *United States v. Cohen*, 179 Fed. 834, 103 C. C. A. 28; *United States v. Poslusny*, 179 Fed. 836, 103 C. C. A. 324; *United States v. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

26. *State v. Superior Court*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425, no appeal lies to supreme court in absence of an express statutory authority.

27. *United States v. Hraskey*, 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288, 16 Ann. Cas. 279; *State v. Brandhorst*, 156 Mo. 457, 56 S. W. 1094, 79 Am. St. Rep. 538. See also *United States v. Breen*, 135 App. Div. 824, 120 N. Y. Supp. 304.

28. See the statute.

[a] A certificate not obtained as the result of proper proceedings, but issued by a county clerk upon his own initiative, is void. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

[b] A forged certificate, of course, is void, and the court by which it purports to have been issued, has power to require its surrender and cancellation. *In re Macolusos's Naturalization*, 237 Pa. 132, 85 Atl. 149, Ann. Cas. 1914B, 226.

29. Act June 29, 1906, §27, 34 St. at L. 596; Comp. St., 1916, §4382.

[a] Invalid Certificate.—One which seems to be merely a statement of the clerk's opinion of the legal import of the record, is not competent to show citizenship. *Miller v. Reinhart*, 18 Ga. 239.

30. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

31. *In re Buck*, 204 Fed. 701, calling attention to the impossibility of second naturalization, because only aliens can institute proceedings therefor.

32. *Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101; *United States v. Ness*, 230 Fed. 950, 45 C. C. A. 144, Ann. Cas. 1917C, 41; *United States v. Jorgenson*, 241 Fed. 412.

33. *United States v. Spohrer*, 175 Fed. 440.

34. See the cases cited *infra*, this note.

[a] Proceeding Not Adversary.

B. **JURISDICTION OF COURTS.** — The cancellation suit may be brought in any court having naturalization jurisdiction³⁵ in the judicial district in which the owner of the certificate resides at the time of bringing suit.³⁶ Thus, a federal court in the proper district has jurisdiction of a suit to cancel a certificate of naturalization issued by a state court.³⁷ The cancellation suit need not be brought before the same federal judge who issued the certificate, even though begun in the same district.³⁸

Power of State Courts. — It would seem that the state courts have jurisdiction of proceedings to cancel a certificate of naturalization.³⁹

C. **PARTIES AND SERVICE.** — 1. **Who May Sue.** — It is the duty of the United States attorney, upon affidavit showing good cause, to institute suit.⁴⁰

2. **Service on Defendant.** — The defendant is entitled to sixty

Such participation does not make the proceeding an adversary one, as the representative of the government merely acts as an *amicus curiae* or in an advisory capacity to the court. *United States v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471; *United States v. Leles*, 230 Fed. 784; *United States v. Nopoulos*, 225 Fed. 656. See also *supra*, III, A.

35. Jurisdiction of courts in naturalization proceedings, see *supra*, II.

36. Act June 29, 1906, §15, 34 St. at L. 596; Comp. St., 1916, §4374.

37. *United States v. Nopoulos*, 225 Fed. 656.

[a] Even prior to the passage of the Act of 1906, the federal courts possessed this power. *United States v. Norsch*, 42 Fed. 417.

38. *United States v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471.

39. See the following: **U. S.**—*United States v. Simon*, 170 Fed. 680; *United States v. Aakervik*, 180 Fed. 137; *United States v. Anderson*, 169 Fed. 201; *United States v. Nisbet*, 168 Fed. 1005. **Cal.**—*Tinn v. U. S. Dist. Attorney*, 148 Cal. 773, 84 Pac. 152, 113 Am. St. Rep. 354. **Mo.**—*In re O'Sullivan*, 137 Mo. App. 214, 117 S. W. 651. **N. Y.**—*McCarran v. Cooper*, 16 App. Div. 311, 44 N. Y. Supp. 695, *affirmed*, 162 N. Y. 654, 57 N. E. 1116. **Pa.**—*In re Macoluso's Naturalization*, 237 Pa. 132, 85 Atl. 149, Ann. Cas. 1914B, 226. **S. C.**—*Richards v. McDaniel*, 2 Nott & McC. 351. **Wash.** *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L. R. A. 671.

[a] "If a state court has authority to naturalize aliens and issue certificates of citizenship, it is not within the power of congress to deprive it of its equitable powers to correct any fraud upon, or fraudulent use of, its process. Congress may establish a uniform rule of naturalization, as authorized by the federal constitution, but it certainly will not be presumed, in the absence of a declaration to the contrary, that such legislation prevents any court, state or federal, from annulling a certificate of citizenship bearing its seal which is a forgery. The power to correct and purge its records is inherent in every state court of general jurisdiction, and it may be exercised in the case of the naturalization of an alien as well as in any other case in which it has jurisdiction to act. It, therefore, follows that the Act of 1906, . . . did not deprive the court below from entering its decree annulling the forged certificate of citizenship and directing that it be surrendered for cancellation." *In re Macoluso's Naturalization*, 237 Pa. 132, 85 Atl. 149, Ann. Cas. 1914B, 226, holding that the statute furnishes cumulative remedy for a wrong which there was an existing appropriate remedy for, and hence is not exclusive.

40. Act June 29, 1906, §15, 34 St. at L. 596; Comp. St., 1916, §4374; *United States v. Anderson*, 169 Fed. 201.

[a] A private party cannot maintain suit for such purpose. *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140; *In re McCarran*, 8 Misc. 482, 29 N. Y. Supp. 582.

days' notice to answer the petition.⁴¹ If the defendant is absent from the United States or the district in which he last had his residence, notice may be made, according to the state law, by publication,⁴² or in other manner provided for service of summons upon absentees.⁴³

D. GROUNDS FOR CANCELLATION. — 1. **Fraud.** — Cancellation proceedings may be based on the ground that the certificate was obtained by fraud.⁴⁴ Fraud may consist of misrepresentation or concealment of material facts without which the certificate would not have been granted,⁴⁵ or that applicant at the time of admission was a person of immoral character.⁴⁶

2. **Illegal Procurement.** — A certificate may be cancelled upon proof that it has been illegally procured.⁴⁷ If procured when prescribed qualifications have no existence in fact, it is illegally procured.⁴⁸ Mere errors of procedure, not going to the court's authority nor rendering the certificate false or spurious, are not ground for cancellation,⁴⁹ such as failure to attach to the petition the certificate of

41. Act June 29, 1906, §15, 34 St. at L. 596.

42. *United States v. Luria*, 184 Fed. 643.

As to service by publication, see generally the title "Service of Process and Papers."

43. See generally the title "Service of Process and Papers."

[a] A curator ad hoc may be appointed and served with notice, where proper under the state practice. *United States v. Ellis*, 185 Fed. 546.

44. Act June 29, 1906, §15, 34 St. at L. 596; Comp. St., 1916, §4374. See also *Johannessen v. United States*, 235 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; *United States v. Spohrer*, 175 Fed. 440.

45. See *infra*, this note.

[a] Concealment of the fact that applicant is married and has abandoned his family, is fraud justifying cancellation. *United States v. Albertini*, 206 Fed. 133.

[b] Misrepresentations as to residence in the United States are sufficient basis for the action. *United States v. Mansour*, 170 Fed. 671.

46. *United States v. Raverat*, 222 Fed. 1018.

[a] Drunkenness.—That one was convicted of drunkenness about four and one-half years before naturalization, is not cause for cancellation where applicant reformed and lived morally at all times subsequent to the conviction. *United States v. Dwyer*, 170 Fed. 686.

47. Act June 29, 1906, §15, 34 St.

at L. 596; Comp. St., 1916, §4374; *United States v. Ness*, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. ed. —; *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. ed. 853.

[a] Naturalization granted without the certificate of arrival having been filed is "illegally procured." *United States v. Ness*, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. ed. —.

[b] Substitution of another witness, in place of witness verifying petition, was held a departure rendering certificate subject to cancellation as having been "illegally procured." *United States v. Gulliksen*, 244 Fed. 727, 157 C. C. A. 175.

48. *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. ed. 853.

[a] A manifest mistake by the judge cannot supply these nor render their existence non-essential. *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. ed. 853.

[b] For example, (1) when applicant's residence in the United States has not been maintained during the five year period (*United States v. Spohrer*, 175 Fed. 440; *United States v. Mulvey*, 232 Fed. 513, 146 C. C. A. 471; *In re Di Giovine*, 242 Fed. 741), (2) when certificate issued to one who had never filed a declaration of intention. *United States v. Nopoulos*, 225 Fed. 656.

49. *United States v. Ness*, 217 Fed. 169; *United States v. Lenore*, 207 Fed. 865. See *United States v. Jorgenson*, 241 Fed. 412.

the department of commerce and labor, of alien's entry,⁵⁰ or conferring citizenship upon a petition signed by applicant's mark instead of in his handwriting.⁵¹

3. Foreign Residence After Naturalization. — The fact that a person, within five years after naturalization, takes up permanent residence in a foreign country, constitutes prima facie evidence of lack of intention to become a permanent citizen at the time of application for citizenship, and unless rebutted by countervailing evidence, is sufficient basis for cancellation.⁵²

E. AFFIDAVIT OF COMPLAINT. — The affidavit of complaint, which sets in motion a suit for cancellation, is not a pleading,⁵³ is not subject to technical attack,⁵⁴ and is sufficient if made on information and belief.⁵⁵

F. THE PETITION. — The petition is sufficient if it sets forth the necessary statutory facts justifying cancellation.⁵⁶ But without the averment of supporting facts, mere conclusions of law such as that the judgment was fraudulently and illegally procured, are insufficient.⁵⁷

G. THE HEARING. — A cancellation suit, being equitable rather than legal in nature, should be heard by the court without a jury.⁵⁸

Scope of Review. — The only action by the naturalizing court which may be reviewed, is its errors of law,⁵⁹ such as absence of declaration of intention in cases not falling within the statutory exceptions,⁶⁰ admitting applicant to citizenship within two years after declaration,⁶¹ and the consideration by the court of depositions not authorized by the statute.⁶² The trial court's decision on questions of fact is conclusive,⁶³ such as a finding as to continuous residence,⁶⁴ as to the age

50. See *United States v. Ness*, 217 Fed. 169.

Necessity of attaching such certificate, see *supra*, III, C, 4.

51. *United States v. Lenore*, 207 Fed. 865.

52. Act June 29, 1906, §15, 34 St. at L. 596; *Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101; *United States v. Ellis*, 185 Fed. 546.

53. *United States v. Leles*, 227 Fed. 189.

54. *United States v. Leles*, 227 Fed. 189.

55. *United States v. Leles*, 227 Fed. 189.

56. *United States v. Mansour*, 170 Fed. 676, even though it is in form neither a complaint at common law, nor a bill in equity.

57. *United States v. Rose*, 166 Fed. 999; *United States v. Norsch*, 42 Fed. 417.

58. *Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101; *United*

States v. Luria, 184 Fed. 643; *United States v. Mansour*, 170 Fed. 671.

59. See *United States v. Shanahan*, 232 Fed. 169; *United States v. Butikofer*, 228 Fed. 918; *United States v. Nopoulos*, 225 Fed. 656; *United States v. Plaistow*, 189 Fed. 1006; *United States v. Neelman*, 183 Fed. 788; *United States v. Meyer*, 170 Fed. 983.

60. *United States v. Nopoulos*, 225 Fed. 656; *United States v. Plaistow*, 189 Fed. 1006; *United States v. Meyer*, 170 Fed. 983.

Necessity for declaration of intention, see *supra*, III, B, 1.

61. *United States v. Van Der Molen*, 163 Fed. 650.

62. *United States v. Nisbit*, 168 Fed. 1005.

What depositions may be considered, see *supra*, III, D.

63. *United States v. Shanahan*, 232 Fed. 169; *United States v. Butikofer*, 228 Fed. 918; *United States v. Neelman*, 183 Fed. 788.

64. *United States v. Shanahan*, 232

of the applicant,⁶⁵ or as to the regularity of the declaration of intention.⁶⁶ However, it may always be shown that fraud was practiced upon the court.⁶⁷

A decision of a state court based on a construction of state laws that it has jurisdiction should not be reviewed in a cancellation suit.⁶⁸

H. EXECUTING CANCELLATION ORDER.—A copy of the order of cancellation must be sent to the clerk of the court which conferred citizenship, who thereupon must cancel the original certificate on the records.⁶⁹

I. APPELLATE REVIEW.—Cancellation proceedings being suits in equity,⁷⁰ review should be obtained by means of appeal.⁷¹

Fed. 169. *Contra*, United States *v.* Mulvey, 232 Fed. 513, 146 C. C. A. 471.

65. United States *v.* Butikofer, 228 Fed. 918; United States *v.* Nechman, 183 Fed. 788.

66. United States *v.* Hodgman, 221 Fed. 1018.

67. See the cases *supra*, this section, and also VI, D.

68. United States *v.* Anderson, 169 Fed. 201.

69. Act June 29, 1906, §15, 34 St. at L. 596; Comp. St., 1916, §4373.

70. Luria *v.* United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101; United States *v.* Ness, 230 Fed. 950, 45 C. C. A. 144, Ann. Cas. 1917C, 41.

71. See generally 2 STANDARD PROC. 127.

Note this practice in Luria *v.* United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101; Johannessen *v.* United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; United States *v.* Mulvey, 232 Fed. 513, 146 C. C. A. 471. See also United States *v.* Ness, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. ed. —.

NAVIGABLE WATERS

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CROSS-REFERENCES:

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. OBSTRUCTIONS. — A. CIVIL REMEDIES. — 1. In General. The public, as a general rule, have a paramount right to navigate all waters that are naturally subject to navigation;¹ if unlawfully obstructed a remedy lies in favor of the state,² or a private individual,

1. Hale, *De Jure Maris*, ch. 1-3. | 2. See *infra*, I, A, 4, b and I, B.

if he suffers therefrom a peculiar and special damage not common to the public.³ Statutes providing special remedies have been enacted from time to time.⁴

2. **Injunction.**⁵—The most useful remedy in case of an unlawful obstruction which materially interferes with the navigation of navigable waters, is an injunction to prevent,⁶ modify,⁷ or abate it.⁸ A

3. *Harvard College v. Stearns*, 15 Gray (Mass.) 1; *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930. See *infra*, I, A, 4, c, and the title "Nuisance."

4. See the statutes and *infra*, this note.

[a] **Exclusive While in Force.**—*Spigelmyer v. Walter*, 3 Watts & S. (Pa.) 540.

[b] **Writ of Ad Quo Damnum.** *Bailey v. Philadelphia*, etc. R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593.

[c] **Writ of Restoration.**—*Kerr v. West Shore R. Co.*, 127 N. Y. 269, 27 N. E. 833.

[d] **Penalty.**—Board of Pilot Comrs. *v. Pidgeon*, 23 Hun (N. Y.) 346; *Bennet v. Hurd*, 3 Johns. (N. Y.) 438.

[e] **Libel for Penalty.**—A libel against a vessel for a penalty for illegal dumping of refuse in New York harbor may be maintained in the federal district court without first fixing the liability in a criminal action. The 6 S., 247 Fed. 348.

[f] **Forfeiture.**—*Black River Imp. Co. v. La Crosse Boom. & T. Co.*, 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66.

5. See generally the title "Injunctions."

6. **U. S.**—*United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; *United States v. Jamaica & R. Turnpike Road*, 183 Fed. 598. **Ala.** *Blackman v. Mauldin*, 164 Ala. 337, 51 So. 23, 27 L. R. A. (N. S.) 670. **Ga.** *Charleston & S. R. Co. v. Johnson*, 73 Ga. 306. **Mass.**—*Rowe v. Granite Bridge Corp.*, 21 Pick. 344. **Mich.**—*Stofflet v. Estes*, 104 Mich. 208, 62 N. W. 347. **N. J.**—*Attorney General v. Patterson*, etc. R. Co., 9 N. J. Eq. 526. **N. Y.** *Barnes v. Midland R. Terminal Co.*, 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962; *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351, 25 How. Pr. 139. **N. C.**—*Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 102 Am.

St. Rep. 555, 65 L. R. A. 930. **Ore.** *Flinn v. Vaughn*, 55 Ore. 372, 106 Pac. 642; *Oliver v. Klamath Lake Nav. Co.*, 54 Ore. 95, 102 Pac. 786; *Trullinger v. Howe*, 53 Ore. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545. **Pa.** *Pennsylvania Canal Co. v. Philadelphia & R. R. Co.*, 2 Pears. 354. **S. C.** *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S. C. 181, 63 S. E. 884, 129 Am. St. Rep. 876, 22 L. R. A. (N. S.) 435. **Wash.**—*Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 103 Pac. 814, 132 Am. St. Rep. 1127; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272. **Wis.**—*Attorney General v. Eau Claire*, 37 Wis. 400. **Eng.**—*Attorney General v. Terry*, L. R. 9 Ch. 423, 30 L. T. N. S. 215, 22 Wkly. Rep. 395. **Can.**—*Burrard Power Co. v. Rex*, 43 Can. Sup. Ct. 27.

7. **U. S.**—*United States v. Louisville Bridge Co.*, 233 Fed. 270. **N. Y.** *People v. Horton*, 5 Hun 516, *affirmed*, 64 N. Y. 610. **Va.**—*White v. King*, 5 Leigh (32 Va.) 726.

8. **U. S.**—*Spokane Mill Co. v. Post*, 50 Fed. 429; *St. Louis v. Knapp, Stout & Co.*, 6 Fed. 221. **Ind.**—*Bissell Chilled Plow Wks. v. South Bend Mfg. Co.* (Ind. App.), 111 N. E. 932. **N. Y.** *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71 (*affirming* 49 How. Pr. 511); *People v. Vanderbilt*, 26 N. Y. 287; *People v. Delaware*, etc. Co., 75 Misc. 322, 135 N. Y. Supp. 339. **N. C.** *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930. **Ohio.**—*Hubbard v. Toledo*, 21 Ohio St. 379. **Wash.**—*Judson v. Tide Water Lumb. Co.*, 51 Wash. 164, 98 Pac. 377. **Wis.**—*Barnes v. Racine*, 4 Wis. 454.

[a] The fact that the party maintaining the obstruction may be entitled to compensation for its removal or modification is not a good ground for denying an injunction, since compensation is a matter which should be presented to the court of claims or to congress. *United States v. Louisville*

temporary restraining order will be granted in a proper case,⁹ and the fact that the obstruction may be a penal offense for which an indictment will lie is not a bar to injunctive relief;¹⁰ but it must be shown that the water is navigable,¹¹ and that the obstruction is unauthorized and a nuisance, that is, that it materially interferes with navigation.¹² An injunction will not be granted when there is an adequate remedy at law.¹³

3. Jurisdiction.—Unless there be some federal statute of which it constitutes a violation, an obstruction of navigable water within a state must be remedied in the state rather than the federal courts,¹⁴ except where some other ground of federal jurisdiction exists.¹⁵

4. Parties.—*a. In General.*—The general rules as to proper and necessary parties obtain in an action arising out of the erection or maintenance of an unlawful obstruction in navigable waters.¹⁶

b. State or United States.—The federal government may be a

Bridge Co., 233 Fed. 270. See *infra*, I, A, 3.

[b] **Nets across a stream** as an obstruction which may be enjoined in a private action by the injured party, see *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930.

9. U. S.—*Devoe v. Penrose Ferry-Bridge Co.*, 5 Clark 313, 7 Fed. Cas. No. 3,845. **Ala.**—*Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384. **N. J.**—*Attorney General v. Paterson*, etc. R. Co., 9 N. J. Eq. 526. **N. Y.** *People v. Gutchess*, 48 Barb. 656.

10. United States v. North Bloomfield Gravel Min. Co., 88 Fed. 664, 32 C. C. A. 84 (*affirming* 81 Fed. 243); *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344.

11. N. D.—*Bissel v. Olson*, 26 N. D. 60, 143 N. W. 340. **Ohio.**—*Erkenbrecher v. Cincinnati*, 2 Cinc. Super. Ct. 412. **Wis.**—*State v. Carpenter*, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848.

[a] **Water temporarily non-navigable** is a good ground for suspending the operation of an injunction during the non-navigable condition. *Buffalo v. Delaware*, etc. R. Co., 112 N. Y. Supp. 690.

12. U. S.—*United States v. Bellingham Bay Boom Co.*, 72 Fed. 585 (*affirmed*, 81 Fed. 658, 26 C. C. A. 547, *reversed*, 176 U. S. 211, 20 Sup. Ct. 543, 44 L. ed. 437); *St. Louis v. Knapp, Stout & Co.*, 6 Fed. 221; *Heerman v. Beef Slough Mfg.*, etc. Co., 1 Fed. 145, 11 Fed. Cas. No. 6,320. **Cal.**—*Brown*

v. Kentfield, 50 Cal. 129. **N. J.**—*Attorney General v. Delaware*, etc. R. Co., 27 N. J. Eq. 1. **Eng.**—*Rex v. Bell*, 1 L. J. K. B. O. S. 42.

13. Heerman v. Beef Slough Mfg., etc. Co., 1 Fed. 145, 11 Fed. Cas. No. 6,320. See generally the title "**Legal Remedy.**"

[a] **By summary proceedings** before a board of public officials. *People v. Horton*, 5 Hun 516, *affirmed*, 64 N. Y. 610.

14. North Shore Boom & D. Co. v. Nicomen Boom Co., 212 U. S. 406, 29 Sup. Ct. 355, 53 L. ed. 574; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. ed. 437; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. ed. 629; *United States v. North Bloomfield Gravel Min. Co.*, 53 Fed. 625.

[a] **But the jurisdiction of a state court does not extend** to an obstruction in another state. *People v. New Jersey Cent. R. Co.*, 42 N. Y. 283.

15. See generally the title "**United States Courts.**"

16. Board of Wardens of Philadelphia Port v. Philadelphia, 42 Pa. 209 (holding that a board of public officials cannot have an injunction when its interest in the subject-matter has been transferred to another body); *Frankford v. Lennig*, 2 Phila. (Pa.) 403, holding a borough and its inhabitants proper parties in an action to restrain the building of a wharf into a stream. See generally the title "**Parties.**"

party to enjoin¹⁷ or abate¹⁸ an unlawful obstruction in navigable water over which its jurisdiction extends.¹⁹ So also, a state, by its attorney general,²⁰ may maintain an action to enjoin²¹ or abate²² an unlawful obstruction in navigable waters as in any action to prevent or remove a public nuisance.²³

c. *Private Party*.—An individual may seek redress in an action to enjoin²⁴ or abate²⁵ an unlawful obstruction in navigable waters, or for damages,²⁶ when it is the cause of some special or peculiar injury to

17. *Northern Pac. R. Co. v. United States*, 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80; *United States v. Jamaica & R. Turnpike Road*, 183 Fed. 598; *United States v. Beef Slough Mfg., etc. Co.*, 8 Biss. 421, 24 Fed. Cas. No. 14,559.

18. *United States v. Pittsburgh & L. E. R. Co.*, 26 Fed. 113.

19. *United States v. North Bloomfield Gravel Min. Co.*, 88 Fed. 664, 32 C. C. A. 84, *affirming* 81 Fed. 243.

20. *Cal.*—*People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80. *N. H.*—*Dover v. Portsmouth Bridge*, 17 N. H. 200. *N. Y.*—*People v. Vanderbilt*, 26 N. Y. 287.

21. *U. S.*—*Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 14 L. ed. 249. *Haw.*—*Territory v. Kerr*, 16 Hawaii 363. *Ill.*—*Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790.

22. *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634.

[a] The state alone may maintain an action to abate or modify an authorized obstruction on the ground that it was not erected in accordance with the law. *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527, *distinguishing* *Bacon v. Arthur*, 4 Watts (Pa.) 437.

23. See generally the title "Nuisance."

24. *U. S.*—*Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 14 L. ed. 249; *McCloskey v. Pacific Coast Co.*, 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673; *Works v. Junction R. Co.*, 5 McLean 425, 30 Fed. Cas. No. 18,046. *Ala.*—*Walker v. Allen*, 72 Ala. 456. *Cal.*—*Crescent Mill & Transp. Co. v. Hayes*, 69 Cal. xv, 8 Pac. 692. *Conn.*—*Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 274. *Del.*—*Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435. *Idaho.*—*Small v. Harrington*, 10 Idaho 499, 79 Pac. 461. *Mich.*

Lepire v. Klenk, 180 Mich. 481, 147 N. W. 503. *N. J.*—*Gilbert v. Morris Canal & Banking Co.*, 8 N. J. Eq. 495. *N. Y.*—*Barnes v. Midland R. Terminal Co.*, 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962; *Jencks v. Miller*, 17 Misc. 461, 40 N. Y. Supp. 1088. *Ohio.*—*Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255. *Ore.*—*Fellmann v. Tidewater Mill Co.*, 78 Ore. 1, 152 Pac. 268. *S. C.*—*Barksdale v. Charleston & W. C. R. Co.*, 83 S. C. 287, 64 S. E. 1013. *Wash.*—*Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 103 Pac. 814, 132 Am. St. Rep. 1127; *Morris v. Graham*, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33. *Wis.*—*Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423. *Can.*—*Ireson v. Holt Timber Co.*, 30 Ont. L. Rep. 209.

25. *U. S.*—*Carver v. San Pedro, etc. R. Co.*, 151 Fed. 334; *Chatfield Co. v. New Haven*, 110 Fed. 788; *Spokane Mill Co. v. Post*, 50 Fed. 429; *Woodman v. Kilbourne Mfg. Co.*, 1 Biss. 546, 30 Fed. Cas. No. 17,978. *Cal.*—*Blane v. Klumpke*, 29 Cal. 156. *Ia.*—*Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76 Iowa 165, 40 N. W. 701, 2 L. R. A. 282. *Mich.*—*Lepire v. Klenk*, 180 Mich. 481, 147 N. W. 503. *Wash.*—*Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178. *Wis.*—*Barnes v. Racine*, 4 Wis. 454. *Eng.*—*Attorney General v. Lonsdale*, 38 L. J. Ch. 335, L. R. 7 Eq. 377, 20 L. T. Rep. N. S. 64, 17 Wkly. Rep. 219.

[a] *Improper Use of Dam*.—A riparian owner who has erected a power dam in a navigable or floatable stream, may enjoin an upper riparian owner from maintaining splash dams in the same stream, by means of which the flow of water is frequently increased or diminished, thus interfering with the continuity of his power. *Trullinger v. Howe*, 53 Ore. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545.

26. *U. S.*—*Atlee v. Northwestern*

him not common to the general public; but if not specially injured an action by an individual will not lie, either to prevent,²⁷ to abate,²⁸ or for damages.²⁹ If the obstruction be authorized, such as a bridge, boom or dam, a private party has no action,³⁰ unless the injury is

Union Pkt. Co., 21 Wall. 389, 22 L. ed. 619; *Chicago v. Erie & W. Trans. Co.*, 178 Fed. 42, 101 C. C. A. 170. **Ala.**—*De Bardeleben Coal Co. v. Cox* (Ala. App.), 76 So. 409. **Conn.**—*Burrows v. Pixley*, 1 Root 362, 1 Am. Dec. 56. **La.**—*Babin v. Lyons Lumb. Co.*, 132 La. 873, 61 So. 855. **Me.**—*Tuell v. Marion*, 110 Me. 460, 86 Atl. 980, 46 L. R. A. (N. S.) 35. **Mass.**—*Butchers' Slaughtering & M. Assn. v. Boston*, 214 Mass. 254, 101 N. E. 426. **Mich.**—*Watts v. Tittabawassee Boom Co.*, 52 Mich. 203, 17 N. W. 809. **Minn.**—*Viebahn v. Crow Wing*, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. (N. S.) 1126. **N. J.**—*Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 51 N. J. L. 56, 16 Atl. 12. **Pa.**—*Hershey v. Kerbaugh*, 242 Pa. 227, 88 Atl. 1009. **S. C.**—*Barksdale v. Charleston & W. C. R. Co.*, 83 S. C. 287, 64 S. E. 1013. **Wash.**—*Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890. **W. Va.**—*Wilson v. Guyandotte Timber Co.*, 70 W. Va. 602, 74 S. E. 870. **Wis.**—*Enos v. Hamilton*, 27 Wis. 256.

[a] Injury to business as a special injury, see *Viebahn v. Crow Wing*, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. (N. S.) 1126. But see *Harvard College v. Stearns*, 15 Gray (Mass.) 1.

[b] Injury Must Be Different in Kind.—*Weller v. Missouri Lumb. & Min. Co.*, 176 Mo. App. 243, 161 S. W. 853.

27. **U. S.**—*Georgetown v. Alexander Canal Co.*, 12 Pet. 91, 9 L. ed. 1012; *Spooner v. McConnell*, 1 McLean 337, 22 Fed. Cas. No. 13,245. **Cal.**—*Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156. **Conn.**—*O'Brien v. Norwich & W. R. Co.*, 17 Conn. 372. **Del.**—*Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479, 29 Am. Dec. 561. **Fla.**—*Sullivan v. Moreno*, 19 Fla. 200; *Alden v. Pinney*, 12 Fla. 348. **Ill.**—*Swain v. Chicago, etc. R. Co.*, 160 Ill. App. 533. **N. H.**—*Dover v. Portsmouth Bridge*, 17 N. H. 200. **N. Y.**—*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. **Ore.**—*Esson v. Wattier*, 25 Ore. 7, 34 Pac. 756.

28. **U. S.**—*Whitehead v. Jessup*, 53

Fed. 707. **Cal.**—*Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156; *Jarvis v. Santa Clara Val. R. Co.*, 52 Cal. 438. **Fla.**—*Thomas v. Wade*, 48 Fla. 311, 37 So. 743. **Ia.**—*Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76 Iowa 165, 40 N. W. 701, 2 L. R. A. 282. **Wis.**—*Clark v. Chicago & N. W. Ry. Co.*, 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187.

29. **U. S.**—*Nester v. Diamond Match Co.*, 105 Fed. 567, 44 C. C. A. 606, 52 L. R. A. 950. **Conn.**—*Seeley v. Bishop*, 19 Conn. 128. **Ill.**—*Swain v. Chicago, B. & Q. R. Co.*, 252 Ill. 622, 97 N. E. 247, 38 L. R. A. (N. S.) 763. **Ia.**—*Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76 Iowa 165, 40 N. W. 701, 2 L. R. A. 282. **Me.**—*Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100. **Mass.**—*Breed v. Lynn*, 126 Mass. 367; *Blackwell v. Old Colony R. Co.*, 122 Mass. 1. **Mich.**—*Potter v. Indiana & L. M. Ry. Co.*, 95 Mich. 389, 54 N. W. 556. **Minn.**—*Viebahn v. Crow Wing*, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. (N. S.) 1126. **Mo.**—*Weller v. Missouri Lumb. & Min. Co.*, 176 Mo. App. 243, 161 S. W. 853. **N. Y.**—*Lansing v. Smith*, 8 Cow. 146, *affirmed*, 4 Wend. 9, 21 Am. Dec. 89. **W. Va.**—*Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491. **Wis.**—*Clark v. Chicago & N. W. Ry. Co.*, 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187.

30. **Minn.**—*Osborne v. Knife Falls Boom Co.*, 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590. **Pa.**—*Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 527, *distinguishing* *Bacon v. Arthur*, 4 Watts 437; *Clarke v. Birmingham & P. Bridge Co.*, 41 Pa. 147. **Wis.**—*Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837.

[a] Authority of one state to permit an obstruction in a navigable stream, which forms a boundary line between two states, cannot be questioned by a private party who is injured by the negligent maintenance of the obstruction. *Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62,

the result of negligence or illegal construction.³¹

5. Pleading.—In an action arising out of the construction or maintenance of an unlawful obstruction in navigable waters the declaration must show the navigability of the waters in question,³² the nature of the obstruction,³³ and, if by a private party, a special injury to the plaintiff.³⁴ In an application for an injunction it must appear that the obstruction is or will be a nuisance.³⁵ In an action for damages the ownership of the obstruction must be alleged,³⁶ and if failure to comply with a statute is relied on that fact³⁷ must be

38 N. W. 529, 7 Am. St. Rep. 837.

31. *Clarke v. Birmingham & P. Bridge Co.*, 41 Pa. 147.

32. **U. S.**—*United States v. Wishkah Boom Co.*, 136 Fed. 42, 68 C. C. A. 592. **Ala.**—*Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384. **Ind.**—*Tyrrell v. Lockhart*, 3 Blackf. 136. **Wash.**—*Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272. **Can.**—*Hall v. Ewart*, 33 U. C. Q. B. 491.

[a] **A general allegation of navigability is not sufficient** when it appears from the facts alleged that, at the point of obstruction, there may be a question as to its navigability; so that it may be said, as a general rule, the allegation of navigability should be specific enough to cover that part of the stream used by the injured party and obstructed by the defendant. *Morrison v. Coleman*, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384.

33. **U. S.**—*United States v. Wishkah Boom Co.*, 136 Fed. 42, 68 C. C. A. 592. **Ala.**—See *Mauldin v. Central of Ga. R. Co.*, 181 Ala. 591, 61 So. 947. **Ill.**—*Illinois River Packet Co. v. Peoria Bridge Assn.*, 38 Ill. 467, that bridge materially obstructed navigation sufficient. **Wis.**—*Hall v. Kitson*, 3 Pin. 296, 4 Chand. 20.

34. **U. S.**—*Spokane Mill Co. v. Post*, 50 Fed. 429. **Ind.**—*Bissell Chilled Plow Wks. v. South Bend Mfg. Co.* (Ind. App.), 111 N. E. 932. **Mich.**—*Lepire v. Klenk*, 169 Mich. 243, 134 N. W. 1119, Ann. Cas. 1913E, 50. **Mo.**—*Weller v. Missouri Lumb. & Min. Co.*, 176 Mo. App. 243, 161 S. W. 853. **N. H.**—*Dover v. Portsmouth Bridge*, 17 N. H. 200. **N. Y.**—*Hudson River R. Co. v. Loeb*, 7 Robt. 418. **W. Va.**—*Adkins v. Guyandotte Timber Co.*, 70 W. Va. 97, 73 S. E. 243. **Wis.**—*Hall v. Kitson*, 3 Pin. 296, 4 Chand. 20. **Can.**

Small v. Grand Trunk R. Co., 15 U. C. Q. B. 283.

[a] **Alleging Special Injury.**—*Weller v. Missouri Lumb. & Min. Co.*, 176 Mo. App. 243, 161 S. W. 853.

35. *St. Louis v. Knapp, Stout & Co.*, 6 Fed. 221; *Attorney-General v. Ewart Booming Co.*, 34 Mich. 462. See also **U. S.**—*United States v. North Bloomfield Gravel Min. Co.*, 53 Fed. 625; *Turner v. Peoples' Ferry Co.*, 21 Fed. 90. **Del.**—*Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435. **Mich.**—*Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498. **N. H.**—*Dover v. Portsmouth Bridge*, 17 N. H. 200. **N. J.**—*Gilbert v. Morris Canal & Banking Co.*, 8 N. J. Eq. 495. **N. Y.**—*Jenks v. Miller*, 14 App. Div. 474, 43 N. Y. Supp. 927. **Ohio.**—*Hutchinson v. Thompson*, 9 Ohio 52.

See generally 13 STANDARD PROC. 47.

[a] **General Allegation of Nuisance Insufficient.**—*St. Louis v. Knapp, Stout & Co.*, 6 Fed. 221. No good reason is shown why the court should grant an injunction where the papers and evidence show that the injury complained of is shadowy and unsubstantial. *Jenks v. Miller*, 14 App. Div. 474, 43 N. Y. Supp. 927.

36. *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112, 629.

37. **U. S.**—*Oregon City Transp. Co. v. Columbia St. Bridge Co.*, 53 Fed. 549. **Ala.**—*Mauldin v. Central of Ga. R. Co.*, 181 Ala. 591, 61 So. 947. See *Alabama S. R. Nav. Co. v. Georgia Pac. R. Co.*, 87 Ala. 154, 6 So. 73. **N. J.**—*Stephens & C. Transp. Co. v. Central R. Co.*, 34 N. J. L. 280. **Can.**—*Desjardins Canal Co. v. Great Western R. Co.*, 27 U. C. Q. B. 363.

[a] **An insufficient allegation of failure to comply with its charter**, which gave defendant the privilege of constructing a bridge with two draws seventy-five feet wide at right angles

specifically alleged, though the contrary has been held.³⁸

6. **Trial.**³⁹—Whether or not the obstruction materially interferes with navigation is a question for the jury.⁴⁰ And there are numerous other jury questions.⁴¹

B. **CRIMINAL PROSECUTION.**—1. **In General.**—An unlawful obstruction in navigable waters is an indictable offense at common law;⁴² and also by virtue of United States statutes,⁴³ and statutes of many states.⁴⁴

2. **Indictment.**—In drawing an indictment for maintaining an unlawful obstruction in navigable waters, the general rules governing indictments should be followed.⁴⁵ The name of the water in question,

to the current, is illustrated by the averment that the draws were not at right angles to the current, but which fails to state anything about their width. *Stephens & C. Transp. Co. v. Central R. Co.*, 34 N. J. L. 280.

38. *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. 129; *Swanson v. Mississippi & R. R. Boom Co.*, 42 Minn. 532, 44 N. W. 986, 7 L. R. A. 673.

39. See generally the title "**Trial.**"

40. *Cal.*—*Blanc v. Klumpke*, 29 Cal. 156. *N. Y.*—*Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70. *Tenn.*—*Cantrell v. Knoxville, C. G. & L. R. Co.*, 90 Tenn. 638, 18 S. W. 271; *Pileher v. Hart*, 1 Humph. 524. *Tex.*—*Selman v. Wolfe*, 27 Tex. 68. *Eng.*—*Rex v. Ward*, 4 Ad. & El. 384, 1 Harr. & W. 703, 31 E. C. L. 180, 6 N. & M. 38, 5 L. J. K. B. 221, 111 Eng. Reprint 832. *Can.*—*Reg. v. Meyers*, 3 U. C. C. P. 305.

41. See *infra*, this note.

[a] Such as (1) the navigability of the water (*Weller v. Missouri Lumb. & Min. Co.*, 176 Mo. App. 243, 161 S. W. 853; *Southern R. Co. v. Ferguson*, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908); whether (2) the obstruction is the proximate cause of the damage (*Hopkins v. Butte & M. Commercial Co.*, 16 Mont. 356, 40 Pac. 865); (3) the reasonableness of defendant's use of the stream (*McGuire v. Post Falls Lumb. & Mfg. Co.*, 23 Idaho 608, 131 Pac. 654; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573); (4) defendant's negligence when alleged to have caused the obstruction (*Bellaire v. Worcester Lumb. Co.*, 177 Mich. 222, 143 N. W. 63; *Myrtle Point Transp. Co. v. Port of Coquille River*, 86 Ore. 311, 168 Pac. 625); (5) contributory negligence by the

plaintiff (*Myrtle Point Transp. Co. v. Port of Coquille River*, 86 Ore. 311, 168 Pac. 625); (6) whether the obstruction was erected as required by statute (*Silver v. Missouri Pac. Ry. Co.*, 101 Mo. 79, 13 S. W. 410); and (7) the existence of special damages to plaintiff. *Harrison v. Sterett*, 4 Harr. & McH. (Md.) 540.

[b] In (1) an action growing out of the abatement of an obstruction, the necessity of the removal is a jury question (*Gumbert v. Wood*, 146 Pa. 370, 23 Atl. 404), as is (2) also what was a reasonable time for the removal (*Weise v. Smith*, 3 Ore. 445, 8 Am. Rep. 621), whether (3) the abatement was accomplished in a negligent manner (*Bedell v. Kirk*, 63 Hun 627, 17 N. Y. Supp. 638), and (4) if more force was used than was necessary. *Larson v. Furlong*, 63 Wis. 323, 23 N. W. 584.

42. *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618; *State v. Thompson*, 2 Strob. (S. C.) 12, 47 Am. Dec. 538.

43. See the federal statutes, and *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 31 Sup. Ct. 603, 55 L. ed. 699; *The Scow No. 36*, 144 Fed. 532, 75 C. C. A. 572; *United States v. Moran*, 113 Fed. 172; *Leovy v. United States*, 92 Fed. 344, 34 C. C. A. 392, reversed on other grounds, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914.

44. See the statutes, and *N. Y. Hudson River R. Co. v. Loeb*, 7 Robt. 418. *Pa.*—*Ensworth v. Com.*, 52 Pa. 320. *Tenn.*—*State v. Gainer*, 3 Humph. 39.

45. See the title "**Indictment and Information.**"

[a] **Negating Exceptions.**—*State v. Narrows Island Club*, 100 N. C. 477,

if it has one, should be averred,⁴⁶ also its navigability at the point of obstruction,⁴⁷ and the place thereof.⁴⁸ If built under authority of a statute, a failure to comply with the statute must be specifically alleged.⁴⁹

3. **Trial.**⁵⁰ — At the trial of a criminal action for erecting or maintaining an unlawful obstruction in navigable waters, navigability of the water in question is for the jury,⁵¹ also the question whether the injury complained of was caused by an unavoidable accident.⁵²

Instructions must conform to the issues,⁵³ and to the law applicable to the case.⁵⁴

When special findings negative the fact that the obstruction interferes with navigation, a verdict of guilty cannot stand.⁵⁵

II. RIPARIAN AND LITTORAL RIGHTS. — A. **INJURIES TO RIPARIAN LAND.** — When irreparable injury is threatened land adjoining navigable water by the negligent or unlawful floating of logs, or otherwise, the riparian owner may have an injunction,⁵⁶ or, if the injury has been done, may maintain an action for damages.⁵⁷ Neighboring riparian land owners whose land has been thus injured by the same cause may join in an action for redress.⁵⁸

B. **WHARVES, PIERS, DOCKS, ETC.** — A riparian land owner on navigable water may be enjoined from building a wharf, pier, or dock in front of his land, if it would operate as an obstruction to navigation.⁵⁹ So also he may be enjoined from encroaching on his neigh-

5 S. E. 411, 6 Am. St. Rep. 618; State v. Cullum, 2 Speers (S. C.) 581. See generally 12 STANDARD PROC. 458.

[b] **Duplicity.** — United States v. Burns, 54 Fed. 351. See generally, 12 STANDARD PROC. 499.

[c] **Preliminary proceedings** required by statute need not be alleged. Com. v. Plumer, 1 Am. Law Reg. (O. S.) 124.

46. Cox v. State, 3 Blackf. (Ind.) 193.

47. Cox v. State, 3 Blackf. (Ind.) 193.

48. Cox v. State, 3 Blackf. (Ind.) 193.

49. State v. Dundee Water P. & L. Co., 71 N. J. L. 419, 58 Atl. 1094.

50. See generally the title "Trial."

51. Leovy v. United States, 92 Fed. 344, 34 C. C. A. 392; State v. Twiford, 136 N. C. 603, 48 S. E. 586.

52. Randall v. United States, 107 Fed. 935, 47 C. C. A. 80.

53. Leovy v. United States, 92 Fed. 344, 34 C. C. A. 392. See generally 13 STANDARD PROC. 778.

54. Randall v. United States, 107 Fed. 935, 47 C. C. A. 80; State v. Baum, 128 N. C. 600, 38 S. E. 900. See generally 13 STANDARD PROC. 771.

55. State v. Babcock, 30 N. J. L. 29.

56. Memphis v. St. Francis Levee Dist., 231 Fed. 217; Summers v. Parkersburg Mill Co., 77 W. Va. 563, 88 S. E. 1020.

57. Memphis v. St. Francis Levee Dist., 231 Fed. 217; Bellaire v. Worcester Lumb. Co., 177 Mich. 222, 143 N. W. 63.

[a] **The obstruction must appear to be the proximate cause of the damage.** Memphis v. St. Francis Levee Dist., 231 Fed. 217.

58. Palmer v. Waddell, 22 Kan. 352; Barnes v. Racine, 4 Wis. 454.

59. Grand Trunk R. Co. v. A. Backus, Jr., & Sons, 46 Fed. 211; Territory v. Kerr, 16 Hawaii 363.

[a] **Building on submerged state lands** a wharf or pier may not be enjoined unless it is apparent that it is or will be a material obstruction to navigation or in some other way will cause irreparable damage. People v. Davidson, 30 Cal. 379.

[b] **Any one who is specially injured** by such an obstruction is entitled (1) to an injunction (Cal.—Cowell v. Martin, 43 Cal. 605. N. Y. Penniman v. New York Balance Co.,

bor's frontage.⁶⁰ The owner of a wharf may have redress for an injury thereto by injunction,⁶¹ or an action for damages.⁶²

C. ACCESS TO NAVIGABLE WATER. — A riparian owner cannot, generally, maintain an action against the state for cutting off his access to navigable water,⁶³ but such action will lie against a private party.⁶⁴ A littoral or riparian owner may enjoin the construction of a wharf which would cut off his access to navigable water,⁶⁵ or the erection of fish traps which would prevent his right of fishery,⁶⁶ or may have his action for damages.⁶⁷ In some jurisdictions a public right of access to the land between high and low water mark is recog-

13 How. Pr. 40. **R. I.**—Thornton & Co. v. Smith, Grant & Co., 10 R. I. 477, 14 Am. Rep. 701. **Can.**—Baldwin v. Chaplin, 34 Ont. L. Rep. 1; or (2) an action for damages (Atlee v. Northwestern Union Pkt. Co., 21 Wall. [U. S.] 389, 22 L. ed. 619; Northcutt v. Long Tie & Timber Co. (Mo. App.), 193 S. W. 612); but (3) the special injury must be of material damage to plaintiff (Seeley v. Brush, 35 Conn. 419; Baldwin v. Chaplin, 34 Ont. L. Rep. 1), and (4) not the result of his own carelessness. The Henry Clark v. O'Brien, 65 Fed. 815.

60. Knickerbocker Ice Co. v. Shultz, 41 Hun (N. Y.) 458 (affirmed, 116 N. Y. 382, 22 N. E. 564); Langdon v. New York, 6 Abb. N. C. (N. Y.) 314, affirmed, 27 Hun 288, 63 How. Pr. 134.

61. **Conn.**—Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274. **Mass.** Haskell v. New Bedford, 108 Mass. 208. **N. Y.**—Hudson River R. Co. v. Loeb, 7 Robt. 418. **Ore.**—Parker v. Taylor, 7 Ore. 435.

62. **Mass.**—Haskell v. New Bedford, 108 Mass. 208. **W. Va.**—Fry v. Campbell's Creek Coal Co., 37 W. Va. 604, 16 S. E. 796. **Can.**—McLoughlan v. Martin, 5 Newfd. 44; Ratte v. Booth, 14 Ont. App. 419.

63. Home for Aged Women v. Com., 202 Mass. 422, 89 N. E. 124, 24 L. R. A. (N. S.) 79; Sage v. New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606.

64. Decker v. Pacific Coast S. S. Co., 164 Fed. 974, 91 C. C. A. 102; Johnson v. Jeldness, 85 Ore. 657, 167 Pac. 798, L. R. A. 1918A, 1074.

[a] But Not if Acting Under Legal Authority.—Thayer v. New Bedford R. Co., 125 Mass. 253.

65. **U. S.**—Worthen Lumb. Mills v. Alaska J. Gold Min. Co., 229 Fed.

966, 144 C. C. A. 248. **Cal.**—Blanc v. Klumpke, 29 Cal. 156. **Ill.**—Comrs. of Lincoln Park v. Fahrney, 250 Ill. 256, 95 N. E. 194.

[a] Right of access to one's land or a wharf is a material right, interference with which by the unlawful construction of a wharf in front of same will be restrained by a perpetual injunction. Cowell v. Martin, 43 Cal. 605.

[b] In Alaska an owner of land which borders navigable water has merely that interest in the land below high-water mark which is incidental to access to the water, and therefore may not enjoin the construction or maintenance of a wharf in front of his land which is an aid, not an obstruction, to navigation, and which does not interfere with, or prevent, his access to the water. Decker v. Pacific Coast S. S. Co., 164 Fed. 974, 91 C. C. A. 102.

[c] Improvements on Tidelands. Where the building of a wharf or other improvement is on tide lands, separating the plaintiff's upland from the ocean, but does not cut off his access to the water, he cannot enjoin its maintenance. Sheldon v. Messerschmidt (C. C. A.), 247 Fed. 104.

[d] Construction in Accordance With Statute.—A littoral owner cannot enjoin a filling in to the bulkhead line of New York bay as fixed by statute, nor enjoin the construction of basins therein to harbor vessels to meet national exigencies of war. Consumers' Coal & Ice Co. v. New York City (App. Div.), 169 N. Y. Supp. 92.

66. Johnson v. Jeldness, 85 Ore. 657, 167 Pac. 798, L. R. A. 1918A, 1074.

67. **U. S.**—Lewis v. Johnson, 76 Fed. 476. **Mass.**—French v. Connecticut River Lumb. Co., 145 Mass. 261, 14 N. E. 113. **R. I.**—Folsom v. Freeborn, 13 R. I. 200.

nized, and the construction of a wharf or pier cutting off such access may be restrained;⁶⁸ but not when the state has made an unqualified grant of such lands.⁶⁹

D. ACCRETIONS. — The riparian owner may protect his right to accretions by any suitable action.⁷⁰ Future deposits by accretion may be protected by injunction, in some jurisdictions, against any one who by changing the course of a stream, or other act, would prevent their formation;⁷¹ or an action for damages may be maintained.⁷² Title acquired by reclamation, to submerged lands along a navigable stream, may be protected by ejectment against any one unlawfully in possession.⁷³

68. *Barnes v. Midland R. Terminal Co.*, 218 N. Y. 91, 112 N. E. 926, reversing 161 App. Div. 621, 146 N. Y. Supp. 1033, affirming conditionally 147 App. Div. 89, 131 N. Y. Supp. 750.
69. *People v. Steeplechase Park Co.*, 218 N. Y. 459, 113 N. E. 521.
70. See the following: *Ark.*—*Fee v. White*, 123 Ark. 619, 186 S. W. 64 (injunction to restrain cutting and removal of timber growing on alluvial soil); *Grier v. Yuttermann*, 102 Ark. 433, 145 S. W. 194; *Malone v. Mobbs*, 102 Ark. 542, 145 S. W. 193, 146 S. W. 143, Ann. Cas. 1914A, 479. *Ill.*—*Griffin v. Kirk*, 47 Ill. App. 258, trespass, forcible entry and detainer, or, in case where sand forming alluvion has been carried away, replevin. *La.*—*Leonard's Heirs v. Baton Rouge*, 39 La. Ann. 275, 4 So. 241.
71. *Hohl v. Iowa Cent. R. Co.*, 162 Iowa 66, 143 N. W. 850. But see *Taylor v. Underhill*, 40 Cal. 471; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.
72. *Freeland v. Pennsylvania R. Co.*, 197 Pa. 529, 47 Atl. 745, 80 Am. St. Rep. 850, 58 L. R. A. 206.
73. *Nichols v. Lewis*, 15 Conn. 137.

NAVIGATION. — See Admiralty; Collision; Navigable Waters; Seamen; Ships and Shipping.

NAVY AND ARMY

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CROSS-REFERENCES:

Courts Martial;	Moratorium;
Habeas Corpus;	Pensions and Bounties;
Martial Law;	War.

Exemptions to soldiers and sailors, see 16 STANDARD PROC. 103.

For further references and cross-references, see the index to this work, and the cross-references throughout this article.

I. COURTS OF INQUIRY. — A. GENERAL STATEMENT. — Courts of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, are provided for both in the army,¹ and navy.² These courts are courts of inferior jurisdiction and their findings are usually advisory.³ They are usually

1. U. S. Rev. St., §1342, art. 115.
[a] **Functions of Courts of Inquiry.**
See 6 Op. Atty. Gen. 239.

2. U. S. Rev. St., §1624, art. 55.
3. *Mullan v. United States*, 42 Ct. Cl. 157; 8 Op. Atty. Gen. 337.

convened only for the purpose of informing the department in a preliminary way as to the facts involved in the inquiry.⁴ In the army a court of inquiry may be ordered by the president or by any commanding officer.⁵ In the naval service the power to order a court of inquiry is vested in the president, the secretary of the navy, or the commander of a fleet or squadron.⁶ The president may appoint one court of inquiry, or several courts, in his discretion.⁷

B. COMPOSITION AND OFFICERS of courts of inquiry are regulated by the statute.⁸

C. JURISDICTION. — This court, in the military service, has no jurisdiction where the person whose conduct is to be investigated is neither an officer nor a soldier.⁹ Where a court of inquiry, properly instituted, has jurisdiction of the person, and has entered into an investigation, a civil court will not remove the person while the inquiry is in progress.¹⁰

D. CONDUCT OF PROCEEDINGS. — The proceedings before a court of inquiry are not in anywise summary,¹¹ the accused being present with his attorney and having the right to examine and cross-examine witnesses.¹² Auditors and spectators have access to hearings before courts of inquiry by permission, but not of right.¹³ Courts of inquiry, in both branches of the service, have the same power to summon and examine witnesses as courts martial.¹⁴ While naval courts of inquiry are specifically given power to punish contempts,¹⁵ the

4. 25 Op. Atty. Gen. 623; 6 Op. Atty. Gen. 239.

[a] Court of inquiry gives executive unexceptional means of ascertaining facts. 6 Op. Atty. Gen. 239.

5. U. S. Rev. St., §1342, art. 115, but cannot be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.

6. U. S. Rev. St., §1642, art. 55. See also *Selfridge v. United States*, 28 Ct. Cl. 440, where ordered at request of naval officer.

7. 8 Op. Atty. Gen. 335.

8. See the statute.

[a] In the army, (1) the court consists of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing (U. S. Rev. St., §1342, art. 116); while (2) in the navy the court is composed of not more than three commissioned officers as members, and a judge, advocate, or person officiating as such. U. S. Rev. St., §1642, arts. 5, 6.

9. Davis, *Military Law*, 556.

[a] In naval service the cases in which inquiry may be ordered are not

by statute confined to any particular class of persons. See U. S. Rev. St., §1624, art. 55.

10. *United States v. Mackenzie*, 26 Fed. Cas. No. 15,690, where it was held that the district court will not issue a warrant of arrest for parties charged with murder on the high seas on board a naval vessel while the matter is under investigation by a court of inquiry instituted by the secretary of the navy.

11. *Mullan v. United States*, 42 Ct. Cl. 157.

12. U. S. Rev. St., §1342, art. 118; U. S. Rev. St., §1642, art. 59; *Mullan v. United States*, 42 Ct. Cl. 157; 8 Op. Atty. Gen. 335.

13. 8 Op. Atty. Gen. 337.

14. U. S. Rev. St., §1342, art. 118; U. S. Rev. St., §1624, art. 57; 8 Op. Atty. Gen. 335.

[a] The evidence adduced before a board of inquiry is surrounded by all the solemnities of evidence taken in a court of record or before a court-martial. *Mullan v. United States*, 42 Ct. Cl. 157.

15. U. S. Rev. St., 1872, §1342, art. 57.

military courts have not this power.¹⁶

E. REPORT. — The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof,¹⁷ or of the president and judge advocate,¹⁸ as the case may be, and delivered to the commanding officer. Courts of inquiry in the report should state only facts,¹⁹ and not give an opinion on the merits unless specially ordered to do so.²⁰ In case of a disagreement between the members of the court as to the opinion, separate reports may be presented.²¹

F. INQUIRY AS BAR TO FURTHER PROCEEDING. — A private reprimand given in accordance with the recommendation of a court of inquiry is no bar to a court martial for the same offense.²²

II. PROCEEDINGS AGAINST PERSONS IN MILITARY SERVICE.²³ — JURISDICTION OF STATE AND MILITARY AUTHORITIES. In time of war all offenses committed by soldiers are cognizable by courts martial or military commissioners.²⁴ In time of peace civil courts of a state have general jurisdiction over persons in the military service who are accused of a public offense, committed in the state and not on property belonging to the United States or over which the United States had jurisdiction,²⁵ though federal courts may in their discretion remove the party charged from the custody of state officers in advance of a trial in the state courts.²⁶ Also if the civil courts seek to inflict punishment which tends to interfere with the duty which the soldier owes the United States the utmost good faith is required and any unjust and unfair discrimination will be remedied by the federal courts at the instance of his commander.²⁷

B. EXEMPTION FROM ARREST AND PROCESS.²⁸ — Private soldiers and non-commissioned officers while engaged in the performance of their military duties are exempt from arrest under civil process.²⁹ It is

16. Davis, Military Law, 557.

17. U. S. Rev. St., §1342, art. 120.

18. U. S. Rev. St., §1642, art. 60.

19. U. S. Rev. St., §1642, art. 57.

20. U. S. Rev. St., §1342, art. 119;

8 Op. Atty. Gen. 335.

21. Davis, Military Law, 558.

22. 25 Op. Atty. Gen. 623.

23. See the title "Courts Martial."

24. *Ex parte* Bright, 1 Utah 145.

See title "Courts Martial."

25. *United States v. Lewis*, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. ed. 343; *In re* Wulzen, 235 Fed. 362, Ann. Cas. 1917A, 274; *Ex parte* Schlaffer, 154 Fed. 921.

26. *United States v. Lewis*, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. ed. 343 (where court refused to exercise discretion); *In re* Wulzen, 235 Fed. 362, Ann. Cas. 1917A, 274, where court exercised discretion.

27. *Ex parte* Schlaffer, 154 Fed. 921, sentence of sixty days in jail for an

offense not of an injurious nature to person or property unwarranted, and soldier will be released on habeas corpus to federal court.

28. See generally the title "Privilege."

29. U. S. Rev. St., §1237. See the following: Ala.—*Ex parte* Harlan, 39 Ala. 563; *Greening v. Sheffield*, Minor 276. N. Y.—*People ex rel. Gaston v. Campbell*, 40 N. Y. 133; *Ray v. Hogeboom*, 11 Johns. 433; *Matter of Roode*, 2 Wheel. Cr. Cas. 541. See also *Coxson v. Doland*, 2 Daly 66. N. C.—*Murphy v. McCombs*, 33 N. C. 274. Pa.—See *Wright v. Quinn*, 1 Yeates 163. S. C. *Moses v. Mellett*, 3 Strobb. 210.

[a] Enlistment After Prior Arrest. *Ex parte* Field, 5 Am. Law J. 474.

[b] When on a furlough, soldier may be arrested by civil authorities for criminal offense. *Ex parte* McRoberts, 16 Iowa 600.

[c] Marines in marine corps are en-

otherwise as to commissioned officers.³⁰ In some jurisdictions by statute persons engaged in the military service of the state or of the United States are exempt from service of civil process;³¹ and even in the absence of statute a militiaman has been held exempt from service of process when, at the command of the governor, he goes into another county.³² A statute exempting an officer from "arrest" does not exempt him from civil process.³³

III. PROSECUTIONS FOR OFFENSES AFFECTING THE SERVICE. — An indictment for soliciting a person to leave the state for the purpose of enlisting elsewhere need not allege that the person solicited left the service.³⁴ Nor is it necessary to allege that he was a citizen of,³⁵ or liable to do military duty in the state,³⁶ or to set forth the means used to solicit such person.³⁷

In such a prosecution the exact time at which the offense was committed need not be proved as laid;³⁸ and the fact that it appears that the person solicited to leave the state had theretofore been rejected as physically unfit is not a defense.³⁹

titled to same exemption. U. S. Rev. St., §1610.

30. **Ala.**—*Ex parte* Harlan, 39 Ala. 563. **Ga.**—*White v. Lowther*, 3 Ga. 397, officer under act of congress not exempt under state statute which exempts the militia of the state. **S. C.** *Moses v. Mellett*, 3 Strobb. 210. **Eng.** *Larchin v. Willan*, 4 Mees. & W. 351, 150 Eng. Reprint 1463.

31. See the following: **Ky.**—*Hart v. Flynn's Exr.*, 8 Dana 190. **Pa.** *Drexel v. Miller*, 49 Pa. 246; *Coxe's Exr. v. Martin*, 44 Pa. 322. **S. C.** *Kirkpatrick v. Irby*, 3 McCord 205; *Gregg v. Summers*, 1 McCord 461.

32. *Land Title & Tr. Co. v. Rambo*, 174 Pa. 566, 34 Atl. 207.

33. *Hart v. Flynn's Exr.*, 8 Dana (Ky.) 190.

34. *Com. v. McGovern*, 10 Allen (Mass.) 193.

35. *Com. v. McGovern*, 10 Allen (Mass.) 193.

36. *Com. v. McGovern*, 10 Allen (Mass.) 193.

37. *Com. v. McGovern*, 10 Allen (Mass.) 193.

38. *Com. v. Jacobs*, 9 Allen (Mass.) 274. See generally the title "**Variance and Failure of Proof.**"

39. U. S. Rev. St., §1642, art. 57; *Com. v. Jacobs*, 9 Allen (Mass.) 274.

NE EXEAT

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CROSS-REFERENCES:

Recognizances and Bail.

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For forms, see 9 STANDARD PROC. 860.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND NATURE OF WRIT. — **A. DEFINITION AND GENERAL STATEMENT.** — The writ of ne exeat is an equitable process designed to prevent the departure of a debtor from the jurisdiction of the court, and to render him amenable to its processes during the pendency of a cause.¹ It is not regarded as a prerogative writ, in this country,² but as a writ of right.³ In many states the use of the writ of ne exeat is abolished, by express terms of the statute,⁴ or by implication.⁵

B. NATURE OF THE REMEDY.⁶ — The ne exeat proceeding is not an action, but is ancillary to a suit in equity.⁷ Ne exeat is a mesne process,⁸ in the nature of equitable bail.⁹ It is frequently said to be analogous to the capias at common law.¹⁰ In some jurisdictions it is merely a preliminary process used to procure attendance of the defendant within the jurisdiction at the time judgment is rendered;¹¹ while in others it is regarded as continuing in force until discharged or the judgment is satisfied.¹²

1. **Md.**—Johnson *v.* Clendenin, 5 Gill & J. 463. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353. **N. Y.**—Glenton *v.* Clover, 10 Abb. Pr. 422. **S. C.**—Commr. *v.* Phillips, 2 Hill 631. **Vt.**—Adams *v.* Whitecomb, 46 Vt. 708.

2. **May v. May**, 146 Ga. 521, 91 S. E. 687; **Lamar v. Lamar**, 123 Ga. 827, 51 S. E. 763; **Gilbert v. Colt**, Hopk. Ch. (N. Y.) 496, 14 Am. Dec. 557; **Gleason v. Bisby**, 1 Clarke Ch. (N. Y.) 551.

3. **U. S.**—Gooding *v.* Reid, Murdock & Co., 177 Fed. 684, 101 C. C. A. 310. **Colo.**—People *v.* Barton, 16 Colo. 75, 26 Pac. 149. **Ga.**—May *v.* May, 146 Ga. 521, 91 S. E. 657. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353. **N. J.**—Myer *v.* Myer, 25 N. J. Eq. 28. **N. Y.**—Gilbert *v.* Colt, 1 Hopk. Ch. 496, 14 Am. Dec. 557; **Forrest v. Forrest**, 10 Barb. 46, 3 Code Rep. 141, 5 How. Pr. 125; **Mitchell v. Bunch**, 2 Paige Ch. 606. **Vt.**—Adams *v.* Whitecomb, 46 Vt. 708.

4. See the statutes and Collins *v.* Collins, 80 N. Y. 24; **General Explosive Co. v. Hough**, 116 N. Y. Supp. 1114.

5. **Cal.**—*Ex parte* Harker, 49 Cal. 465. **Ohio.**—Cable *v.* Alvord, 27 Ohio St. 654. **S. C.**—*Ex parte* Messervy, 80 S. C. 285, 61 S. E. 445.

6. Whether a prerogative writ, see the preceding section.

7. **Cable v. Alvord**, 27 Ohio St. 654; **State v. Turner**, 145 Wis. 484, 130 N. W. 510.

8. **Colo.**—People *v.* Barton, 16 Colo. 75, 26 Pac. 149. **N. J.**—Greisner *v.* Greisner, 86 N. J. Eq. 76, 97 Atl. 287.

N. Y.—Mitchell *v.* Bunch, 2 Paige 606. **Vt.**—Adams *v.* Whitecomb, 46 Vt. 708.

9. **U. S.**—Gooding *v.* Reid, Murdock & Co., 177 Fed. 684, 101 C. C. A. 310. **Ark.**—Gresham *v.* Peterson, 25 Ark. 377. **Ga.**—Sheppard *v.* Blue, 26 Ga. 117. **Ind.**—Hunter *v.* Nelson, 5 Blackf. 263. **Mass.**—Rice *v.* Hale, 5 Cush. 238. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353. **N. J.**—Schreiber *v.* Schreiber, 85 N. J. Eq. 203, 96 Atl. 85. **N. Y.**—Dunham *v.* Jackson, 1 Paige 629; **Mitchell v. Bunch**, 2 Paige 606; **Neville v. Neville**, 22 How. Pr. 500. **Ohio.**—Cable *v.* Alvord, 27 Ohio St. 654. **S. C.**—*Ex parte* Dawson, McMull. Eq. 405. **Vt.**—Adams *v.* Whitecomb, 46 Vt. 708. **Wis.**—Davidson *v.* Rosenberg, 130 Wis. 22, 109 N. W. 925; **Dean v. Smith**, 23 Wis. 483, 99 Am. Dec. 198.

10. **Ark.**—Gresham *v.* Peterson, 25 Ark. 377. **Ky.**—Burnsides *v.* Blythe, 11 B. Mon. 6. **Me.**—Carter *v.* Porter, 71 Me. 167. **N. Y.**—Gleason *v.* Bisby, 1 Clarke Ch. 551. **Ohio.**—Cable *v.* Alvord, 27 Ohio St. 654. **Wis.**—State *v.* Turner, 145 Wis. 484, 130 N. W. 510.

11. **Ga.**—May *v.* May, 146 Ga. 521, 91 S. E. 687; **Freeman v. Freeman**, 143 Ga. 788, 85 S. E. 1038; **Leseur v. Pounds**, 139 Ga. 470, 77 S. E. 629. **N. Y.**—Glenton *v.* Clover, 10 Abb. Pr. 422; **Gleason v. Bisby**, 1 Clarke Ch. 551. **Wis.**—State *v.* Turner, 145 Wis. 484, 130 N. W. 510.

12. **Lewis v. Shainwald**, 48 Fed. 492.

[a] **Entry of judgment** does not discharge the writ. **Lewis v. Shainwald**, 48 Fed. 492.

II. JURISDICTION TO ISSUE.—Independent of statute, chancery courts have the power to issue the writ of ne exeat.¹³ The justices of the supreme court may issue it in proper cases;¹⁴ also circuit,¹⁵ and district courts, where they have equitable jurisdiction.¹⁶ The writ cannot be allowed except by the judge himself;¹⁷ consequently a master in chancery, or commissioner, has no power to issue it,¹⁸ unless specially authorized by statute.¹⁹ By statutes in some states, judges of inferior courts,²⁰ justices of the peace,²¹ and other officials,²² have been authorized to issue the writ under prescribed conditions.

III. PROCEEDINGS TO PROCURE.—**A. IN GENERAL.**—The proceeding to obtain the writ is ex parte,²³ and it may be applied for at any stage of the suit.²⁴

B. APPLICATION.—The writ may be had upon petition or motion;²⁵ or it may even be granted under the prayer for general relief in the bill, if facts sufficient are alleged therein.²⁶ There is no technical form of application.²⁷ Sufficient equity must appear in the face of the bill itself;²⁸ or if the proceeding is statutory, the complaint should make out a prima facie case under the statute.²⁹ It must appear either

13. **Me.**—Carter *v.* Porter, 71 Me. 167. **Mass.**—Dunsmoor *v.* Bankers' Surety Co., 206 Mass. 23, 91 N. E. 907. **Mich.**—Bailey *v.* Cadwell, 51 Mich. 217, 16 N. W. 381. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353. **N. J.**—Palmer *v.* Palmer, 84 N. J. Eq. 550, 95 Atl. 241.

14. *Rice v. Hale*, 5 Cush. (Mass.) 238; Samuel *v.* Wiley, 50 N. H. 353.

15. **Haw.**—Aldrich *v.* Judge of Circuit Court, 9 Hawaii 470. **Tenn.**—Caughron *v.* Stinespring, 132 Tenn. 636, 179 S. W. 152. **Wis.**—Dean *v.* Smith, 23 Wis. 483, 99 Am. Dec. 198.

16. *Lewis v. Shainwald*, 48 Fed. 492; *People v. Barton*, 16 Colo. 75, 26 Pac. 142.

[a] The bankrupt court has the power to issue the writ under the authority of Sec. 716, Rev. St., and Sec. 2, subd. 15 of the bankrupt law. *In re Cohen*, 136 Fed. 999; *In re Lipke*, 98 Fed. 970.

17. *Bailey v. Cadwell*, 51 Mich. 217, 16 N. W. 381.

18. *Seoggin v. Taylor*, 13 Ark. 380; *Bailey v. Cadwell*, 51 Mich. 217, 16 N. W. 381.

19. *Bassett v. Bratton*, 86 Ill. 152; *Commissioner v. Phillips*, 2 Hill (S. C.) 631.

20. *Burnsides v. Blythe*, 11 B. Mon. (Ky.) 6; *Caughron v. Stinespring*, 132 Tenn. 636, 179 S. W. 152.

21. *Hunter v. Nelson*, 5 Blackf. (Ind.) 263.

22. *Ruddell v. Childress*, 31 Ark. 511.

23. **Ga.**—Carnes *v.* Carnes, 133 Ga. 1, 74 S. E. 785; *Bleyer v. Blum & Co.*, 70 Ga. 558. **Mass.**—*Rice v. Hale*, 5 Cush. 238. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353. **N. Y.**—*Denton v. Denton*, 1 Johns. Ch. 441.

[a] A rule to show cause is improper. *Bleyer v. Blum & Co.*, 70 Ga. 558.

24. **Colo.**—*People v. Barton*, 16 Colo. 75, 26 Pac. 149. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353. **N. Y.**—*Neville v. Neville*, 22 How. Pr. 500; *Dunham v. Jackson*, 1 Paige 629. **Wis.**—*State v. Turner*, 145 Wis. 484, 130 N. W. 510.

25. **Ill.**—*Fisher v. Stone*, 4 Ill. 68. **Ind.**—*Fitzgerald v. Gray*, 59 Ind. 254. **N. Y.**—*Mattocks v. Tremain*, 3 Johns. Ch. 75.

26. **U. S.**—*Lewis v. Shainwald*, 48 Fed. 492. **Colo.**—*People v. Barton*, 16 Colo. 75, 26 Pac. 149. **N. H.**—Samuel *v.* Wiley, 50 N. H. 353.

27. *Yule v. Yule*, 10 N. J. Eq. 138.

28. *Fisher v. Stone*, 4 Ill. 68; *Woodward v. Schatzell*, 3 Johns. Ch. (N. Y.) 412; *Brown v. Haff*, 5 Paige Ch. (N. Y.) 235.

[a] Showing of fraud, in Illinois, see *Bassett v. Bratton*, 86 Ill. 152; *Malcolm v. Andrews*, 68 Ill. 100.

29. *Ramsey v. Foy*, 10 Ind. 493.

from the pleadings, or from a separate application, or affidavits,³⁰ that the defendant is about to remove from the state,³¹ and that the demand will be jeopardized unless the writ is granted.³²

Amendment.—The application may be amended,³³ upon a request seasonably made.³⁴

C. AFFIDAVIT.—1. **In General.**—An affidavit made to the truth of the allegations is a prerequisite;³⁵ but the petition, if sworn to, may be regarded as a sufficient affidavit.³⁶ The affidavit may be made by an agent,³⁷ or attorney;³⁸ but the court may require complainant also to make the oath.³⁹ In matrimonial cases the writ may be granted on the affidavit of the wife, either corroborated,⁴⁰ or alone.⁴¹ Where the verification is insufficient, it may be cured by amendment,⁴² or by ad-

30. *Clayton v. Mitchell*, 1 Del. Ch. 32.

31. *Ala.*—*Baker v. Rowan*, 2 Stew. & P. 361. *Ga.*—*Reed v. Barber*, 110 Ga. 524, 35 S. E. 650. *Ind.*—*Ramsey v. Foy*, 10 Ind. 493; *Simpkins v. Malatt*, 9 Ind. 543. *Me.*—*Mason v. Hutchings*, 20 Me. 77. *N. J.*—*Yule v. Yule*, 10 N. J. Eq. 138. *N. Y.*—*Mattocks v. Tremain*, 3 Johns. Ch. 75. *R. I.*—*Robinson v. Robinson*, 21 R. I. 81, 41 Atl. 1009. *Tenn.*—*Caughron v. Stinespring*, 132 Tenn. 636, 179 S. W. 152. *Va.*—*Rhodes v. Cousins*, 8 Rand. (27 Va.) 188, 18 Am. Dec. 715.

[a] It is not essential to aver that intent of departure is to avoid jurisdiction. *U. S.*—*Shainwald v. Lewis*, 46 Fed. 839. *Haw.*—*King v. Huntley*, 2 Hawaii 457. *N. J.*—*McDonough v. Gaynor*, 18 N. J. Eq. 249. *Tenn.*—*Caughron v. Stinespring*, 132 Tenn. 636, 648, 179 S. W. 152.

[b] Alleging mere change of residence not sufficient. *Mason v. Hutchings*, 20 Me. 77.

[c] Where removal of property is ground, exempt character of property must be negatived. *Jones v. Kennicott*, 83 Ill. 484; *Garden City Sand Co. v. Gettins*, 102 Ill. App. 261, affirmed, 200 Ill. 268, 65 N. E. 664; *Louderback v. Rosengrant*, 4 Ind. 563.

32. *Fla.*—*Bronk v. State*, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119, 129. *Ga.*—*McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407. *Haw.*—*King v. Huntley*, 2 Hawaii 457. *N. Y.*—*Mattocks v. Tremain*, 3 Johns. Ch. 75.

[a] Danger of loss may be inferred from other allegations. *McGehee v. Polk*, 24 Ga. 406.

[b] In suit against administrator it is not necessary to allege that sure-

ties on administrator's bond are insolvent. *Sheppard v. Blue*, 26 Ga. 117.

33. *U. S.*—*Gernon v. Boecaline*, 2 Wash. C. C. 130, 10 Fed. Cas. No. 5,367. *Colo.*—*People v. Barton*, 16 Colo. 75, 26 Pac. 149. *Ill.*—*Bassett v. Bratton*, 86 Ill. 152; *Fisher v. Stone*, 4 Ill. 68. *Ind.*—*Louderback v. Rosengrant*, 4 Ind. 563.

[a] Great caution in allowing amendments should be exercised. *Jones v. Kennicott*, 83 Ill. 484.

34. *Jones v. Kennicott*, 83 Ill. 484. 35. *La.*—*Graham v. Noble*, 19 La. Ann. 512. *Va.*—*Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715. *Wis.*—*Bonesteel v. Bonesteel*, 28 Wis. 245.

[a] An affidavit made before a suit is pending is sufficient, if a prosecution for perjury would lie for the making of a false affidavit. *Clark v. Clark*, 51 N. J. Eq. 404, 26 Atl. 1012.

36. *Wallace v. Duncan*, 13 Ga. 41; *Robinson v. Robinson*, 21 R. I. 81, 41 Atl. 1009.

37. *Orme v. McPherson*, 36 Ga. 571. 38. *Smith v. Koontz*, 4 Hayw. (Tenn.) 189.

39. *Orme v. McPherson*, 36 Ga. 571. 40. *Bayly v. Bayly*, 2 Md. Ch. 326, 331; *Viadero v. Viadero*, 7 Hun (N. Y.) 313.

41. *Ga.*—*McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407. *Md.*—*Bayly v. Bayly*, 2 Md. Ch. 326. *N. J.*—*Yule v. Yule*, 10 N. J. Eq. 138. *N. Y.*—*Denton v. Denton*, 1 Johns. Ch. 441.

42. *Gernon v. Boecaline*, 2 Wash. C. C. 130, 10 Fed. Cas. No. 5,367; *Holliday v. Riordan*, 25 Ga. 629.

[a] Testimony on hearing as to truth of allegations is not equivalent to an amendment. *Carnes v. Carnes*, 138 Ga. 1, 74 S. E. 785.

missions in the answer⁴³ dispensing with the necessity of proof.

2. **As to Certainty.**—The affidavit as to the truth of the allegations should, as a general rule, be stated in positive terms;⁴⁴ and an oath as to the complainant's information and belief will not ordinarily suffice.⁴⁵ The averments as to an existing debt must be positive;⁴⁶ but in a suit for accounting, when it is shown that something is due, the amount may be sworn to on belief.⁴⁷ The intended departure must be averred by positive allegations, or by facts, threats, or declarations evidencing such intention.⁴⁸ If stated upon belief or information, the grounds for the belief,⁴⁹ and the source of the information, should appear.⁵⁰

D. **BOND OF COMPLAINANT.**—Both by the chancery practice,⁵¹ and by the provisions of statute,⁵² complainants may be required to furnish bond, with security, conditioned for the payment of the costs and damages the defendant may be entitled to, in case the issuance of the writ was procured without probable cause. The failure to file the

43. *Edwards v. Massey*, 8 N. C. 359; *Gibert v. Colt*, 1 Hopk. Ch. (N. Y.) 496, 14 Am. Dec. 557.

44. *Ga.*—*Wallace v. Duncan*, 13 Ga.

41. *N. Y.*—*Mattocks v. Tremain*, 3 Johns. Ch. 75. *R. I.*—*Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531. *Eng.* *Jones v. Alephsin*, 16 Ves. Jr. 470, 33 Eng. Reprint 1063; *Oldham v. Oldham*, 7 Ves. Jr. 410, 32 Eng. Reprint 166.

45. *Ga.*—*Orme v. McPherson*, 36 Ga. 571; *Holliday v. Riodan*, 25 Ga. 629; *Woods v. Symmes*, 25 Ga. 69; *Bryan v. Ponder*, 23 Ga. 480. *N. Y.*—*Gordon v. Fox*, 11 N. Y. Supp. 5, 18 Civ. Proc. 291. *N. C.*—*Edwards v. Massey*, 8 N. C. 359.

46. *Gibert v. Colt*, 1 Hopk. Ch. (N. Y.) 496, 14 Am. Dec. 557; *Mattocks v. Tremain*, 3 Johns. Ch. (N. Y.) 75; *Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715.

[a] When debt is established by master's report, it need not be verified by affidavits. *Yule v. Yule*, 10 N. J. Eq. 138.

47. *U. S.*—*Gernon v. Boccacine*, 2 Wash. C. C. 130, 10 Fed. Cas. No. 5367. *Del.*—*Clowes v. Judge*, 1 Del. Ch. 295; *Clayton v. Mitchell*, 1 Del. Ch. 32. *Ga.*—*McGehee v. Polk*, 24 Ga. 406. See also *Lamar v. Lamar*, 123 Ga. 827, 51 S. E. 763. *N. J.*—*McDonough v. Gaynor*, 18 N. J. Eq. 249. *N. Y.*—*Thorne v. Halsey*, 7 Johns. Ch. 189. *Ohio.*—*Cable v. Alvord*, 27 Ohio St. 654. *Va.*—*Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715.

48. *Conn.*—*Lyon v. Lyon*, 21 Conn. 185. *Del.*—*Clowes v. Judge*, 1 Del. Ch.

295. *Ga.*—*Grier v. Ward*, 23 Ga. 145; *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407. *N. J.*—*Yule v. Yule*, 10 N. J. Eq. 138. *N. Y.*—*Mattocks v. Tremain*, 7 Johns. Ch. 75. *R. I.*—*Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531; *Robinson v. Robinson*, 21 R. I. 81, 41 Atl. 1009. *Tenn.*—*Caughron v. Stinespring*, 132 Tenn. 636, 648, 179 S. W. 152.

[a] "Has reason to believe and does verily believe" is sufficiently positive. *Simpkins v. Malatt*, 9 Ind. 543.

49. *U. S.*—*Shainwald v. Lewis*, 46 Fed. 839. *Ala.*—*Baker v. Rowan*, 2 Stew. & P. 361. *N. Y.*—*Forrest v. Forrest*, 10 Barb. 46, 3 Code Rep. 141, 5 How. Pr. 125. *N. C.*—*Edwards v. Massey*, 8 N. C. 359. *R. I.*—*Robinson v. Robinson*, 21 R. I. 81, 41 Atl. 1009. *Va.*—*Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715.

50. *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407.

[a] Fears and apprehensions alone will not suffice. *N. J.*—*Anschutz v. Anschutz*, 16 N. J. Eq. 162. *N. Y.*—*Woodward v. Schatzell*, 3 Johns. Ch. 412; *Forrest v. Forrest*, 10 Barb. 46, 3 Code Rep. 141, 5 How. Pr. 125. *N. C.*—*Lehman v. Logan*, 42 N. C. 296.

51. *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361; *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

[a] The practice of requiring a bond may be followed at the discretion of the court. *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

52. *Ga.*—*Grier v. Ward*, 23 Ga. 145.

bond when required by statute is fatal to the proceeding.⁵³ The clerk of the court ordinarily approves the bond.⁵⁴

E. ORDER.—The writ of ne exeat is issued only on the special order of the court.⁵⁵ The order should fix the sum in which the party is to be held to bail,⁵⁶ and this is usually an amount equal to the debt claimed,⁵⁷ but may be regulated by statute.⁵⁸ In matrimonial cases the amount depends upon the circumstances of the parties and of the case.⁵⁹ The order usually prescribes the condition of the bond,⁶⁰ which generally is that the party will not depart the state.⁶¹ And it is error to require the payment of the judgment as a further condition,⁶² but the order may be in the alternative.⁶³

IV. FORM AND SUFFICIENCY OF WRIT.—The writ of ne exeat is usually directed to the sheriff,⁶⁴ and commands him to cause the defendant to give sufficient security that he will not depart the

Ind.—Fitzgerald v. Gray, 59 Ind. 254.

Ky.—Burnsides v. Blythe, 11 B. Mon.

6. **La.**—Graham v. Noble, 19 La. Ann. 512.

53. **Fla.**—Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119.

Ind.—Straughan v. Inge, 5 Ind. 157; Ramsey v. Fay, 10 Ind. 493. **La.**—Graham v. Noble, 19 La. Ann. 512.

[a] **The Point Must Be Made in the Trial Court.**—Grier v. Ward, 23 Ga. 145; Ramsey v. Foy, 10 Ind. 493.

[b] **A defective bond may be amended by substituting a new one.** Fitzgerald v. Gray, 59 Ind. 254.

54. Burnsides v. Blythe, 11 B. Mon. (Ky.) 6.

55. **Ga.**—Bleyer v. Blum & Co., 70 Ga. 558. **N. Y.**—Neville v. Neville, 22 How. Pr. 500; Viadero v. Viadero, 7 Hun 313. **Wis.**—State v. Turner, 145 Wis. 484, 130 N. W. 510; Dean v. Smith, 23 Wis. 483, 99 Am. Dec. 193.

[a] **Order may be entered nunc pro tunc, where defendant is not prejudiced.** Viadero v. Viadero, 7 Hun (N. Y.) 313. See *supra*, III, B, 1.

56. **Del.**—Clowes v. Judge, 1 Del. Ch. 295. **Fla.**—Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119. **N. Y.**—Denton v. Denton, 1 Johns. Ch. 441; Gibert v. Colt, Hopk. Ch. 496, 14 Am. Dec. 557; Harris v. Hardy, 3 Hill 393; Gleason v. Bisby, 1 Clarke Ch. 551. **Va.**—Rhodes v. Cousins, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715.

57. **Del.**—Clowes v. Judge, 1 Del. Ch. 295. **Mich.**—Bailey v. Cadwell, 51 Mich. 217, 16 N. W. 381. **N. Y.**—Gleason v. Bisby, 1 Clarke Ch. 551; Gibert v. Colt, Hopk. Ch. 496, 14 Am. Dec. 557.

[a] **Future interest, in a reasonable amount, should be included.** Gibert v. Colt, Hopk. Ch. (N. Y.) 496, 14 Am. Dec. 557.

58. Smith v. Koontz, 4 Hayw. (Tenn.) 189.

59. Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763; Denton v. Denton, 1 Johns. Ch. (N. Y.) 441.

60. Burnsides v. Blythe, 11 B. Mon. 6.

[a] **Unauthorized conditions in order, where they are disregarded in the writ and bond, do not affect the validity of the writ.** Burnsides v. Blythe, 11 B. Mon. (Ky.) 6.

[b] **In New Jersey the conditions of the bond are prescribed by Rule 192 of the courts of chancery.** Elliott v. Elliott (N. J. Eq.), 36 Atl. 951.

61. **Ga.**—Ross v. Hawkins, 29 Ga. 261. **N. Y.**—Gleason v. Bisby, Clarke Ch. 551. **S. C.**—Commissioner v. Phillips, 2 Hill 631.

62. **Fla.**—Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119. **Ga.**—May v. May, 146 Ga. 521, 91 S. E. 687; Carnes v. Carnes, 138 Ga. 1, 74 S. E. 785. **N. J.**—Waners v. Van Vorst, 28 N. J. Eq. 103. **N. Y.**—Gleason v. Bisby, Clarke Ch. 551. **S. C.**—Commr. v. Phillips, 2 Hill 631.

See *infra*, IV, C.

63. Ross v. Hawkins, 29 Ga. 261; McGehee v. Polk, 24 Ga. 406.

[a] **Defendant has the option to give bond to remain within the state, or to satisfy the judgment, under the alternative order.** Ross v. Hawkins, 29 Ga. 261.

64. Samuel v. Wiley, 50 N. H. 353;

state without leave of the court,⁶⁵ and in default of such bail or security, to commit the defendant to prison.⁶⁶ The sum in which the party is to be held to bail, as fixed by the court,⁶⁷ is always marked on the writ.⁶⁸ The writ must bear the signature of the clerk and the seal of the court.⁶⁹

V. SERVICE AND RETURN.—The writ of ne exeat is served and returned as in the case of other writs;⁷⁰ general statutes apply.⁷¹ The taking and return of the recognizance is no necessary part of the service and return of the writ.⁷² Failure to serve a subpoena with the writ is not a material irregularity.⁷³

VI. VACATING AND DISCHARGING WRIT.—A. APPLICATION FOR DISCHARGE.—Application for discharge is made by motion,⁷⁴ or petition, after notice;⁷⁵ and may be made at any time, before⁷⁶

Bushnell v. Bushnell, 15 Barb. (N. Y.) 399.

65. Ga.—*McGehee v. Polk*, 24 Ga. 406. Mass.—*Rice v. Hale*, 5 Cush. 238, 242. N. H.—*Samuel v. Wiley*, 50 N. H. 353. N. J.—*McDonough v. Gaynor*, 18 N. J. Eq. 249. N. Y.—*Bushnell v. Bushnell*, 15 Barb. 399. S. C.—*Commr. v. Phillips*, 2 Hill 631.

[a] "The ancient writ always recited that it appears that the defendant is indebted to the complainant, and designs quickly to go to ports beyond the seas." *Davidor v. Rosenberg*, 130 Wis. 22, 109 N. W. 925.

[b] An endorsement on a subpoena in chancery cannot be treated as a writ of ne exeat. *Smith v. Morrow*, 5 Litt. (Ky.) 210.

[c] In the form of the common *capias*, the equity writ is irregular, and will be set aside. *McDonough v. Gaynor*, 18 N. J. Eq. 249.

[d] A ne exeat and attachment against property may issue together, and the writ may direct that the execution of the latter will suffice. This alternate writ is the common practice in Alabama. *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361.

66. Mass.—*Rice v. Hale*, 5 Cush. 238, 242. N. H.—*Samuel v. Wiley*, 50 N. H. 353. N. Y.—*Bushnell v. Bushnell*, 15 Barb. 399. S. C.—*Commr. v. Phillips*, 2 Hill 631.

67. *Harris v. Hardy*, 3 Hill (N. Y.) 393. See *supra*, III, E.

[a] **Presumption of Regularity.** When the writ is marked by the court, it will be presumed done in pursuance of the fiat of the proper officer, though such fiat is not produced. *Gleason v. Bisby*, 1 Clarke Ch. (N. Y.) 551.

68. *Harris v. Hardy*, 3 Hill (N. Y.) 393; *Gleason v. Bisby*, 1 Clarke Ch. (N. Y.) 551; *Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715.

[a] When marked for too large a sum, the amount may be reduced without affecting the regularity of the writ. *Gleason v. Bisby*, 1 Clarke Ch. (N. Y.) 551.

[b] Failure to mark writ with amount of bail may be cured by amendment. *Viadero v. Viadero*, 7 Hun (N. Y.) 313.

69. *Bonesteel v. Bonesteel*, 28 Wis. 245.

[a] A Writ Signed Only by the Judge Is Void.—*Bonesteel v. Bonesteel*, 28 Wis. 245.

70. *Fitzgerald v. Gray*, 61 Ind. 109; *Ramsey v. Foy*, 10 Ind. 493.

As to service of process generally, see the title "Service of Process and Papers."

71. *Crocker v. Dunkin*, 6 Blackf. (Ind.) 535; *Jewett v. Bowman*, 27 N. J. Eq. 275.

72. *Fitzgerald v. Gray*, 61 Ind. 109.

73. *Georgia Lumber Co. v. Bissell*, 9 Paige Ch. (N. Y.) 225.

74. *Crocker v. Dunkin*, 6 Blackf. (Ind.) 535; *Chew v. Chew*, 74 N. J. Eq. 285, 69 Atl. 1079.

[a] Whether the motion need be in writing, when a verified answer has been filed, see *Fitch v. Richardson*, Morris (Ia.) 245.

75. *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. ed. 678; *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

76. *Dithmar v. Dithmar*, 68 N. J. Eq. 533, 59 Atl. 644; *Cary v. Cary*, 39 N. J. Eq. 3.

or after, the filing of the answer,⁷⁷ except that it may not be delayed until after the cause has been noticed for hearing.⁷⁸

B. GROUNDS FOR DISCHARGE.—The grounds for the motion may be the want of equity appearing in the bill,⁷⁹ insufficiency of complainant's affidavit,⁸⁰ or any other thing which shows that the writ should not have been granted.⁸¹ The application may be founded on the answer,⁸² or affidavits,⁸³ or both.⁸⁴ The defendant's sworn denial of an intention to go abroad will ordinarily not alone be sufficient to procure the discharge of the writ,⁸⁵ though it will be sufficient as against the unsupported affidavit of complaint.⁸⁶

C. DISCHARGE ON GIVING SECURITY.—The ne exeat will be discharged on motion, and the bond will be delivered up for cancellation, upon defendant's giving security for the performance of the decree of the court,⁸⁷ and the defendant is entitled to this substitution as a matter

[a] **Motion before answer does not preclude another** being made in more mature state of case. *Evans v. Van Hall*, 1 Clarke Ch. (N. Y.) 22.

77. *Fitch v. Richardson*, Morris (Ia.) 245.

[a] **Hearing of motion to set aside not premature**, though heard before cause could have been tried on its merits under the statute. *Fitch v. Richardson*, Morris (Ia.) 245.

78. *Miller v. Miller*, 1 N. J. Eq. 386.

79. *Dithmar v. Dithmar*, 68 N. J. Eq. 533, 59 Atl. 644; *Jesup v. Hill*, 7 Paige Ch. (N. Y.) 95.

80. *McGehee v. Polk*, 24 Ga. 406; *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531. See *supra*, III, C.

[a] **Demurrer may be filed** to test the sufficiency of complainant's affidavit. *Blue v. Sheppard*, 28 Ga. 566.

81. **Ga.**—*McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407. **Ky.**—*Field v. Montmollin*, 5 Bush 455. **La.**—*Gardner v. O'Connell*, 5 La. Ann. 353. **N. J.** *Dithmar v. Dithmar*, 68 N. J. Eq. 533, 59 Atl. 644; *Cary v. Cary*, 39 N. J. Eq. 3. **N. Y.**—*Mitchell v. Bunch*, 2 Paige Ch. 606. **Va.**—*Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715. 82. **Ia.**—*Fitch v. Richardson*, 1 Morris 245. **Md.**—*Bayly v. Bayly*, 2 Md. Ch. 326. **N. J.**—*Cary v. Cary*, 39 N. J. Eq. 3. **Va.**—*Rhodes v. Cousins*, 6 Rand. (27 Va.) 188, 18 Am. Dec. 715.

[a] **Though time for filing exceptions to the answer has expired**, its sufficiency may be considered on motion to discharge writ. *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189.

83. *Chew v. Chew*, 74 N. J. Eq. 285,

69 Atl. 1079; *Dithmar v. Dithmar*, 68 N. J. Eq. 533, 59 Atl. 644; *Cary v. Cary*, 39 N. J. Eq. 3; *Glenton v. Clover*, 10 Abb. Pr. (N. Y.) 422; *Allen v. Hyde*, 2 Abb. N. C. (N. Y.) 197.

84. *Myer v. Myer*, 25 N. J. Eq. 28; *Yule v. Yule*, 10 N. J. Eq. 138; *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

85. **Ga.**—*Conyers v. Gray*, 67 Ga. 329. **N. J.**—*Cary v. Cary*, 39 N. J. Eq. 20; *Houseworth's Admr. v. Hendrickson*, 27 N. J. Eq. 60. **N. Y.**—*Hammond v. Hammond*, Clarke Ch. 151; *Glenton v. Clover*, 10 Abb. Pr. 422. **S. C.**—*Devall v. Devall*, 4 Desaus. 79.

[a] **Where preponderance of affidavits and circumstances are against the denial**, the writ will be sustained. *Chew v. Chew*, 74 N. J. Eq. 285, 69 Atl. 1079.

86. **U. S.**—*Shainwald v. Lewis*, 46 Fed. 839. **La.**—*Gardner v. O'Connell*, 5 La. Ann. 353. **Md.**—*Bayly v. Bayly*, 2 Md. Ch. 326, 332. **N. Y.**—*Palmer v. Van Doren*, 2 Edw. Ch. 425.

[a] **The entire burden of proof is on the complainant.** *Garden City Sand Co. v. Gettins*, 102 Ill. App. 261.

[b] **Affidavit of belief is sufficient to obtain but not to maintain arrest if denied.** *Gardner v. O'Connell*, 5 La. Ann. 353.

87. **U. S.**—*Lewis v. Shainwald*, 48 Fed. 492. **Del.**—*Clayton v. Mitchell*, 1 Del. Ch. 32. **N. H.**—*Samuel v. Wiley*, 50 N. H. 353. **N. J.**—*Chew v. Chew*, 74 N. J. Eq. 285, 69 Atl. 1079; *Houseworth's Admr. v. Hendrickson*, 27 N. J. Eq. 60. **N. Y.**—*Breck v. Smith*, 54 Barb. 212; *Woodward v. Schatzell*, 3 Johns. Ch. 412. **S. C.**—*Prather v.*

of course.⁸⁸ The security required on this proceeding for discharge of the writ is usually in the form of a bond,⁸⁹ but it may be furnished by other means approved by the court.⁹⁰

D. WAIVER AND CONDITIONS OF DISCHARGE. — Giving bail is not a waiver of the right to move to vacate the writ;⁹¹ but rights to further relief may be waived by preliminary proceedings unless specially reserved.⁹² Leave of absence from the state may be granted by the court without discharge of the writ, or prejudice to the bail bond.⁹³ When the writ is discharged for irregularities, the court may nevertheless require security for the performance of the decree as a condition;⁹⁴ but not when the ground for discharge is insufficiency of affidavits.⁹⁵ The order discharging the writ may include an injunction,⁹⁶ or require the defendant to stipulate,⁹⁷ against suing at law for the wrongful issuance of the writ. Where a party is guilty of contempt, the motion for discharge will not be considered until he has purged himself of the contempt.⁹⁸

Prather, 4 Desaus. 33; *Commr. v. Phillips*, 2 Hill 631.

See *supra*, III, E.

[a] **Cancellation of original bail bond** must be asked for in notice of motion for discharge of writ. *Breck v. Smith*, 54 Barb. (N. Y.) 212.

[b] **When sheriff declines security tendered**, defendant should apply to the court for discharge of writ on security to answer the bill and render himself amenable to the processes of the court. *Brayton v. Smith*, 6 Paige Ch. (N. Y.) 489.

88. *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. ed. 678; *Mitchell v. Bunch*, 2 Paige Ch. (N. Y.) 606; *Gleason v. Bisby*, 1 Clarke Ch. (N. Y.) 551; *Ellingwood v. Stevenson*, 4 Sandf. Ch. (N. Y.) 366.

[a] **The order is regarded as a substitute**, for the ne exeat, and an indulgence to the defendant. *Commr. v. Phillips*, 2 Hill (S. C.) 631.

89. *Clayton v. Mitchell*, 1 Del. Ch. 32; *Chew v. Chew*, 74 N. J. Eq. 285, 69 Atl. 1079; *Houseworth's Admr. v. Hendrickson*, 27 N. J. Eq. 60.

90. *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361; *Read v. Prince*, 1 Desaus. (S. C.) 145.

[a] **Surrender of property to sheriff** on an attachment writ may suffice. *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361.

[b] **Power of attorney to convey property**, as security, may procure suspension of the writ. *Read v. Prince*, 1 Desaus. (S. C.) 145.

91. *Jesup v. Hill*, 7 Paige Ch. (N.

Y.) 95; *Allen v. Hyde*, 2 Abb. N. C. (N. Y.) 197.

[a] **Bail may be reduced** under prayer for general relief, when discharge of writ is refused. *McNamara v. Dwyer*, 7 Paige Ch. (N. Y.) 239.

92. *Jesup v. Hill*, 7 Paige Ch. (N. Y.) 95; *Breck v. Smith*, 54 Barb. (N. Y.) 212.

[a] **The procuring of an order for the substitute bond**, conditioned that defendant abide the decree, is an abandonment of the right to question the propriety of being held to bail originally, unless prayed for without prejudice to such right. *Jesup v. Hill*, 7 Paige Ch. (N. Y.) 95.

93. *Dunsmoor v. Bankers' Surety Co.*, 206 Mass. 23, 91 N. E. 907; *Dupont v. Goffe*, 1 Desaus. (S. C.) 143.

94. *McDonough v. Gaynor*, 18 N. J. Eq. 249; *Parker v. Parker*, 12 N. J. Eq. 105.

[a] **Unless the party is in actual custody**, the writ will not be discharged. *Anerum v. Dawson*, 1 McMull. (S. C.) 405.

95. *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

96. *Gooding v. Reid, Murdock & Co.*, 101 C. C. A. 310, 177 Fed. 684; *Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

97. *Allen v. Hyde*, 2 Abb. N. C. (N. Y.) 197.

98. *Aldrich v. Judge of Circuit Court*, 9 Hawaii 470; *Evans v. Van Hall*, 1 Clarke Ch. (N. Y.) 22, 28.

[a] **But discharge may be had on giving bond** to abide the decree, since

VII. ACTIONS ON BONDS.—A. IN GENERAL.—The chancery courts ordinarily retain control of the liability in ne exeat proceedings on bonds given by either the complainant,⁹⁹ or defendant.¹ This right to control is inherent with the power to issue the writ.² It may be enforced by an injunction against suing at law to recover damages or penalties,³ or by requiring a stipulation between the parties against such suit.⁴ It is therefore for the chancery court to say whether there has been a breach of the condition of the bond,⁵ to decide the question of liability,⁶ and the extent of liability.⁷ Redress may either be granted in the court issuing the writ,⁸ or a suit at law may be authorized.⁹ Leave to prosecute the bonds is usually had by petition.¹⁰ Where the ne exeat proceeding is regulated by statute, of course the statute controls.¹¹

In a suit upon a bond conditioned for payment of costs and damages, a plea of payment of costs is good,¹² but not a plea of non damnificatus.¹³

B. ON BOND OF DEFENDANTS.—Upon default of defendants, a ne exeat bond may be forfeited by the chancery court, and the sureties directed to pay the amount thereof into court.¹⁴ Summary judgment may be entered upon default of sureties,¹⁵ after notice to show cause;¹⁶

that is a matter of right. *Ellingwood v. Stevenson*, 4 Sandf. Ch. (N. Y.) 366.

99. *Gooding v. Reid*, Murdock & Co., 101 C. C. A. 310, 177 Fed. 684; *Jastram v. McAuslan*, 29 R. I. 471, 477, 72 Atl. 531.

1. *Elliott v. Elliott* (N. J. Eq.), 36 Atl. 951; *Wauters v. Van Vorst*, 28 N. J. Eq. 103; *Harris v. Hardy*, 3 Hill (N. Y.) 393.

2. *Gooding v. Reid*, Murdock & Co., 101 C. C. A. 310, 177 Fed. 684.

3. *Gooding v. Reid*, Murdock & Co., 101 C. C. A. 310, 177 Fed. 684; *Jastram v. McAuslan*, 29 R. I. 471, 477, 72 Atl. 531.

4. *Allen v. Hyde*, 2 Abb. N. C. (N. Y.) 197.

5. *Wauters v. Van Vorst*, 28 N. J. Eq. 103.

6. *Wauters v. Van Vorst*, 28 N. J. Eq. 103; *Brayton v. Smith*, 6 Paige Ch. (N. Y.) 489.

7. *Wauters v. Van Vorst*, 28 N. J. Eq. 103.

8. **U. S.**—*Gooding v. Reid*, Murdock & Co., 101 C. C. A. 310, 177 Fed. 684. **N. J.**—*Schreiber v. Schreiber*, 85 N. J. Eq. 303, 96 Atl. 85; *Wauters v. Van Vorst*, 28 N. J. Eq. 103. **R. I.**—*Jastram v. McAuslan*, 29 R. I. 471, 72 Atl. 531.

9. *Harris v. Hardy*, 3 Hill (N. Y.) 393.

10. *Elliott v. Elliott* (N. J. Eq.), 36 Atl. 951; *Wauters v. Van Vorst*, 28 N. J. Eq. 103.

[a] The objection that the suit is without the sanction of the chancery court must be made at the earliest possible moment, to be available. *Harris v. Hardy*, 3 Hill (N. Y.) 393.

11. *Cochran v. People*, 140 Ill. App. 596.

12. *Coombs v. Newlon*, 4 Blackf. (Ind.) 120.

13. *Coombs v. Newlon*, 4 Blackf. (Ind.) 120.

14. *Harris v. Hardy*, 3 Hill (N. Y.) 393; *Brayton v. Smith*, 6 Paige Ch. (N. Y.) 489.

[a] Bond will not be forfeited until defendant fails to appear when required to answer an order in the cause. *Wauters v. Van Vorst*, 28 N. J. Eq. 103.

[b] Jurisdiction to forfeit not affected by form of bond failing to comply with rules of chancery practice, where it has effected its purpose. *Schreiber v. Schreiber* (N. J. Eq.), 99 Atl. 117.

15. *Schreiber v. Schreiber*, 85 N. J. Eq. 303, 96 Atl. 85.

16. **Ala.**—*Stapler v. Hurt's Exr.*, 16 Ala. 799. **Ga.**—*Freeman v. Freeman*, 143 Ga. 788, 85 S. E. 1038. **N. J.** *Schreiber v. Schreiber*, 85 N. J. Eq. 303, 96 Atl. 85.

or suit at law may be ordered brought on the bond.¹⁷ In some jurisdictions the action at law is the only method of enforcing liabilities of sureties.¹⁸ Statutes providing conditions precedent to suits on bail bonds, apply to ne exeat bonds.¹⁹ When sued on the bond, sureties may not question the sufficiency of the affidavit upon which the writ was granted.²⁰ The remedies and rights of sureties are similar to those of sureties on bail bonds at common law.²¹ Sureties may not, however, obtain their discharge by surrendering their principals;²² but where ne exeat bonds are regarded as appearance bonds,²³ presence of defendant in court when final judgment is entered discharges the bond.²⁴

17. *Harris v. Hardy*, 3 Hill (N. Y.) 393.

[a] The law courts do not undertake to settle the amount for which sureties are liable, but enter judgment for the penal sum of the bond. *Harris v. Hardy*, 3 Hill (N. Y.) 393.

18. *Wolfe v. Garcia*, 72 Fla. 491, 73 So. 593.

19. *Cochran v. People*, 140 Ill. App. 596.

20. *Freeman v. Freeman*, 143 Ga. 788, 85 S. E. 1038; *Blue v. Sheppard*, 28 Ga. 566.

[a] Collateral attack cannot be made on a ne exeat writ. *Bassett v. Bratton*, 86 Ill. 152.

21. *Johnson v. Clendenin*, 5 Gill & J. (Md.) 463; *Commr. v. Phillips*, 2 Hill (S. C.) 631.

[a] Death of Defendant Releases

Sureties.—*Wakefield v. McKinnell*, 5 La. 279.

22. *N. J.*—*Schreiber v. Schreiber*, 85 N. J. Eq. 303, 96 Atl. 85. *N. Y.* *In re Wolfe*, 3 N. Y. Leg. Obs. 383. *R. I.*—*Hazard v. Durant*, 13 R. I. 125.

[a] Custody under final decree, releases sureties. *Johnson v. Clendenin*, 5 Gill & J. (Md.) 463.

23. *Freeman v. Freeman*, 143 Ga. 788, 85 S. E. 1038; *Le Sueur v. Pounds*, 139 Ga. 470, 77 S. E. 629. See *supra*, I, B.

24. *May v. May*, 146 Ga. 521, 91 S. E. 687; *Le Sueur v. Pounds*, 139 Ga. 470, 77 S. E. 629.

[a] The writ is not discharged upon the entry of the judgment, but continues in force until the judgment is satisfied, or until the writ is discharged. *Lewis v. Shainwald*, 48 Fed. 492.

NEGATIVE PREGNANT. — See Answers.

NEGATING EXCEPTIONS. — See Indictment and Information.

NEGLIGENCE

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CROSS-REFERENCES:

Death by Wrongful Act; Injuries to Persons and Property;
 Master and Servant.

For forms, see 9 STANDARD PROC. 864, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. FORM OF ACTION.—If the negligence operates only indirectly and consequentially, case is the appropriate form of action;¹ but where it operates directly or immediately upon the person or thing injured, the courts are not entirely agreed as to whether the plaintiff should proceed in trespass or in case, or whether he has an option.² The simple code action has of course largely displaced the formal remedies in use under the former system.³

II. PARTIES.—**A. PLAINTIFF.**—The general rules governing parties plaintiff apply to actions founded upon negligence.⁴ Generally any person who has sustained damages by reason of the negligent act of another may maintain an action therefor.⁵ This general principle, however, is subject to limitations and exceptions elsewhere treated, depending upon statutes and upon the character and relation of the parties involved and the nature of the property interests affected.⁶ Where several persons have a joint interest in the damages sustained by defendant's negligence, they are properly joined as parties plaintiff.⁷

B. DEFENDANT.—Where acts of negligence of different persons concur in causing a single injury, the injured party ordinarily may bring an action against all or any number of them.⁸ And where the defendants owe a joint duty they may be sued jointly, although there

1. See 4 STANDARD PROC. 634.

2. See 4 STANDARD PROC. 634.

3. Such as trespass (see the title "Trespass") and trespass on the case. See the title "Case (The Action of Trespass on the)."

4. See the title "Parties."

5. *Terre Haute & I. R. Co. v. Williams*, 69 Ill. App. 392.

[a] Contractor erecting a building may sue for injury thereto. *Lynds v. Clark*, 14 Mo. App. 74.

[b] Holder of chattel mortgage may intervene in an action brought by the mortgagor for damages caused by negligence. *Wohlwend v. J. I. Case Thresh. Mach. Co.*, 42 Minn. 500, 44 N. W. 517.

[c] An interest in the profits of a property does not make the parties having such interest necessary or proper parties to a suit for the destruction of the property brought by the owner. *Conner v. Missouri Pac. Ry. Co.*, 181 Mo. 397, 81 S. W. 145.

6. See numerous titles dealing with particular classes of persons and relations, and particular sorts of property interests.

7. *Munson v. New York Cent. & H. R. R. Co.*, 32 Misc. 282, 65 N. Y. Supp. 848; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449. See generally the title "Parties."

8. **Cal.**—*Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171. **Ill.**—*Nordhaus v. Vandalia R. Co.*, 242 Ill. 166, 89 N. E. 974; *Wabash R. Co. v. Keeler*, 127 Ill. App. 265. **Ind.**—*Wabash R. Co. v. Priddy*, 179 Ind. 483, 101 N. E. 724; *Cleveland, C. C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723. **Ky.**—*Clinger's Admx. v. Chesapeake & O. R. Co.*, 128 Ky. 736, 109 S. W. 315, 15 L. R. A. (N. S.) 998. **Mass.**—*Hawkesworth v. Thompson*, 98 Mass. 77, 93 Am. Dec. 137. **Mo.**—*Berry v. St. Louis, M. & S. E. R. Co.*, 214 Mo. 593, 114 S. W. 27; *Charlton v. Jackson*, 183 Mo. App. 613, 167 S. W. 670. **N. Y.**—*Sternfels v. Metropolitan St. R. Co.*, 73 App. Div. 494, 77 N. Y. Supp. 309; *Goldstein v. Tunick*, 59 Misc. 516, 110 N. Y. Supp. 905. **Pa.**—*Wiest v. Electric Traction Co.*, 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666. **Tex.**—*Galveston, H. & S. A. R. Co. v. Croskell*, 6 Tex. Civ. App. 160, 25 S. W. 486. **Wis.**—*Keeley v. Great Northern R. Co.*, 139 Wis. 448, 121 N. W. 167.

See the title "Parties."

[a] Even though the degree of care which the various defendants owed to the injured party was not the same, *Sternfels v. Metropolitan St. R. Co.*, 73 App. Div. 494, 77 N. Y. Supp. 309.

was no concert of action between them.⁹ But where the duty of the several defendants is not joint, a concert of action between them is necessary to authorize an action against them jointly.¹⁰

III. PLEADING. — A. DECLARATION, COMPLAINT OR PETITION.¹¹

1. **In General.** — It is important in connection with the averment of negligence to observe the general rules of pleading, as for example, the requirement that a party set out his cause of action in ordinary and concise language,¹² avoiding, on the one hand, undue prolixity,¹³ and the statement of mere evidentiary facts,¹⁴ and on the other the averment of naked legal conclusions.¹⁵ Ultimate facts should be alleged;¹⁶ facts sufficient to apprise defendant of the negligence complained of and to enable him to prepare his defense.¹⁷

9. *Birch v. Charleston Light, H. & P. Co.*, 113 Ill. App. 229; *Markham v. Houston Direct Nav. Co.*, 73 Tex. 247, 11 S. W. 131. See the title "Parties."

10. *Goodman v. Coal Twp.*, 206 Pa. 621, 56 Atl. 65. See the title "Parties."

[a] The owner, architect and contractor cannot be jointly sued for an injury sustained by one in the employment of the contractor for the reason that there is no common legal relation between them with respect to the plaintiff. *Cole v. Lippitt*, 22 R. I. 31, 46 Atl. 43.

11. See generally the titles "Declaration and Complaint;" "Petitions."

12. *Cal.*—*Stephens v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. *Idaho.*—*King v. Oregon Short Line Ry. Co.*, 6 Idaho 306, 55 Pac. 665, 59 L. R. A. 209. *Ind.*—*Cincinnati, H. & D. R. R. Co. v. Chester*, 57 Ind. 297.

13. *Florida East Coast R. Co. v. Knowles*, 68 Fla. 400, 67 So. 122; *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426.

14. *Cal.*—*House v. Meyer*, 100 Cal. 592, 35 Pac. 308. *Fla.*—*Consumers' Electric Light & St. R. Co. v. Pryor*, 44 Fla. 354, 32 So. 797. *Ill.*—*Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 386; *Chicago & A. R. Co. v. Redmond*, 70 Ill. App. 119. *Ind.*—*Princeton Coal & Min. Co. v. Roll*, 162 Ind. 115, 66 N. E. 169; *Louisville, N. A. & C. Ry. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Cleveland, C. C. & I. R. Co. v. Wynant*, 119 Ind. 539, 20 N. E. 730. *Ia.*—*Grinde v. Milwaukee, etc. Ry. Co.*, 42 Iowa 376. *Mich.*—*Thorsen v. Babcock*, 68 Mich. 523, 36 N. W. 723. *Minn.*—*Ekman v. Minneapolis St. Ry. Co.*, 34 Minn. 24, 24

N. W. 291. *Mo.*—*Mack v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 232. *Neb.*—*Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741. *Ohio.*—*Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548. *Tex.*—*Gulf, etc. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; *Austin R. T. Ry. Co. v. Cullen* (Tex. Civ. App.), 29 S. W. 256.

See 6 STANDARD PROC. 695, et seq.

15. *Ala.*—*Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88. *Ind.*—*Indianapolis, D. & W. Ry. Co. v. Wilson*, 134 Ind. 95, 33 N. E. 793; *Pennsylvania Co. v. Dean*, 92 Ind. 459; *Hawley v. Williams*, 90 Ind. 160. *Vt.*—*Kennedy v. Morgan*, 57 Vt. 46.

See generally the title "Conclusions of Law."

16. *Ala.*—*Mary Lee Coal & Ry. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897. *Cal.*—*Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. *Fla.*—*Crum v. Sumter County*, 68 Fla. 122, 66 So. 723; *Warfield v. Hepburn*, 62 Fla. 418, 57 So. 618. *Ind.*—*Princeton Coal & Min. Co. v. Roll*, 162 Ind. 115, 66 N. E. 169; *Citizens' St. Ry. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935. *Ia.*—*Grinde v. Milwaukee, etc. Ry. Co.*, 42 Iowa 376. *Ky.*—*Louisville & N. R. Co. v. Wolfe*, 85 Ky. 82. *Minn.*—*Keating v. Brown*, 30 Minn. 9, 13 N. W. 909. *Pa.*—*Charnogorsky v. Price-Pan-coast Coal Co.*, 249 Pa. 1, 94 Atl. 451.

17. *Ala.* — *Dwight Mfg. Co. v. Holmes*, 73 So. 933; *Tennessee Coal, I. & R. Co. v. Smith*, 171 Ala. 251, 55 So. 170; *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 So. 349. *Fla.*—*Warfield v. Hepburn*, 62 Fla. 418, 57 So. 618. *Md.*—*American Paving &*

Elements of Cause of Action for Negligence. — Tested by the foregoing rules, the complaint for negligence must set forth in plain and concise language facts from which appear a duty resting upon the defendant to use proper care under the circumstances;¹⁸ negligence in the exercise of that duty;¹⁹ and consequent injury to plaintiff as a proximate result of such negligence.²⁰

2. Allegation of Duty. — a. *Generally.* — The existence of defendant's duty towards the injured person and a breach thereof must appear.²¹ The duty need not be averred in terms,²² for a complaint showing that the defendant owed a duty to plaintiff and that he had been guilty of negligence which was the proximate cause of the injury complained of is good as against a demurrer.²³ On the contrary, an averment that the defendant owed a duty is insufficient, unless such averment is connected with a statement of facts from which the law infers the duty.²⁴ Nor is the omission to state facts showing defendant's duty supplied by an averment that the defendant neg-

Contracting Co. *v.* Davis, 127 Md. 477, 96 Atl. 623. **Pa.**—Charnogursky *v.* Price-Pancoast Coal Co., 249 Pa. 1, 94 Atl. 451. **W. Va.**—Owen *v.* Appalachian Power Co., 78 W. Va. 596, 89 S. E. 262.

18. See *infra*, III, A, 2.

19. See *infra*, III, A, 3, b.

20. See *infra*, III, A, 4.

21. **Ala.**—Tarrance *v.* Chapman, 196 Ala. 88, 71 So. 707; Crawford *v.* McMickens, 190 Ala. 102, 66 So. 712. **Cal.** Schmidt *v.* Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. **Conn.**—Vain *v.* Jewell, 88 Conn. 151, 90 Atl. 36, L. R. A. 1915B, 324. **Fla.**—De Funiak Springs *v.* Perdue, 69 Fla. 326, 68 So. 234; Crum *v.* Sumter County, 68 Fla. 122, 66 So. 723; Gonzales *v.* Pensacola, 65 Fla. 241, 61 So. 503, Ann. Cas. 1915C, 1290. **Idaho.**—Holt *v.* Spokane & P. Ry. Co., 3 Idaho 703, 35 Pac. 39. **Ill.**—Chicago & W. I. R. Co. *v.* Gardanier, 116 Ill. App. 619. **Ind.**—Pittsburgh, C. C. & St. L. Ry. Co. *v.* Lightbeiser, 163 Ind. 247, 71 N. E. 218, 660; St. Joseph Ice Co. *v.* Bertch, 33 Ind. App. 491, 71 N. E. 56. **Md.**—Maenner *v.* Carroll, 46 Md. 193. **Mich.**—Thompson *v.* Flint & P. M. R. Co., 57 Mich. 300, 23 N. W. 820. **Minn.**—Berry *v.* Dole, 87 Minn. 471, 92 N. W. 334. **N. J.**—Race *v.* Easton & A. R. Co., 62 N. J. L. 536, 41 Atl. 710; Marvin Safe Co. *v.* Ward, 46 N. J. L. 19. **N. Y.** General Rubber Co. *v.* Benedict, 215 N. Y. 18, 109 N. E. 96, L. R. A. 1915F, 617. **Okla.**—Lisle *v.* Anderson, 159 Pac. 278. **Ore.**—Todd *v.* Pacific Ry. & N. Co., 59 Ore. 249, 110 Pac. 391, 117

Pac. 300. **Pa.**—Charnogursky *v.* Price-Pancoast Coal Co., 249 Pa. 1, 94 Atl. 451. **R. I.**—Parker *v.* Providence & S. S. Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414. **Vt.**—Kennedy *v.* Morgan, 57 Vt. 46. **Va.**—Norfolk & W. R. Co. *v.* Stegall's Admx., 105 Va. 538, 54 S. E. 19; Norfolk & W. R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846. **W. Va.** Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215.

22. **Ill.**—Rohmer *v.* Anderson, 189 Ill. App. 274. **Mass.**—Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715. **Mich.**—Geveke *v.* Grand Rapids & I. R. Co., 57 Mich. 589, 24 N. W. 675. **Vt.**—Brothers' Admr. *v.* Rutland R. Co., 71 Vt. 48, 42 Atl. 980.

23. **Fla.**—Ingram-Dekle Lumber Co. *v.* Geiger, 71 Fla. 390, 71 So. 552, Ann. Cas. 1918A, 971. **Ind.**—Chicago & E. R. Co. *v.* Biddinger (Ind. App.), 113 N. E. 1027; Jourdan *v.* Lagrange, 55 Ind. App. 502, 104 N. E. 104. **R. I.** McKee *v.* McCardell, 21 R. I. 363, 43 Atl. 847. **W. Va.**—Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215.

[a] Where the general duty to use care is shown, an allegation that an act was negligently done or omitted is equivalent to an allegation that the defendant failed to exercise ordinary care in the discharge of this duty. Belt R. & S. Co. *v.* McClain, 58 Ind. App. 171, 106 N. E. 742.

24. **U. S.**—Whitten *v.* Nevada Power, L. & W. Co., 132 Fed. 782. **Ala.**—Tarrance *v.* Chapman, 196 Ala. 88, 71 So.

ligently did or omitted to do the act which caused the injury.²⁵

b. *Relation of Parties*.—The complaint, as a rule, must show the relation of the parties out of which defendant's duty to exercise due care arose.²⁶

c. *Ownership of Property*.—Where defendant's liability is based upon his ownership or control of the premises upon which the injury occurred, such ownership or control must be alleged.²⁷ And where the injury was to property, an allegation of ownership of such property is indispensable.²⁸

d. *Invitation*.—Where the right of action depends upon the injured person's lawful presence on the defendant's premises, the facts alleged must show an invitation express or implied.²⁹ Such invitation

707. *Ill.*—Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 619; Putney v. Keith, 98 Ill. App. 285. *Ind.*—Pittsburgh, C. C. & St. L. Ry. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Muncie Pulp Co. v. Davis, 162 Ind. 558, 70 N. E. 875. *N. J.*—Breese v. Trenton Horse R. Co., 52 N. J. L. 250, 19 Atl. 204. *R. I.*—Laforrest v. O'Driscoll, 26 R. I. 547, 59 Atl. 923. *Tex.*—San Antonio & A. P. R. Co. v. Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544. *Vt.*—Kennedy v. Morgan, 57 Vt. 46. *Va.*—Norfolk & W. R. Co. v. Stegall's Admx., 105 Va. 538, 54 S. E. 19.

See 5 STANDARD PROC. 213.

[a] *Surplusage*.—An averment in terms that it was defendant's "duty" to do certain things, is surplusage. The duty must appear from the facts alleged. See Hinchliff v. Rudnick, 70 Ill. App. 148; West Chicago St. R. Co. v. James, 69 Ill. App. 609.

25. *Tarrance v. Chapman*, 196 Ala. 88, 71 So. 707; *Tippecanoe L. & T. Co. v. Cleveland, etc. R. Co.*, 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739.

26. *Chicago, I. & L. R. Co. v. McCandish*, 167 Ind. 648, 79 N. E. 903; *Norfolk & W. R. Co. v. Stegall's Admx.*, 105 Va. 538, 54 S. E. 19; *Hortenstein v. Virginia C. Ry. Co.*, 102 Va. 914, 47 S. E. 996.

[a] *But* (1) where the law imposes and defines the duty (*Adams Exp. Co. v. Aldridge*, 20 Colo. App. 74, 77 Pac. 6), or (2) where the circumstances under which the plaintiff was injured are set out in the complaint and defendant's duty follows therefrom as a matter of law (*Hortenstein v. Virginia C. Ry. Co.*, 102 Va. 914, 47 S. E. 996; *Norfolk & W. R. Co. v. Wood*, 99 Va. 156, 37 S. E. 816), (3) it is not neces-

sary to aver specifically the relation of the parties, or the manner in which the duty was imposed upon the defendant. *Griswold v. Gallup*, 22 Conn. 208.

27. *Hollenbeck v. Winnebago Co.*, 95 Ill. 148, 35 Am. Rep. 151; *Waterhouse v. Jos. Schlitz Brew. Co.*, 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157.

[a] *An allegation of ownership carries with it the presumption of control* and is sufficient. *Gaston v. Bailey*, 24 Ind. App. 24, 53 N. E. 1021.

[b] *Where the complaint shows that the several defendants owned a building, although their respective interest therein is not set forth, the complaint is good as against a demurrer.* *McBride v. Scott*, 125 Mich. 517, 84 N. W. 1079.

28. *Mackey v. Monahan*, 13 Colo. App. 144, 56 Pac. 680.

29. *Cal.*—*Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. *Ill.*—*Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 48 Am. St. Rep. 298, 29 L. R. A. 492; *Chicago & W. I. R. Co. v. Gardanier*, 116 Ill. App. 619. *Ind.*—*St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491, 71 N. E. 56; *South Bend Iron-Works v. Larger*, 11 Ind. App. 367, 39 N. E. 209. *Md.*—*Maenner v. Carroll*, 46 Md. 193. *Mo.*—*Arnold v. St. Louis*, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291. *Mont.*—*Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373. *Neb.*—*Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920.

[a] *An allegation that plaintiff was lawfully upon the premises at the time he was injured does not show that he was there with greater right than that of a mere licensee.* *Land v. Fitzgerald*, 68 N. J. L. 28, 52 Atl. 229;

may sufficiently appear from an express averment,³⁰ or from the facts and circumstances alleged.³¹

e. *Statute or Ordinance.*—Where the duty is imposed by a statute, it is not necessary to plead the statute specifically.³² But if negligence is predicated upon a failure to comply with a municipal ordinance, the ordinance must be pleaded³³ in accordance with the rules elsewhere treated.³⁴

3. **Averment of Breach of Duty.**—a. *Generally.*—After the averment of facts showing a duty, the complaint must state facts showing a breach of that duty.³⁵ Since negligence is the breach of the duty with which we are here concerned, it must be pleaded in some manner;³⁶ and it should appear that such negligence was the proximate cause of the injury.³⁷

b. *How Negligence Is Alleged.*—(I.) **Generally.**—The courts very generally regard negligence as an ultimate fact, inferable from certain evidence, and frequently say that it is sufficient to plead it generally.³⁸ This statement, however, must always be taken in con-

Mathews v. Bense, 51 N. J. L. 30, 16 Atl. 195.

[b] Plaintiff presumed a trespasser unless the facts alleged show otherwise. Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291.

[c] Omission of Allegation Cured by Verdict.—Barnum & Richardson Mfg. Co. v. Wagner, 64 Ill. App. 375.

30. Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580.

31. Richmond Locomotive & Mach. Works v. Ford, 94 Va. 627, 27 S. E. 509. See Brothers' Admr. v. Rutland R. Co., 71 Vt. 48, 42 Atl. 980.

32. Ala.—Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457. Colo.—Adams Exp. Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6. Ind.—Cleveland, C. C. & St. L. Ry. Co. v. Gray, 148 Ind. 266, 46 N. E. 675. Ky.—Illinois Cent. R. Co. v. Mizell, 100 Ky. 235, 38 S. W. 5. Mo.—Nutter v. Chicago, R. I. & P. Ry. Co., 22 Mo. App. 328. Mont.—Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 146 Pac. 278. N. Y.—Brennan v. Lachat, 14 Daly 197, 6 N. Y. St. 278.

33. Colo.—Griffith v. Denver Consol. Tr. Co., 14 Colo. App. 504, 61 Pac. 46. Ill.—Rockford City Ry. Co. v. Matthews, 50 Ill. App. 267. Me.—Jackson v. Castle, 82 Me. 579, 20 Atl. 237. Mich.—Gardner v. Detroit St. Ry. Co., 99 Mich. 182, 58 N. W. 49; Richter v. Harper, 95 Mich. 221, 54 N. W. 768. Mo.—Nutter v. Chicago, R. I. & P. Ry. Co., 22 Mo. App. 328. Wyo.—Hazard

Powder Co. v. Volger, 3 Wyo. 189, 18 Pac. 636.

34. See the title "Municipal Corporations."

35. See cases *infra*, this section.

36. U. S.—Jacobsen v. Dalles, etc. Nav. Co., 93 Fed. 975. Ala.—Crawford v. McMickens, 190 Ala. 102, 66 So. 712. Fla.—Savannah, F. & W. Ry. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697. Ind.—Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Indianapolis, P. & C. R. Co. v. Williams, 15 Ind. 486. La.—Ranson v. Labranche, 16 La. Ann. 121. Mich.—Thompson v. Flint & P. M. R. Co., 57 Mich. 300, 23 N. W. 820. Mo.—Harrison v. Missouri Pac. Ry. Co., 74 Mo. 364, 41 Am. Rep. 318; Dyer v. Pacific R. Co., 34 Mo. 127. Ore.—McPherson v. Pacific Bridge Co., 20 Ore. 486, 26 Pac. 560.

37. See *infra*, III, A, 4.

38. Ala.—Burnett v. Alabama Powder Co., 74 So. 459; Western Ry. v. Mays, 197 Ala. 367, 72 So. 641; Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Alabama G. S. R. Co. v. Clark, 136 Ala. 450, 34 So. 917. Cal.—Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 Pac. 452; Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Cooley v. Brunswick Drug Co., 30 Cal. App. 58, 157 Pac. 13. Colo.—McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367. Conn.—Lang v. Brady, 73 Conn. 707, 49 Atl. 199. Fla.—Florida East Coast R. Co. v. Knowles, 68 Fla. 400, 67 So.

nection with the facts before the court, and when so considered it merely means that the pleader, having set out the ultimate facts concerning the relation between the parties and the acts or omissions that caused the injury, may state generally that such acts or omissions were negligently done.³⁹ Nor is it necessary that negligence be

122; *Walsh v. Western Ry. Co.*, 34 Fla. 1, 15 So. 686. **Ga.**—*Hudgins v. Coca Cola B. Co.*, 122 Ga. 695, 50 S. E. 974; *Daly v. Stoddard*, 66 Ga. 145. **Ill.**—*Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629; *Rohmer v. Anderson*, 189 Ill. App. 274. **Ind.**—*Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Pittsburg, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150; *Chicago & E. R. Co. v. Biddinger* (Ind. App.), 113 N. E. 1027; *Terre Haute, I. & E. Traction Co. v. Maberry*, 52 Ind. App. 114, 100 N. E. 401. **Ia.**—*Hanen v. Lenander*, 160 N. W. 18; *Gordon v. Chicago, etc. Ry. Co.*, 129 Iowa 747, 106 N. W. 177. **Ky.**—*Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82. **Md.**—*American Pav. & Contract. Co. v. Davis*, 127 Md. 477, 96 Atl. 623; *Sims v. American Ice Co.*, 109 Md. 68, 71 Atl. 522. **Mich.**—*Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Merkle v. Bennington*, 68 Mich. 133, 35 N. W. 846. **Minn.**—*Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899. **Mo.**—*Lee v. Publishers, Geo. Knapp & Co.*, 155 Mo. 610, 56 S. W. 458; *Conrad v. De Montcourt*, 138 Mo. 311, 39 S. W. 805; *Gurley v. Missouri Pac. Ry. Co.*, 93 Mo. 445, 6 S. W. 218. **Neb.**—*Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741. **N. J.**—*Seitter v. West Jersey & S. R. Co.*, 79 N. J. L. 277, 75 Atl. 435. **N. C.**—*Conley v. Richmond, etc. R. Co.*, 109 N. C. 692, 14 S. E. 303. **Ohio.**—*New York, C. & St. L. Ry. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130; *Baltimore & O. R. Co. v. McPeck*, 16 Ohio Cir. Ct. 87. **Tenn.**—*Cumberland Tel. & Tel. Co. v. Cook*, 103 Tenn. 730, 55 S. W. 152. **Tex.**—*East Line & Red River R. Co. v. Brinker*, 68 Tex. 500, 3 S. W. 99. **Va.**—*Hortenstien v. Virginia C. Ry. Co.*, 102 Va. 914, 47 S. E. 996; *Norfolk & W. R. Co. v. Phillips' Admx.*, 100 Va. 362, 41 S. E. 726; *Atlantia & D. Ry. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590. **W. Va.**—*Owen v. Appalachian Power Co.*, 78 W. Va. 596, 89 S. E. 262; *Starks v. Baltimore & O. R. Co.*, 77 W. Va. 93, 87 S. E. 88;

Jaeger v. City Ry. Co., 72 W. Va. 307, 78 S. E. 59; *Mahaffey v. Rumbarger Lumb. Co.*, 71 W. Va. 175, 76 S. E. 182.

Compare King v. Oregon Short Line Ry. Co., 6 Idaho 306, 55 Pac. 665, 59 L. R. A. 209.

[a] "In adopting what is known as the code system of pleading, courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence; or rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms without stating the facts constituting such negligence." *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618.

[b] **Proof of any act or omission** tending to show want of due care on the part of the defendant may be made under a general allegation of negligence. *Hanen v. Lenander* (Iowa), 160 N. W. 18.

[c] **Negligence being a mixed question of law and fact**, an allegation of negligence as applied to the conduct of a party is not a mere conclusion of law but rather a statement of an ultimate fact. *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899.

39. **Ala.**—*Dwight Mfg. Co. v. Holmes*, 73 So. 933; *Western Ry. v. Mays*, 197 Ala. 367, 72 So. 641; *Birmingham, E. & B. R. Co. v. Stagg*, 196 Ala. 612, 72 So. 164; *Davis v. Drennen Co. Dept. Store*, 189 Ala. 683, 66 So. 642. **Cal.**—*Hughes v. Warman Steel C. Co.*, 174 Cal. 556, 163 Pac. 885; *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269; *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 108 Pac. 682, 27 L. R. A. (N. S.) 764; *Pigeon v. Fuller Co.*, 156 Cal. 691, 105 Pac. 976. **Colo.**—*Adams Exp. Co. v. Aldridge*, 20 Colo. App. 74, 77 Pac. 6. **Conn.**—*Hill v. Fair Haven & W. R. Co.*, 75 Conn. 177, 52 Atl. 725. **Fla.**—*Tampa Elect. Co. v. Bourquardez*, 72 Fla. 161, 72 So. 668; *Ingram-Dekle*

averred in terms,⁴⁰ if from the facts alleged the conclusion of defendant's negligence follows as a matter of law.⁴¹ In fact, a mere general averment of negligence without reference to some act or omission, is insufficient;⁴² and if the specific acts alleged as constituting the

Lumb. Co. v. Geiger, 71 Fla. 390, 71 So. 552, Ann. Cas. 1918A, 971; Aultman v. Atlantic Coast Line R. Co., 71 Fla. 276, 71 So. 283; Co-Operative Sanitary Baking Co. v. Shields, 71 Fla. 110, 70 So. 934. **Ga.**—Hudgins v. Coca Cola B. Co., 122 Ga. 695, 50 S. E. 974.

Ill.—Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425. **Ind.**—Lake Erie & W. R. Co. v. McFali, 165 Ind. 574, 76 N. E. 400; Hindman v. Timme, 8 Ind. App. 416, 35 N. E. 1046; Coal Bluff Min. Co. v. Watts, 6 Ind. App. 347, 33 N. E. 662. **Ia.**—Hanan v. Lenander, 160 N. W. 18. **Ky.**—Louisville & N. R. Co. v. Sherrer, 119 Ky. 648, 59 S. W. 330. **Mass.**—Dolan v. Alley, 153 Mass. 380, 26 N. E. 989. **Minn.**—Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688. **Mo.**—Rinnard v. Omaha, K. C. & E. Ry. Co., 164 Mo. 270, 64 S. W. 124; Gurley v. Missouri Pac. Ry. Co., 93 Mo. 445, 6 S. W. 218; Schneider v. Missouri Pac. Ry. Co., 75 Mo. 295; Murdock v. Brown, 16 Mo. App. 549. **Neb.**—Omaha & R. V. R. Co. v. Crow, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741. **N. Y.**—Robinson v. Ocean S. S. Co., 162 App. Div. 169, 147 N. Y. Supp. 310; Taite v. Boorum & Pease Co., 37 Misc. 162, 74 N. Y. Supp. 874. **Ohio.**—New York, C. & St. L. Ry. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Lake Erie & W. R. Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980, 53 Am. St. Rep. 641, 29 L. R. A. 757. **Ore.**—Cederson v. Oregon R. & N. Co., 38 Ore. 343, 62 Pac. 637, 63 Pac. 763; Kohn v. Hinshaw, 17 Ore. 308, 20 Pac. 629. **R. I.**—Laporte v. Cook, 20 R. I. 261, 38 Atl. 700. **S. D.**—Waterhouse v. Jos. Schlitz Brew. Co., 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157. **Tex.**—Prokop v. Gulf, C. & S. F. R. Co., 34 Tex. Civ. App. 520, 79 S. W. 101. **W. Va.**—Owen v. Appalachian Power Co., 78 W. Va. 596, 89 S. E. 262.

[a] "Where the duty to use ordinary care is shown, the general averment that appellant carelessly and negligently did, or omitted to do, the acts necessary to the discharge of such duty, and that such negligent acts were the proximate cause of the injury complained of, render the complaint suffi-

cient as against a demurrer, unless the specific acts pleaded are of a character to destroy the force and effect of such general charge of negligence." Chicago & E. R. Co. v. Biddinger (Ind. App.), 113 N. E. 1027.

40. Cal.—Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Cooley v. Brunswick Drug Co., 30 Cal. App. 58, 157 Pac. 13. **Colo.**—Catlett v. Colorado & S. Ry. Co., 56 Colo. 463, 139 Pac. 14. **Ill.**—Illinois Steel Co. v. Ostrowski, 194 Ill. 376, 62 N. E. 822; Winheim v. Field, 107 Ill. App. 145. **Ind.**—Green v. Eden, 24 Ind. App. 583, 56 N. E. 240. **Neb.**—Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 101 Am. St. Rep. 628, 58 L. R. A. 287.

41. Cal.—Cooley v. Brunswick Drug Co., 30 Cal. App. 58, 157 Pac. 13. **Fla.**—Consumers' Elect. L. & St. R. Co. v. Pryor, 44 Fla. 354, 32 So. 797. **Ill.**—Illinois Steel Co. v. Ostrowski, 194 Ill. 376, 62 N. E. 822. **Ind.**—Blue v. Briggs, 12 Ind. App. 105, 39 N. E. 885; Louisville, E. & St. L. C. Ry. Co. v. Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767. **Mich.**—Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837. **Mo.**—Dyer v. Pacific R. Co., 34 Mo. 127. **Neb.**—Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 101 Am. St. Rep. 628, 58 L. R. A. 287. **Ore.**—Cederson v. Oregon R. & Nav. Co., 38 Ore. 343, 62 Pac. 637, 63 Pac. 763. **Tex.**—San Antonio Street Ry. Co. v. Cailloutte, 79 Tex. 341, 15 S. W. 390.

42. Gogol v. Baltimore & O. R. Co., 226 Fed. 224; Warfield v. Hepburn, 62 Fla. 418, 57 So. 618.

[a] All negligence is not actionable, and pleadings to be sufficient to state a cause of action grounded on negligence must affirmatively show that the negligence relied upon is actionable. If pleadings as to negligence show a duty owed by the defendant to the plaintiff and a breach of that duty to the damage or injury of plaintiff, very general averments of negligence will suffice. As is often said they need be but little more than conclusions; but the duty and its breach must be shown. Merely alleging that a given act was negligence, or was negligently

negligence, cannot, as a matter of law amount to negligence, the fact that they are characterized as negligent does not make them sufficient.⁴³

(II.) **As Affected by Method of Attack.** — In asserting the sufficiency of a general allegation of negligence, the courts must not be understood as pronouncing such pleading invulnerable to every form of attack. It will, it is true, usually withstand a general demurrer;⁴⁴ but, except when it is not within plaintiff's power to make a more specific statement of the facts,⁴⁵ he may be required to do so on a

done, without more, is not sufficient. Such pleadings may allege negligence, but the trouble is it is not in such cases actionable negligence. *Nashville, C. & St. L. Ry. Co. v. Beard* (Ala. App.), 73 So. 828; *Tarrance v. Chapman*, 196 Ala. 88, 71 So. 707.

[b] Thus a declaration for injuries on a railroad track is not sufficient which merely alleges that at a certain time and place specified the defendants, employes, agents, etc., so negligently conducted themselves in the management, etc., of defendant's locomotives, cars, etc., that "through the fault, carelessness, negligence and improper conduct of the said defendant, by and through its said servants and employes, with great force and violence, was driven, run and struck against the plaintiff." The bare statement that the act was negligently done is not sufficient. The declaration must show how the act was negligent. *Gogol v. Baltimore, etc. R. Co.*, 226 Fed. 224.

43. **Ala.**—*Louisville & N. R. Co. v. Kelly*, 73 So. 953. **Ind.**—*Scheiber v. United Tel. Co.*, 153 Ind. 609, 55 N. E. 742; *Lake Shore & M. S. Ry. Co. v. Butts*, 28 Ind. App. 289, 62 N. E. 647. **N. Y.**—*Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855.

44. **Cal.**—*Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269; *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. **Fla.**—*Aultman v. Atlantic Coast Line R. Co.*, 71 Fla. 276, 71 So. 283; *Co-Operative Sanitary Baking Co. v. Shields*, 71 Fla. 110, 70 So. 934. **Idaho.**—*King v. Oregon Short Line Ry. Co.*, 6 Idaho 306, 55 Pac. 665, 59 L. R. A. 209. **Ind.**—*Cincinnati, I. St. & C. Ry. Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334; *Chicago & E. R. Co. v. Biddinger* (Ind.

App.), 113 N. E. 1027; *Terre Haute, I. & E. Traction Co. v. Mayberry*, 52 Ind. App. 114, 100 N. E. 401. **W. Va.**—*Owen v. Appalachian Power Co.*, 78 W. Va. 596, 89 S. E. 262.

[a] But where no act of negligence is pointed out, even in general terms, the complaint is demurrable. *Woodward Iron Co. v. Marbut*, 183 Ala. 310, 62 So. 804.

[b] In the absence of a motion to make more specific, a complaint stating decedent's injury, and alleging that it was caused as a consequence and solely by reason of the defendant's negligence, sufficiently charged actionable negligence. *Terre Haute, I. & E. Traction Co. v. Maberry*, 52 Ind. App. 114, 100 N. E. 401; *Indianapolis & Northwestern Traction Co. v. Newby*, 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36; *Princeton Coal & Min. Co. v. Roll*, 162 Ind. 115, 66 N. E. 169.

45. **Ga.**—*O'Dell v. Wolcott*, 14 Ga. App. 536, 81 S. E. 819. **Ia.**—*Grinde v. Milwaukee, etc. Ry. Co.*, 42 Iowa 376. **N. Y.**—*Schmidt-kunst v. Sutro*, 15 Daly 93, 16 Civ. Proc. 143, 2 N. Y. Supp. 706, 19 N. Y. St. 913; *Steinau v. Metropolitan St. Ry. Co.*, 63 App. Div. 126, 71 N. Y. Supp. 256; *Donohue v. Meares*, 65 Hun 620, 19 N. Y. Supp. 586; *Loeber v. Roberts*, 9 N. Y. Supp. 718. **Ore.**—*Cederson v. Oregon R. & Nav. Co.*, 38 Ore. 343, 62 Pac. 637, 63 Pac. 763.

[a] Where the doctrine of *res ipso loquitur* is applicable, a particular statement of the facts of negligence will not be required. *Lykiardopoulou v. New Orleans, etc. Co.*, 127 La. 309, 53 So. 575, Ann. Cas. 1912A, 976. See also *Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89; *Missouri Pac. Ry. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608.

motion to make more definite and certain,⁴⁶ upon an exception,⁴⁷ or a special demurrer;⁴⁸ or under the practice provisions of some states, he may be required to furnish a bill of particulars.⁴⁹ Thus, the plaintiff on defendant's motion may be called upon to fix the particular time of the accident.⁵⁰

(III.) **General and Special Allegations.** — It is a familiar rule that a complaint which avers negligence in general terms, and then attempts to set out the particular acts constituting the negligence is demurrable, unless the acts so specified in themselves constitute negligence as a matter of law.⁵¹

(IV.) **Several Separate Acts of Negligence.** — A complaint founded upon negligence is not subject to a demurrer on the ground that several separate acts of negligence are set forth in the complaint,⁵² provided

46. **Colo.**—Denver Con. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39. **Ind.**—Louisville, N. A. & C. Ry. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; Louisville, N. A. & C. Ry. Co. v. Berkeley, 136 Ind. 181, 35 N. E. 3; Terre Haute, I. & E. Traction Co. v. Maberry, 52 Ind. App. 114, 100 N. E. 401. **Ia.** Hanen v. Lenander, 160 N. W. 18. **Kan.**—Atchison, T. & S. F. Ry. Co. v. O'Neill, 49 Kan. 367, 30 Pac. 470. **Mo.**—Stevens v. Walpole, 76 Mo. App. 213. Compare Rinard v. Omaha, K. C. & E. Ry. Co., 164 Mo. 270, 64 S. W. 124. **Neb.**—Omaha & R. V. R. Co. v. Crow, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; Fremont, E. & M. V. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 61 Am. St. Rep. 578, 36 L. R. A. 417. **Ohio.**—New York, C. & St. L. Ry. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Golley & F. I. Works v. Callan, 4 Ohio Cir. Dec. 233, 9 Ohio Cir. Ct. 217. **Wis.**—Young v. Lynch, 66 Wis. 514, 29 N. W. 224.

47. *Lykiardopoulos v. New Orleans*, etc. R. Co., 127 La. 309, 53 So. 575, Ann. Cas. 1912A, 976.

48. **Cal.**—Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. **Ga.**—Hudgins v. Coca Cola B. Co., 122 Ga. 695, 50 S. E. 974; Russell v. Carolina Cent. R. Co., 119 Ga. 705, 46 S. E. 858; Miller v. Merchants' & Miners' Transp. Co., 115 Ga. 1009, 42 S. E. 385. **Idaho.**—King v. Oregon Short Line Ry. Co., 6 Idaho 306, 55 Pac. 665, 59 L. R. A. 209. **N. C.** Conley v. Richmond, etc. R. Co., 109 N. C. 692, 14 S. E. 303. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Anson (Tex. Civ. App.), 82 S. W. 785.

49. **U. S.**—Wilson v. New England

Co., 197 Fed. 88; Zulkowski v. American Mfg. Co., 163 Fed. 550. **N. Y.** Ferris v. Brooklyn H. R. Co., 116 App. Div. 892, 102 N. Y. Supp. 463; Howland v. Bradley C. Co., 155 N. Y. Supp. 510; Pierini v. Ullman, 137 N. Y. Supp. 696. **Pa.**—Tiffany v. Nicholson Borough, 11 Pa. Dist. 601. **Va.**—Washington-Va. R. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546; Interstate R. Co. v. Tyree, 110 Va. 38, 65 S. E. 500.

Bills of particulars in regard to damages sustained, see 13 STANDARD PROC. 385, et seq.

50. **Ky.**—Bogard v. Illinois Cent. R. Co., 116 Ky. 429, 76 S. W. 170. **N. Y.** Ferris v. Brooklyn Heights R. Co., 116 App. Div. 892, 102 N. Y. Supp. 463. **Tenn.**—May v. Illinois Cent. R. Co., 129 Tenn. 521, 167 S. W. 477, Ann. Cas. 1916A, 213, L. R. A. 1915A, 781.

51. *Dwight Mfg. Co. v. Holmes*, 73 So. 933; *Birmingham Ry., L. & P. Co. v. Barrett*, 179 Ala. 279, 60 So. 262; *Johnson v. Birmingham Ry., L. & P. Co.*, 149 Ala. 529, 43 So. 33.

[a] **A general charge of negligent speed in running a train is not destroyed by a specific allegation that "it was at a high and dangerous rate, to-wit, fifty miles an hour," when considered in the light of the averments that the crossing where the injury occurred was in the city where vehicles passed over it every two minutes.** *Chicago & E. R. Co. v. Biddinger* (Ind. App.), 113 N. E. 1027.

52. **Ala.**—Sloss-Sheffield Steel & I. Co. v. Smith, 166 Ala. 437, 52 So. 38. **Cal.**—Bergen v. Tulare Power Co., 173 Cal. 709, 161 Pac. 269. **Conn.**—Hill v. Fair Haven & W. R. Co., 75 Conn.

that the acts of negligence charged are not inconsistent with each other.⁵³

Separate Counts. — It is not necessary for the plaintiff charging negligence in several particulars to state the negligent acts in separate counts,⁵⁴ unless each of the several negligent acts relied on constitutes a complete cause of action.⁵⁵

(V.) Negligence of Third Persons. — Where the defendant is charged with a negligent act committed by a third person, the complaint must show defendant's liability for the negligence of such third person.⁵⁶

(VI.) Gross Negligence. — The degree of negligence need not be alleged in terms.⁵⁷ Gross negligence must appear, if at all, from the facts pleaded,⁵⁸ and merely characterizing acts alleged as gross negligence does not make them so,⁵⁹ nor is the nature of the action in anywise affected by such allegation.⁶⁰

177, 52 Atl. 725. **Ia.**—*Hammer v. Chicago*, etc. R. Co., 61 Iowa 56, 15 N. W. 597. **N. Y.**—*Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19.

[a] If any of the several acts is sufficient, the complaint will stand. *Wabash R. Co. v. McDoniels*, 183 Ind. 104, 107 N. E. 291; *Ward v. Salt Lake City*, 46 Utah 616, 151 Pac. 905.

[b] Acts constituting negligence at common law may be pleaded in the same court with acts constituting negligence under the statute. *Clark v. St. Joseph T. R. Co.*, 242 Mo. 570, 148 S. W. 472; *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19; *Acardo v. New York C. & T. Co.*, 116 App. Div. 793, 102 N. Y. Supp. 7. *Contra*, *Green v. Michigan Cent. R. Co.*, 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98.

[c] **Alternative Allegations.** — An averment in a simple count of several breaches of duty in the alternative is objectionable for ambiguity. *Highland Ave. & B. R. Co. v. Dusenberry*, 94 Ala. 413, 10 So. 274.

53. *Jordan v. St. Louis Transit Co.*, 202 Mo. 418, 101 S. W. 11.

54. **U. S.**—*Boireau v. Rhode Island Co.*, 169 Fed. 1015. **Ala.**—*Sloss-Sheffield Steel & I. Co. v. Smith*, 166 Ala. 437, 52 So. 38. **Del.**—*Braunstein v. People's Ry. Co.*, 1 Boyce 310, 77 Atl. 738. **D. C.**—*Flynn v. Staples*, 34 App. Cas. 92, 27 L. R. A. (N. S.) 792. **Ind.**—*National Motor Co. v. Kellum*, 184 Ind. 457, 109 N. E. 196; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377. **Ia.**—*Hammer v. Chicago*, etc. R. Co., 61 Iowa 56, 15 N.

W. 597. **N. Y.**—*Dickens v. New York Cent. R. Co.*, 13 How. Pr. 228. **S. C.**—*Boggero v. Southern R. R. Co.*, 64 S. C. 104, 41 S. E. 819. **Va.**—*Southern R. Co. v. Blanford's Admx.*, 105 Va. 373, 54 S. E. 1.

Allegations of damage to property during transit and after arrival, in the same count, see 10 STANDARD PROC. 255.

55. **Ill.**—*Haberlau v. Lake Shore & M. S. R. Co.*, 73 Ill. App. 261. **Ind.**—*Toledo & W. Ry. Co. v. Daniels*, 21 Ind. 256. **Me.**—*Ferguson v. National Shoemakers*, 108 Me. 189, 79 Atl. 469. **R. I.**—*Flynn v. International Power Co.*, 24 R. I. 291, 52 Atl. 1089.

56. *Louisville & N. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463.

[a] **Averring commission of act (1) by defendant's agents** is sufficient. *Rinard v. Omaha, K. C. & E. Ry. Co.*, 164 Mo. 270, 64 S. W. 124; *Bolin v. Southern R. Co.*, 65 S. C. 222, 43 S. E. 665. (2) Names of particular agents or employees need not be set out. *South Georgia R. Co. v. Ryals*, 123 Ga. 330, 51 S. E. 428; *Atlantic Coast Line R. Co. v. Burroughs* (Ga. App.), 92 S. E. 1010.

57. *Shumacher v. St. Louis*, etc. R. Co., 39 Fed. 174; *Cleveland, C. C. & I. Ry. Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140.

58. *Herrem v. Konz*, 165 Wis. 574, 162 N. W. 654.

59. *Herrem v. Konz*, 165 Wis. 574, 162 N. W. 654.

60. **U. S.**—*Clark v. Colorado & N. W. R. Co.*, 165 Fed. 408, 91 C. C. A. 358,

4. Showing Negligence Proximate Cause of Injury.—In actions brought for the recovery of damages resulting from defendant's negligence, a causative connection between the alleged act of negligence and the injury must be shown,⁶¹ either by direct averment,⁶² or by necessary inference from the facts alleged in the complaint.⁶³

19 L. R. A. (N. S.) 988; *Kelly v. Malott*, 135 Fed. 74, 67 C. C. A. 548. **Colo.**—*Denver, etc. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582. **Ill.**—*Lake Shore & M. S. Ry. Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. **Kan.**—*Rouse v. Downs*, 5 Kan. App. 549, 47 Pac. 982. **Mo.**—*Taylor v. Scherpe & Koken A. Iron Co.*, 133 Mo. 349, 34 S. W. 581. **N. C.**—*McAdoo v. Richmond & D. R. Co.*, 105 N. C. 140, 11 S. E. 316.

Pleading willful injury, see 13 STANDARD PROC. 354, et seq.

Effect of characterizing wrongful act as "wanton" or "reckless," see 13 STANDARD PROC. 355, 356.

61. **Ala.**—*Birmingham, E. & B. R. Co. v. Stagg*, 196 Ala. 612, 72 So. 164. **Cal.**—*Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269; *Marsiglia v. Dozier*, 161 Cal. 403, 119 Pac. 505. **Ill.**—*Hartnett v. Boston Store*, 185 Ill. App. 332; *Paige Iron Works v. Hutter*, 107 Ill. App. 673; *Eilenberger v. Nelson*, 64 Ill. App. 277. **Ind.**—*Baltimore & O. S. W. Ry. Co. v. Conroyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; *Kistner v. Indianapolis*, 100 Ind. 210; *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459, 70 N. E. 834. **Ia.**—*McCaull v. Bruner*, 91 Iowa 214, 59 N. W. 37. **Ky.**—*North v. Monterey & C. C. Tpk. Co.*, 9 Ky. L. Rep. 326. **Md.**—*Weiller v. Weiss*, 124 Md. 461, 92 Atl. 1028. **Minn.**—*Berry v. Dole*, 87 Minn. 471, 92 N. W. 334; *Dugan v. St. Paul, etc. R. Co.*, 40 Minn. 544, 42 N. W. 538. **Mo.**—*Mathiason v. Mayer*, 90 Mo. 585, 2 S. W. 834. **Neb.**—*Chicago, B. & Q. R. Co. v. Clinebell*, 5 Neb. (Unof.) 603, 99 N. W. 839. **N. J.**—*Minnuei v. Philadelphia & R. R. Co.*, 68 N. J. L. 432, 53 Atl. 229. **N. Y.**—*Allinger v. McKeown*, 30 Misc. 275, 63 N. Y. Supp. 221. **N. C.**—*Hayes v. Southern Ry. Co.*, 141 N. C. 195, 53 S. E. 847. **Ore.**—*Palmer v. Portland Ry., etc. Co.*, 56 Ore. 262, 108 Pac. 211. **Pa.**—*Charnogursky v. Price-Pancoat Coal Co.*, 249 Pa. 1, 94 Atl. 451. **R. I.**—*Edwards v. Brayton*, 25 R. I. 597, 57 Atl. 784. **S. D.**—*Loiseau v. Arp*, 21 S. D. 566, 114

N. W. 701, 130 Am. St. Rep. 741, 14 L. R. A. (N. S.) 855. **Tex.**—*Canyon Power Co. v. Gober* (Tex. Civ. App.), 192 S. W. 802; *Gulf, C. & S. F. Ry. Co. v. Renfro* (Tex. Civ. App.), 69 S. W. 648; *Miller v. Itasca Cotton Seed Oil Co.* (Tex. Civ. App.), 41 S. W. 366.

[a] Although the violation of a statute is negligence per se, a causal connection between the unlawful act and the injury must be shown. *Hartnett v. Boston Store*, 185 Ill. App. 332; *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117.

[b] Demurrer will lie where the complaint clearly shows that the alleged negligence of the defendant was not the proximate cause of the injury. *Kistner v. Indianapolis*, 100 Ind. 210.

62. **Ind.**—*Louisville, N. A. & C. Ry. Co. v. Lynch*, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Chicago & E. I. R. Co. v. Stephenson*, 33 Ind. App. 95, 69 N. E. 270. **Mo.**—*Schultz v. Moon*, 33 Mo. App. 329. **Tex.**—*International & G. N. R. Co. v. Glover* (Tex. Civ. App.), 88 S. W. 515.

[a] Sufficient Averment.—*Louisville & N. R. Co. v. Shearer*, 119 Ky. 648, 59 S. W. 330.

63. **Fla.**—*Tampa & J. R. Co. v. Crawford*, 67 Fla. 77, 64 So. 437. **Ind.**—*Newcastle v. Grubbs*, 171 Ind. 482, 86 N. E. 757; *Board of Comrs. of Wabash v. Pearson*, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325. **Minn.**—*Berry v. Dole*, 87 Minn. 471, 92 N. W. 334. **N. Y.**—*Allinger v. McKeown*, 30 Misc. 275, 63 N. Y. Supp. 221. **Tex.**—*Canyon Power Co. v. Gober* (Tex. Civ. App.), 192 S. W. 802. **Wis.**—*Shepherd v. Morton-Edgar Lumb. Co.*, 115 Wis. 522, 92 N. W. 260.

[a] Not necessary to allege in terms that defendant's negligence was the proximate cause of the injury; but it must be made to appear that such negligence did cause the injury complained of. *Soule v. Weatherby*, 39 Utah 580, 118 Pac. 833, Ann. Cas. 1913E, 75.

5. Negating Contributory Negligence.⁶⁴ — a. *Generally.* — In some jurisdictions, contributory negligence must be negated in the complaint;⁶⁵ but generally it is regarded as a matter of defense and need not be negated;⁶⁶ a complaint which shows contributory neg-

64. Necessity of negating contributory negligence in cases of injury by wild animals, see 1 STANDARD PROC. 951.

65. Ill.—Jorgenson v. Johnson Chair Co., 169 Ill. 429, 48 N. E. 822; Gerke v. Fancher, 155 Ill. 375, 41 N. E. 982. *Compare* Lund v. Osborne, 183 Ill. App. 63. **Ia.**—Brown v. Illinois Cent. R. Co., 123 Iowa 239, 98 N. W. 625; Baker v. Chicago, R. I. & P. Ry. Co., 95 Iowa 163, 63 N. W. 667. **Mich.**—Denman v. Johnston, 85 Mich. 387, 48 N. W. 565; Thompson v. Flint & P. M. R. Co., 57 Mich. 300, 23 N. W. 820. **Okla.**—Guthrie v. Nix, 3 Okla. 136, 41 Pac. 343. **66. U. S.**—Texas & P. Ry. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. ed. 78; Berry v. Lake Erie & W. R. Co., 70 Fed. 193. **Ala.**—Birmingham Ry., L. & P. Co. v. Hinton, 141 Ala. 606, 37 So. 635; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566. **Ariz.**—Lopez v. Central Arizona Min. Co., 1 Ariz. 464, 2 Pac. 748. **Cal.**—Matthews v. Bull, 116 Cal. xvi, 47 Pac. 773; House v. Meyer, 100 Cal. 592, 35 Pac. 308. **D. C.**—Atchison v. Wills, 21 App. Cas. 548; Hines v. Georgetown Gas Co., 3 App. Cas. 369. **Fla.**—Cooney-Eckstein Co. v. King, 69 Fla. 246, 67 So. 918; Morris v. Florida Cent. & P. R. Co., 43 Fla. 10, 29 So. 541. **Ga.**—Fisher Motor Car Co. v. Seymour, 9 Ga. App. 465, 71 S. E. 764. **Ind.**—Pittsburgh, C. & St. L. Ry. Co. v. Martin, 157 Ind. 216, 61 N. E. 229; Pittsburgh, C. & St. L. Ry. Co. v. Browning, 34 Ind. App. 90, 71 N. E. 227. **Kan.**—Carrier v. Union P. R. Co., 61 Kan. 447, 59 Pac. 1075; Missouri Pac. Ry. Co. v. McCally, 41 Kan. 639, 655, 21 Pac. 574. **Ky.**—Johnson v. Westfield's Admr., 143 Ky. 10, 135 S. W. 425; Depp v. Louisville & N. R. Co., 12 Ky. L. Rep. 366, 14 S. W. 363. **La.**—Buechner v. New Orleans, 112 La. 599, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334. **Minn.**—Thompson v. Great Northern Ry. Co., 70 Minn. 219, 72 N. W. 962; Clark v. Chicago, M. & St. P. Ry. Co., 28 Minn. 69, 9 N. W. 75. **Miss.**—Hickman v. Kansas City, etc. R. Co., 66 Miss. 154, 5 So. 225. **Mo.**—Young v. Shickle, Harrison &

Howard Iron Co., 103 Mo. 324, 15 S. W. 771; Mitchell v. Clinton, 99 Mo. 153, 12 S. W. 793. **Mont.**—Pryor v. Walker-ville, 31 Mont. 618, 79 Pac. 240; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871. **N. H.**—Valley v. Concord & M. R. R., 68 N. H. 546, 38 Atl. 383. **N. J.**—Smith v. Delaware River A. Co., 76 N. J. L. 461, 69 Atl. 970; Purcell v. Bennett, 68 N. J. L. 519, 53 Atl. 235; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722. **N. Y.**—Lee v. Troy, etc. Co., 98 N. Y. 115; Klein v. Burleson, 138 App. Div. 405, 122 N. Y. Supp. 752. **N. D.**—Gram v. Northern Pac. R. Co., 1 N. D. 252, 46 N. W. 972. **Ohio.**—Street R. R. v. Nolthenius, 40 Ohio St. 376; Voss v. Young, 9 Ohio Dec. (Reprint) 48, 10 Wkly. L. Bul. 292. **Ore.**—Johnston v. Oregon, etc. R. Co., 23 Ore. 94, 31 Pac. 283. **S. C.**—Crouch v. Charleston, etc. Ry. Co., 21 S. C. 495. **Tenn.**—Illinois Cent. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. 296. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Galveston, H. & H. R. Co. v. Bohan (Tex. Civ. App.), 47 S. W. 1050. **Utah.**—Smith v. Ogden & N. W. R. Co., 33 Utah 129, 93 Pac. 185. **Vt.**—Benedict v. Union Agr. Soc., 74 Vt. 91, 52 Atl. 110; Brothers' Admr. v. Rutland R. Co., 71 Vt. 48, 42 Atl. 980. **Va.**—Winchester v. Carroll, 99 Va. 727, 40 S. E. 37; Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232; Norfolk & W. R. Co. v. Gilman's Admx., 88 Va. 239, 13 S. E. 475. **Wash.**—Randall v. Hoquiam, 30 Wash. 435, 70 Pac. 1111; Johnson v. Bellingham, etc. Co., 13 Wash. 455, 43 Pac. 370. **W. Va.**—Britton v. South Penn Oil Co., 73 W. Va. 792, 81 S. E. 525; Berns v. Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304; Fowler v. Baltimore & O. R. Co., 18 W. Va. 579. **Wis.**—Paradies v. Woodard, 156 Wis. 243, 145 N. W. 657; Shepherd v. Morton-Edgar Lumb Co., 115 Wis. 522, 92 N. W. 260.

Compare 1 STANDARD PROC. 951; 6 STANDARD PROC. 418; 11 STANDARD PROC. 216.

[a] Unless the complaint affirmatively discloses the defense of con-

ligence on the part of the injured person is bad on demurrer.⁶⁷

b. *Mode of Averment.*—In pleading contributory negligence the plaintiff is not required to set forth the specific steps and precautions taken to avoid the injury, but a general allegation that the injury was sustained without plaintiff's fault is sufficient.⁶⁸ It has been held that where the complaint contains an averment that the injury was caused solely by defendant's negligence, such averment impliedly negatives contributory negligence.⁶⁹

tributory negligence. **Ind.**—Michigan City v. Werner, 114 N. E. 636. **Mont.** Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036; Cummings v. Helena & L., etc. Co., 26 Mont. 434, 68 Pac. 852; Kennon v. Gilmer, 4 Mont. 433, 2 Pac. 21. **Tex.** San Antonio & A. P. R. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319; Louisiana & Texas Lumber Co. v. Brown, 50 Tex. Civ. App. 482, 109 S. W. 950.

[b] **Rule by Statute.**—Evansville & T. H. R. Co. v. Berndt, 172 Ind. 697, 88 N. E. 612; Southern Indiana R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722; Chicago & E. R. Co. v. Ginther (Ind. App.), 90 N. E. 911.

[c] **Where the injury is sustained by a child non sui generis**, the want of negligence on the part of the child need not be averred. Elwood Elect. St. R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535; Citizens' St. Ry. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723.

[d] **Due care on the part of the parents** (1) should be alleged where the age of the injured child is such that an inference of negligence on their part might properly be drawn from the facts of the injury (Pittsburgh, Ft. W. & C. Ry. Co. v. Vining's Admr., 27 Ind. 513, 92 Am. Dec. 269); (2) but such an averment is not necessary when the facts alleged disclose no negligence on their part. Cleveland, C., C. & St. L. Ry. Co. v. Keely, 138 Ind. 600, 37 N. E. 406.

Pleading as defense, see *infra*, III, B, 2.

67. **Cal.**—Nicolosi v. Clark, 169 Cal. 746, 147 Pac. 971, L. R. A. 1915F, 638. **Colo.**—Oliver v. Denver Tramway Co., 13 Colo. App. 543, 59 Pac. 79. **Ga.** Donehoe v. Crane, 141 Ga. 224, 80 S. E. 712; Ball v. Walsh, 137 Ga. 350, 73 S. E. 585; Dorsey v. Columbus R. Co., 121 Ga. 697, 49 S. E. 698; Abrams v. Waycross, 114 Ga. 712, 40 S. E. 699. **Ind.** National Motor Vehicle Co. v. Kellum,

184 Ind. 457, 109 N. E. 196; Greenawaldt v. Lake Shore, etc. R. Co., 165 Ind. 219, 74 N. E. 1081; Gartin v. Meredith, 153 Ind. 16, 53 N. E. 936; Indianapolis & E. R. Co. v. Barnes, 35 Ind. App. 485, 74 N. E. 583; Lafayette v. Fitch, 32 Ind. App. 134, 69 N. E. 414. **Ky.**—Stillwell's Admr. v. South Louisville Land Co., 22 Ky. L. Rep. 785, 58 S. W. 696, 52 L. R. A. 325. **Minn.**—Clark v. Chicago, M. & St. P. Ry. Co., 28 Minn. 69, 9 N. W. 75. **Va.** Baker v. Butterworth, 119 Va. 402, 89 S. E. 849, L. R. A. 1916F, 1287; Winchester v. Carroll, 99 Va. 727, 40 S. E. 37. **W. Va.**—Dimmey v. Wheeling, etc. R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

[a] **A statute providing that the plaintiff is not required to allege freedom from fault on his part** does not change "the common law rule that where the facts specially alleged show that the plaintiff was guilty of negligence contributing to her injury, such complaint will not withstand the attack of the demurrer for want of facts." Indianapolis Traction & T. Co. v. Pressell, 39 Ind. App. 472, 77 N. E. 357.

[b] **But in order to sustain the demurrer**, the facts alleged must raise such a presumption of negligence as to warrant the conclusion therefrom, as a matter of law, that the plaintiff was guilty of contributory negligence. Union v. Hester, 8 Kan. App. 725, 54 Pac. 923.

68. **Ia.**—Messenger v. Pate, 42 Iowa 443. **Mo.**—Swigart v. Lusk, 196 Mo. App. 471, 192 S. W. 138. **Neb.**—Chicago, St. P., M. & O. Ry. Co. v. Lagerkrans, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2.

[a] **A mere averment of an attempt to exercise due care** is not sufficient. Thompson v. Flint & P. M. R. Co., 57 Mich 300, 23 N. W. 820.

69. Benedict v. Union Agr. Soc., 74 Vt. 91, 52 Atl. 110; Brothers' Admr.

c. *Want of Knowledge of Danger*.—The want of knowledge of danger need not as a rule be alleged in the complaint;⁷⁰ and in jurisdictions in which freedom from contributory negligence must be shown in the complaint an averment of due care dispenses with the necessity of alleging the same.⁷¹

6. *Averments as to injuries and damage in actions for negligence* are governed by rules elsewhere discussed.⁷²

B. PLEA OR ANSWER.⁷³—1. *Generally*.—The general rule that affirmative defenses must be specially pleaded is applicable in actions based on negligence.⁷⁴ So also the rule that a plea of the general issue or a general denial puts in issue the material allegations of the complaint,⁷⁵ applies to actions founded upon negligence.⁷⁶ It has been held that a denial that defendant's negligence caused the injury constitutes a sufficient defense, without a denial of the acts set forth in the complaint constituting the alleged negligence.⁷⁷

2. *Setting Up Contributory Negligence*.⁷⁸—a. *In General*.—Contributory negligence of the plaintiff in order to be availed of as a defense, as a rule, must be specially pleaded.⁷⁹ But where plaintiff's

v. Rutland R. Co., 71 Vt. 48, 42 Atl. 980.

70. *Ill.*—Chicago & E. I. R. Co. v. Hines, 33 Ill. App. 271. *Ind.*—Indiana Natural G. & Oil Co. v. O'Brien, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742. *Ky.*—Brown's Admr. v. Cincinnati, N. O. & T. P. R. Co., 29 Ky. L. Rep. 146, 92 S. W. 583. *Mo.*—Hall v. St. Joseph Water Co., 48 Mo. App. 356.

[a] But a general allegation of plaintiff's want of knowledge respecting the danger is sufficient, unless specific facts disclosed by the complaint overcome such general averment. Pittsburgh C. C. Ry. Co. v. Hoffman, 57 Ind. App. 431, 107 N. E. 315.

71. James v. Emmet Min. Co., 55 Mich. 335, 21 N. W. 361.

72. See 13 STANDARD PROC. 356, et seq.

73. See generally the titles "Answers;" "Pleas."

74. See *infra*, this note.

[a] A defense that an ordinance, the violation of which is charged in the complaint, is invalid, must be specifically pleaded. Bludorn v. Missouri Pac. Ry. Co., 121 Mo. 258, 25 S. W. 943.

[b] Where defendant relies upon an act of God as a defense, he must plead such defense. Mont.—Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036. Neb.—Chicago, R. I. & P. Ry. Co. v. Shaw, 63 Neb. 380, 88 N. W. 508, 56 L. R. A. 341.

Okla.—Sand Springs Ry. Co. v. Baldridge, 159 Pac. 487.

Necessity for pleading contributory negligence, see *infra*, III, B, 2, a.

Pleading new matter, see 2 STANDARD PROC. 37 et seq., and generally the title "New Cause of Action or Defense."

75. See 7 STANDARD PROC. 31 et seq.

76. Ala.—Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262. *Ill.*—Coles v. Louisville, etc. R. Co., 41 Ill. App. 607. *Ind.*—Stevens v. Lafayette & C. Gravel Road Co., 99 Ind. 392. *Ia.*—Kendig v. Overhulser, 58 Iowa 195, 12 N. W. 264, defendant may prove under general denial acts tending to show exercise of due care. *Kan.*—Leavenworth, etc. Co. v. Waller, 65 Kan. 514, 70 Pac. 365. *La.*—Hart v. New Orleans & C. R. Co., 4 La. Ann. 261. *Md.*—Gault v. Humes, 20 Md. 297. *Mo.*—Bragg v. Metropolitan St. Ry. Co., 192 Mo. 331, 91 S. W. 527. *N. Y.*—Roemer v. Striker, 142 N. Y. 134, 36 N. E. 808. *Wash.*—Collett v. Northern Pac. Ry. Co., 23 Wash. 600, 63 Pac. 225.

77. Chicago, N. O. & T. R. R. Co. v. Pemberton, 8 Ky. L. Rep. 169.

78. As a defense in admiralty, see 1 STANDARD PROC. 537.

79. U. S.—Gadonnex v. New Orleans Ry. Co., 128 Fed. 805. Ala.—Southern Ry. Co. v. Hayes, 194 Ala. 194, 69 So. 641; Louisville & N. R. Co. v. Moran, 190 Ala. 108, 66 So. 799; Black v. Blacksher, 11 Ala. App. 545, 66

contributory negligence appears from the allegations of the complaint,⁸⁰ or from the evidence introduced in behalf of plaintiff,⁸¹ the defense of contributory negligence may be taken advantage of, although it is not pleaded in the answer. And in some jurisdictions, contributory negligence need not be specially pleaded; it is provable under the general issue or general denial.⁸²

So. 863. **Ariz.**—*De Amado v. Friedman*, 11 Ariz. 56, 89 Pac. 588. **Cal.** *Kenny v. Kennedy*, 9 Cal. App. 350, 99 Pac. 384. **Colo.**—*White v. Trinidad*, 10 Colo. App. 327, 52 Pac. 214. **Fla.** *Atlantic Coast Line R. Co. v. McCormick*, 59 Fla. 121, 52 So. 712; *Jacksonville Elect. Co. v. Sloan*, 52 Fla. 257, 42 So. 516. **Ia.**—*Willis v. Perry*, 92 Iowa 297, 60 N. W. 727, 26 L. R. A. 124. **Kan.**—*Western Union Tel. Co. v. Morris*, 10 Kan. App. 61, 61 Pac. 972. **Ky.**—*Bevis v. Vanceburg Tel. Co.*, 132 Ky. 385, 113 S. W. 811; *Louisville & N. R. Co. v. Schuster*, 10 Ky. L. Rep. 65, 7 S. W. 874. **La.**—*Buechner v. New Orleans*, 112 La. 599, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334. **Mass.**—*Leary v. Webber Co.*, 210 Mass. 68, 96 N. E. 136. **Miss.**—*Westbrook v. Mobile & O. R. Co.*, 66 Miss. 560, 6 So. 221, 14 Am. St. Rep. 587. **Mo.**—*Peterson v. Chicago & A. Ry. Co.*, 265 Mo. 462, 178 S. W. 182; *Boesel v. Wells, Fargo & Co.*, 260 Mo. 463, 169 S. W. 110. **Mont.**—*Gleason v. Missouri River P. Co.*, 42 Mont. 238, 112 Pac. 394; *Orient Ins. Co. v. Northern P. R. Co.*, 31 Mont. 502, 78 Pac. 1036; *Meisner v. Dillon*, 29 Mont. 116, 74 Pac. 130, nature of a confession and avoidance and must be specially pleaded. **Neb.**—*South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930. **N. C.**—*Jeffress v. Norfolk So. R. Co.*, 158 N. C. 215, 73 S. E. 1013; *Wright v. Southern R. Co.*, 155 N. C. 325, 71 S. E. 306; *Stewart v. Raleigh & A. A. L. R. Co.*, 137 N. C. 687, 50 S. E. 312. **N. D.**—*Carr v. Minneapolis, etc. R. Co.*, 16 N. D. 217, 112 N. W. 972. **Ore.**—*Sanders v. Taber*, 79 Ore. 522, 155 Pac. 1194. **S. C.**—*Singletary v. Seaboard Air Line Ry.*, 88 S. C. 565, 71 S. E. 57; *Martin v. Southern Ry. Co.*, 51 S. C. 150, 28 S. E. 303. **Tex.**—*Missouri, K. & T. Ry. Co. v. Whitsett* (Tex. Civ. App.), 185 S. W. 406; *St. Louis S. W. R. Co. v. Gammage* (Tex. Civ. App.), 96 S. W. 645; *Missouri, K. & T. R. Co. v. Foster* (Tex. Civ. App.), 87 S. W. 879. **Utah** *Smith v. Ogden & N. W. R. Co.*, 33

Utah 129, 93 Pac. 185; *Holland v. Oregon Short Line R. Co.*, 26 Utah 209, 72 Pac. 940. **Wash.**—*Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518.

[a] But in an action instituted before a justice of the peace, where defendant is not required to make any written plea, evidence of contributory negligence is admissible, although such negligence was not pleaded. *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629. See also 18 STANDARD PROC. 37.

80. *Birsch v. Citizens' Elec. Co.*, 36 Mont. 574, 93 Pac. 940; *Missouri Pac. Ry. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731.

81. **Minn.**—*Mellon v. Great Northern Ry. Co.*, 116 Minn. 449, 134 N. W. 116, Ann. Cas. 1913B, 843. **Miss.**—*McMurtry v. Louisville, N. O. & T. Ry. Co.*, 67 Miss. 601, 7 So. 401. **Mo.**—*Boesel v. Wells, Fargo & Co.*, 260 Mo. 463, 169 S. W. 110; *State v. Hallen*, 165 Mo. App. 422, 146 S. W. 1171; *Stewart v. Quiney, etc. R. Co.*, 142 Mo. App. 322, 126 S. W. 1003. **Mont.**—*Nelson v. Boston, etc. Min. Co.*, 35 Mont. 223, 88 Pac. 785. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Allright*, 7 Tex. Civ. App. 21, 26 S. W. 250. **Utah.**—*Holland v. Oregon, etc. R. Co.*, 26 Utah 209, 72 Pac. 940; *Bunnell v. Rio Grande, etc. Ry. Co.*, 13 Utah 314, 44 Pac. 927. **Wash.** *Brown v. Oregon R. & Nav. Co.*, 41 Wash. 688, 84 Pac. 400. **Wyo.**—*Chicago, etc. R. Co. v. Cook*, 18 Wyo. 43, 102 Pac. 657.

[a] By Demurrer to Evidence. *Sprinkles v. Missouri Utilities Co.* (Mo. App.), 193 S. W. 1072.

[b] Evidence elicited on cross-examination of plaintiff's witnesses, but not appearing from the testimony offered in plaintiff's case, cannot be availed of unless the defense of contributory negligence is pleaded. *Lewis v. Texas & P. Ry. Co.*, 57 Tex. Civ. App. 585, 122 S. W. 605.

82. **Ind.**—*Indiana Natural G. Oil Co. v. O'Brien*, 160 Ind. 266, 65 N. E. 913, 66 N. E. 742; *Cole v. Searfoss*, 49 Ind. App. 334, 97 N. E. 345. **N. Y.**—*Levy*

Under statutes providing that the defendant may set forth in his answer as many grounds of defense as he may have, a general denial is held not to be inconsistent with the defense of contributory negligence.⁸³

b. *Mode of Averment.*—Where contributory negligence must be specially pleaded, it is held in some jurisdictions that a general allegation of contributory negligence without a statement of facts constituting such negligence is sufficient;⁸⁴ but in other jurisdictions, the facts relied upon as showing plaintiff's contributory negligence must be set forth.⁸⁵

Where the complaint shows that plaintiff is an infant, the defense of contributory negligence is not sufficiently pleaded without averments

v. Metropolitan St. Ry. Co., 34 Misc. 220, 68 N. Y. Supp. 944; *McDonell v. Buffum*, 31 How. Pr. 154. **Ohio.**—*Barackman v. Cleveland, etc. Ry. Co.*, 1 Ohio N. P. (N. S.) 237, either under a general denial or under an averment that the plaintiff was guilty of want of ordinary care. **W. Va.**—*Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386. **Wis.**—*Harper v. Holcomb*, 146 Wis. 183, 130 N. W. 1128; *McQuade v. Chicago & N. W. Ry. Co.*, 68 Wis. 616, 32 N. W. 633.

Admissibility of proof of contributory negligence under the general issue, see also 7 STANDARD PROC. 73, et seq.; 4 STANDARD PROC. 661.

83. **Ala.**—*Louisville & N. R. Co. v. Pearce*, 142 Ala. 680, 39 So. 72. **Kan.**—*Leavenworth, etc. Co. v. Waller*, 65 Kan. 514, 70 Pac. 365. **Ky.**—*Weingartner v. Louisville & N. R. Co.*, 19 Ky. L. Rep. 1023, 42 S. W. 839. **La.**—*Jackson v. Natchez & W. R. Co.*, 114 La. 981, 33 So. 701, 108 Am. St. Rep. 366, 70 L. R. A. 294. **Miss.**—*Hasie v. Alabama, etc. Ry. Co.*, 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632. **Wash.**—*Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689.

But see: **N. Y.**—*Levy v. Metropolitan St. Ry. Co.*, 34 Misc. 220, 68 N. Y. Supp. 944. **N. C.**—*Cogdell v. Wilmington & W. R. Co.*, 132 N. C. 852, 44 S. E. 618. **S. C.**—*Scott v. Seaboard Air Line Ry. Co.*, 67 S. C. 136, 45 S. E. 129.

84. **Cal.**—*Magee v. North Pac. C. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69. **Ky.**—*Chesapeake & O. Ry. Co. v. Smith*, 101 Ky. 104, 39 S. W. 832. **Mo.**—*Neier v. Missouri Pac. R. Co.*, 1 S. W. 387. **Tex.**—*Stewart v. Galveston, H. & S. A. R. Co.*, 34 Tex. Civ. App. 370, 78 S. W. 979.

See also 4 STANDARD PROC. 850.

[a] But an averment "that the plaintiff by his own carelessness and negligence caused the injury or injuries of which he complains" has reference to the act by which the injury was inflicted and does not put in issue the plaintiff's contributory negligence subsequent to the occurrence which operated to aggravate the damage. *Louisville & N. R. Co. v. Mason*, 24 Ky. L. Rep. 1623, 72 S. W. 27.

85. **U. S.**—*McInerney v. Virginia Carolina Chem. Co.*, 118 Fed. 653. **Ala.**—*Osborne v. Alabama Steel & W. Co.*, 135 Ala. 571, 33 So. 687. **Ind.**—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426. **Mont.**—*Melzner v. Chicago, etc. Ry. Co.*, 51 Mont. 487, 153 Pac. 1019. **Neb.**—*Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359. **N. C.**—*Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419. **Ore.**—*Edlefson v. Portland Ry., etc. Co.*, 69 Ore. 18, 136 Pac. 832. **S. C.**—*Scott v. Seaboard Air Line Ry. Co.*, 67 S. C. 136, 45 S. E. 129. **Wash.**—*Brown v. Seattle City Ry. Co.*, 16 Wash. 465, 47 Pac. 890.

[a] Where it is alleged in the complaint that the injury occurred through no fault of plaintiff and the answer denies such allegation and in addition thereto contains a statement styled "a further and separate defense," that the injury was "wholly owing to the negligence and fault of the plaintiff himself," the latter statement amounts to nothing more or less than another denial of the allegation that the injury was not caused by plaintiff's negligence, but does not constitute a good plea of contributory negligence. *Watkins v. Southern Pac. R. Co.*, 38 Fed. 711.

showing the degree of his discretion rendering him *sui juris*.⁸⁶

A specific allegation of contributory negligence does not control a general allegation, where the specific allegation does not appear to include all of the occurrence and is not in conflict with the general allegation.⁸⁷

C. REPLICATION OR REPLY.⁸⁸ — A failure to reply to an answer raising the issue of contributory negligence admits such negligence,⁸⁹ unless the statute provides that any new matter pleaded in the answer shall be deemed denied.⁹⁰

A general denial of contributory negligence in a replication is sufficient without a denial of the specific facts alleged in the answer to show contributory negligence.⁹¹

IV. TRIAL.⁹² — A. VARIANCE. — 1. In General. — The general rules in reference to variance apply to actions founded upon negligence.⁹³

2. As to Negligent Acts. — Where negligence is pleaded generally, plaintiff may prove every act of negligence which would fall within

86. *Huntsville v. Phillips*, 191 Ala. 524, 67 So. 664.

87. *Pittsburgh, C. C. & St. L. Ry. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

88. See generally the title "Replication and Reply."

89. *Board of Trustees of Wabash & E. Canal v. Mayer*, 10 Ind. 400; *Brooks v. Louisville & N. R. Co.*, 24 Ky. L. Rep. 1318, 71 S. W. 507.

[a] The fact that plaintiff unnecessarily negatives contributory negligence in his complaint does not relieve him from the necessity of replying to an answer pleading contributory negligence. *Louisville & N. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179; *Louisville & N. R. Co. v. Paynter's Admx.*, 26 Ky. L. Rep. 761, 82 S. W. 412; *Louisville & N. R. Co. v. Copas*, 14 Ky. L. Rep. 672. But see *Watkins v. Southern Pac. R. Co.*, 38 Fed. 711.

90. *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Texas Elev. & C. Co. v. Mitchell*, 78 Tex. 64, 14 S. W. 275.

91. *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82.

[a] Where plaintiff does not move to have an answer setting up contributory negligence made more specific nor interpose a demurrer thereto, but files a reply denying the allegations of contributory negligence contained in the answer, he cannot object to introduction of evidence of contributory negligence on the ground that the affirmative defense in the answer did

not state facts sufficient to constitute a defense, but the statement of such defense is rendered sufficient by the reply especially in view of the fact that the plaintiff negatives contributory negligence in the complaint. *Brown v. Seattle City Ry. Co.*, 16 Wash. 465, 47 Pac. 890.

92. See generally the title "Trial."

93. See *infra*, this section; and generally the title "Variance and Failure of Proof."

[a] A variance as to the duty which defendant owed to the plaintiff is fatal. *U. S.—Currier v. Dartmouth College*, 117 Fed. 44, 54 C. C. A. 420. *Ala.—Collier v. Coggins*, 103 Ala. 281, 15 So. 578. *Miss.—Lepnick v. Gaddis*, 18 So. 319.

[b] Variance (1) as to the place where the injury was sustained is not necessarily material unless the adverse party is misled thereby. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288. (2) But where plaintiff describes with particularity the place where the injury was inflicted, evidence of an injury sustained at another place creates a material variance. *Carlin v. Chicago*, 262 Ill. 564, 104 N. E. 905, Ann. Cas. 1915 B, 213.

[c] Variance as to the time when the injury was sustained is not material. *Louisville v. Walter's Admx.*, 25 Ky. L. Rep. 893, 76 S. W. 516. See also *Toledo, P. & W. Ry. Co. v. McClannon*, 41 Ill. 238.

[d] An averment of an omission

the general averment.⁹⁴ But where plaintiff specifically sets forth the facts constituting the alleged negligence, proof tending to show that the damage was caused by other acts of negligence creates a fatal variance;⁹⁵ the plaintiff must recover, if he recovers at all, upon the

to act is not sustained by proof of a negligent act. *Cohen v. Chicago*, etc. Ry. Co., 104 Ill. App. 314.

94. **Colo.**—*McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367. **Fla.**—*Louisville & N. R. Co. v. Jones*, 45 Fla. 407, 34 So. 246. **Ill.**—*Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548. **Ind.**—*Louisville, N. A. & C. Ry. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Indiana Union Traction Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203. **Ky.**—*Chesapeake & O. Ry. Co. v. Dixon's Admr.*, 104 Ky. 608, 47 S. W. 615. **Minn.**—*Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899. **Mo.**—*Rinard v. Omaha, K. C. & E. Ry. Co.*, 164 Mo. 270, 64 S. W. 124. **Neb.**—*Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456, 68 N. W. 618. **N. Y.**—*Barker v. Paulson*, 116 N. Y. 660, 22 N. E. 959; *Leeds v. New York Tel. Co.*, 64 App. Div. 484, 72 N. Y. Supp. 250. **S. D.**—*Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578. **Tex.**—*Texas & P. Ry. Co. v. Meeks* (Tex. Civ. App.), 74 S. W. 329. **Wash.**—*Collett v. Northern Pac. Ry. Co.*, 23 Wash. 600, 63 Pac. 225; *Cogswell v. West St.*, etc. Ry. Co., 5 Wash. 46, 31 Pac. 411.

95. **U. S.**—*Santa Fe P. & P. R. Co. v. Hurley*, 172 U. S. 645, 19 Sup. Ct. 879, 43 L. ed. 1183; *De La Mar v. Herdeley*, 157 Fed. 547, 85 C. C. A. 209. **Colo.**—*Elkton, etc. Min. Co. v. Sullivan*, 41 Colo. 241, 92 Pac. 679; *Adams Express Co. v. Aldridge*, 20 Colo. App. 74, 77 Pac. 6. **Del.**—*Barker v. Collins*, 6 Penne. 49, 63 Atl. 686; *McCoy v. Philadelphia, W. & B. R. Co.*, 5 Houst. 599. **Fla.**—*Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318. **Ga.**—*Augusta R. & Elect. Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444. **Ill.**—*Chicago, B. & Q. R. Co. v. Levy*, 160 Ill. 385, 43 N. E. 357; *Chicago, R. I. & P. Ry. Co. v. Urbanic*, 106 Ill. App. 325. **Ind.**—*Thompson v. Citizens' St. R. Co.*, 152 Ind. 461, 53 N. E. 462; *South Shore G. & E. Co. v. Ambre*, 44 Ind. App. 435, 87 N. E. 246. **Ia.**—*Box v. Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 694; *Carter v. Kansas City, etc. R. Co.*, 65 Iowa 287, 21 N. W. 607. **Kan.**—*Greco v. Western*

States, etc. Co., 84 Kan. 110, 113 Pac. 410, Ann. Cas. 1912A, 638; *Tells v. Leavenworth Rapid Transit Ry. Co.*, 50 Kan. 455, 31 Pac. 1076. **Ky.**—*Lexington R. Co. v. Britton*, 130 Ky. 676, 114 S. W. 295; *Louisville, etc. R. Co. v. McGarry's Admr.*, 104 Ky. 509, 47 S. W. 440. **Mass.**—*Fairman v. Boston, etc. R. Co.*, 169 Mass. 170, 47 N. E. 613. **Mich.**—*Schindler v. Milwaukee, L. S. & W. Ry. Co.*, 77 Mich. 136, 43 N. W. 911. **Minn.**—*Donahue v. Northwestern, etc. Co.*, 103 Minn. 432, 115 N. W. 279. **Mo.**—*Van Horn v. St. Louis Transit Co.*, 198 Mo. 481, 95 S. W. 326; *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872. **Mont.**—*Flaherty v. Butte Elec. R. Co.*, 40 Mont. 454, 107 Pac. 416, 135 Am. St. Rep. 630. **Neb.**—*Elliott v. Carter, etc. Co.*, 53 Neb. 458, 73 N. W. 948. **N. J.**—*Holmes v. Pennsylvania R. Co.*, 74 N. J. L. 469, 66 Atl. 412. **N. Y.**—*Finnegan v. Robinson Co.*, 124 App. Div. 117, 108 N. Y. Supp. 135; *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. Supp. 413; *Reilly v. Vought*, 87 N. Y. Supp. 492. **N. C.**—*McCoy v. Carolina Cent. R.*, 142 N. C. 383, 55 S. E. 270. **N. D.**—*Hall v. Northern R. Co.*, 16 N. D. 60, 111 N. W. 609. **Ore.**—*Eastman v. Jennings-McRae L. Co.*, 69 Ore. 1, 138 Pac. 216, Ann. Cas. 1916A, 185; *Lieuallen v. Mosgrove*, 33 Ore. 282, 54 Pac. 200, 664. **Pa.**—*Rodell v. Adams*, 231 Pa. 284, 80 Atl. 253, Ann. Cas. 1912B, 1333; *Stewart v. De Noon*, 220 Pa. 154, 69 Atl. 587. **R. I.**—*Capuano v. American Loc. Works*, 31 R. I. 166, 76 Atl. 435; *McGinn v. United States Finishing Co.*, 27 R. I. 58, 60 Atl. 677. **S. C.**—*McKain v. Camden Water, L. & I. Co.*, 89 S. C. 378, 71 S. E. 949. **Tenn.**—*East Tenn., etc. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99; *East Tenn. C. Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062. **Tex.**—*Newnom v. Southwestern Tel. & Tel. Co.* (Tex. Civ. App.), 47 S. W. 669. **Utah**—*Smith v. San Pedro R. Co.*, 35 Utah 390, 100 Pac. 673. **Wash.**—*Albin v. Seattle Elect. Co.*, 40 Wash. 51, 82 Pac. 145. **W. Va.**—*Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

[a] The failure to object to the

acts of negligence pleaded in the complaint.⁹⁶ And where the complaint contains a general statement of negligence followed by an averment of the specific facts, the plaintiff will be confined in his proof to such specific facts.⁹⁷ Where averments of specific negligent acts are followed by a general allegation of negligence, however, the plaintiff is not restricted to proof of the specific acts of negligence set forth in the complaint.⁹⁸ Where the acts alleged are sufficiently broad to include the negligent act proved, the variance will be deemed immaterial.⁹⁹

Where several acts of negligence are set forth in the complaint, it is not a variance that the proof supports some, but fails to sustain other, averments of negligence.¹

3. Statutory and Common Law Negligence.—Where negligence of the defendant is predicated upon the violation of a law, proof of common law negligence creates a fatal variance.² Nor does proof of negligence consisting in violation of a law support a complaint based upon common law negligence.³

introduction of evidence tending to prove acts of negligence which are not mentioned in the complaint does not deprive a party of the right to avail himself of the variance on appeal. *Peterson v. Sears, Roebuck & Co.*, 242 Ill. 38, 89 N. E. 696.

96. **Fla.**—*Coombs v. Rice*, 68 Fla. 499, 67 So. 143. **Mo.**—*Gurley v. Missouri Pac. Ry. Co.*, 93 Mo. 445, 6 S. W. 218; *Winkleblack v. Great Western Mfg. Co.* (Mo. App.), 187 S. W. 95; *Williams v. Kansas City* (Mo. App.), 177 S. W. 783. **Utah**—*Martindale v. Oregon S. L. R. Co.*, 48 Utah 464, 160 Pac. 275. **Va.**—*Atlantic & D. Ry. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590.

97. **Kan.**—*Chicago, etc. Ry. Co. v. Wheeler*, 70 Kan. 755, 79 Pac. 673. **Mo.**—*McCarty v. Rood Hotel Co.*, 144 Mo. 397, 46 S. W. 172; *Winkleblack v. Great Western Mfg. Co.* (Mo. App.), 187 S. W. 95. **Tex.**—*Wallace v. San Antonio & A. P. R. Co.* (Tex. Civ. App.), 42 S. W. 865; *Missouri, K. & T. Ry. Co. v. Chittim* (Tex. Civ. App.), 40 S. W. 23.

[a] But see *Cunningham v. Union Pac. Ry. Co.*, 4 Utah 206, 7 Pac. 795, holding that under a general allegation of negligence, the circumstances constituting it may be proved even though other circumstances particularly specified in the complaint remain unproved.

[b] But this rule is applicable only where the complaint clearly indicates that it was the intention of the plead-

er to limit the negligence to the specific acts, according to the following:

U. S.—*United States Express Co. v. Wahl*, 168 Fed. 848, 851, 94 C. C. A. 260. **Cal.**—*Roberts v. Sierra Ry. Co.*, 14 Cal. App. 180, 111 Pac. 519, 527. **Wash.**—*Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284.

98. *May v. Berlin Iron Bridge Co.*, 43 App. Div. 569, 60 N. Y. Supp. 550. *Compare Albin v. Seattle Elect. Co.*, 40 Wash. 51, 82 Pac. 145, holding that where specific allegations of negligence are followed by a general allegation of negligence, the latter allegation must be deemed a mere conclusion of the pleader from the specific allegations and the plaintiff is confined in his proof to the specific allegations.

99. **U. S.**—*United States v. Peachy*, 36 Fed. 160. **Conn.**—*Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24, 33 Atl. 533. **Mo.**—*Leslie v. Wabash, etc. Ry. Co.*, 88 Mo. 50; *Bell v. Boyd*, 66 Mo. App. 137. **N. Y.**—*Reynolds v. Van Beuren*, 51 App. Div. 632, 64 N. Y. Supp. 724. **Wis.**—*Marvin v. Chicago, M. & St. P. Ry. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506.

1. **Ill.**—*Franklin P. & P. Co. v. Behrens*, 181 Ill. 340, 54 N. E. 896. **Ind.**—*New York, C. & St. L. Ry. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804. **Mo.**—*Yost v. Atlas P. C. Co.*, 191 Mo. App. 422, 177 S. W. 690.

2. *Hirst v. Ringen, etc. Co.*, 169 Mo. 194, 69 S. W. 368.

3. *Spring Valley Coal Co. v. Robbins*, 111 Ill. App. 49.

4. **Gross Negligence.**—The fact that plaintiff charges gross negligence does not preclude him from proving ordinary negligence.⁴ Conversely, under an allegation of negligence, proof of gross negligence is admissible without affecting a variance.⁵

5. **Contributory Negligence.**—Where defendant sets forth facts claimed to show contributory negligence on the part of plaintiff, his proof is confined to the particular facts alleged.⁶

6. **Proximate Cause.**—A variance between the allegations of the complaint and the proof as to the proximate cause of the injury is fatal.⁷

B. **QUESTIONS OF LAW AND FACT.**⁸—1. **As to Negligence.**—a. *Generally.*—What constitutes the exercise of ordinary care under the circumstances of the case is usually a question of fact for the jury.⁹

4. **D. C.**—*Atchison v. Wills*, 21 App. Cas. 548. **Mich.**—*Keating v. Detroit*, etc. R. Co., 104 Mich. 418, 62 N. W. 575. **Miss.**—*Hollingshed v. Yazoo & M. V. R. Co.*, 99 Miss. 464, 55 So. 40. **Tex.**—*Hays v. Gainesville St. Ry. Co.*, 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; *San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50, 71 S. W. 565.

[a] Though in jurisdictions in which gross negligence imports a willful injury, proof of ordinary negligence under a charge of gross negligence constitutes a fatal variance. *Wilson v. Chippewa*, etc. R. Co., 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912.

5. **Rockford**, R. I. & St. L. R. Co. v. *Phillips*, 66 Ill. 548; *Depp v. Louisville & N. R. Co.*, 12 Ky. L. Rep. 366, 14 S. W. 363. See also *Belt Ry. Co. v. Banicki*, 102 Ill. App. 642.

6. *Atchison, T. & S. F. Ry. Co. v. Dickey*, 1 Kan. App. 770, 41 Pac. 1070.

7. **U. S.**—*Santa Fe, P. & P. R. Co. v. Hurley*, 172 U. S. 645, 19 Sup. Ct. 879, 43 L. ed. 1183. **Ill.**—*East St. Louis E. St. Ry. Co. v. Steger*, 65 Ill. App. 312; *Harrigan v. Chicago*, etc. R. Co., 53 Ill. App. 344. **Ia.**—*Willoughby v. Chicago & N. W. R. Co.*, 37 Iowa 432. **Md.**—*Baltimore & O. R. Co. v. State*, 101 Md. 359, 61 Atl. 189. **N. Y.** *White v. Daniels*, 39 App. Div. 668, 57 N. Y. Supp. 305. **Pa.**—*Bube v. Weatherly Borough*, 25 Pa. Super. 88. **Tex.** *Newnom v. Southwestern Tel. & Tel. Co.* (Tex. Civ. App.), 47 S. W. 669.

[a] Averment that the injury was caused by the concurrent negligence of two defendants is not supported by proof of negligence of one of the de-

fendants. *St. Louis, B. & S. Co. v. Hopkins*, 100 Ill. App. 567; *Cleveland, C. & St. L. Ry. Co. v. Eggmann*, 71 Ill. App. 42. See *Sturzebecker v. Inland Traction Co.*, 211 Pa. 156, 60 Atl. 583; *Howard v. Union Traction Co.*, 195 Pa. 391, 45 Atl. 1076; also *Dutton v. Lansdowne*, 198 Pa. 563, 48 Atl. 494, 82 Am. St. Rep. 814, 53 L. R. A. 469.

[b] But where the proof supports the allegations of the complaint as to the cause of injury, the fact that there was another contributing cause constitutes no material variance. *New York, etc. Ry. Co. v. Green*, 90 Tex. 257, 38 S. W. 31.

8. See generally the title 'Province of Judge and Jury.'

9. **U. S.**—*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485. **Colo.**—*Colorado Mtg. & Inv. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42. **Ga.**—*Augusta & S. R. Co. v. Kilian*, 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410. **Ill.**—*Quiney Gas & Elec. Co. v. Bauman*, 104 Ill. App. 600. **Ia.** *Middleton v. City of Cedar Falls*, 153 N. W. 1040. **Ky.**—*Louisville & N. R. Co. v. Derriekson*, 170 Ky. 334, 185 S. W. 1114; *Carpenter v. Laswell*, 23 Ky. L. Rep. 686, 63 S. W. 609. **Me.**—*Littlefield v. Biddeford*, 29 Me. 310. **Mass.** *Hendricksen v. Meadows*, 154 Mass. 599, 28 N. E. 1054. **Mich.**—*McCrum v. Weil & Co.*, 125 Mich. 297, 84 N. W. 282. **Minn.**—*Richards v. Schleusener*, 41 Minn. 49, 42 N. W. 599. **Neb.**—*McClelland v. Scroggin*, 48 Neb. 141, 66 N. W. 1123. **N. Y.**—*Jones v. Sagar Co.*, 14 N. Y. Supp. 57. **Ore.**—*Lienallen v. Mosgrove*, 37 Ore. 446, 61 Pac. 1022. **Pa.**—*Grow v. Pottsville*, 197

The question of negligence, as a rule, is to be submitted to the jury wherever there is evidence tending to show the existence of negligence on the part of the defendant.¹⁰ But whether there is any such evidence is to be determined by the court.¹¹ And where the facts are such that all fair minded and reasonable men must draw the same conclusion therefrom, negligence is a question of law.¹² Hence, where

Pa. 337, 47 Atl. 195. **Tenn.**—Louisville & N. R. Co. v. Fort, 112 Tenn. 432, 80 S. W. 429. **Wis.**—Brown v. Brooks, 85 Wis. 290, 55 N. W. 395, 21 L. R. A. 255.

[a] Questions "involving alleged negligent action which turn upon the proposition as to what should be expected of an ordinarily reasonable man under the circumstances, present mixed questions of law and fact which generally should go to the jury under proper instructions as to the law, leaving the deductions of fact to be made by the verdict." *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 Pac. 29.

10. **U. S.**—Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. ed. 852; *American Car & F. Co. v. Duke*, 218 Fed. 437, 134 C. C. A. 237; *Norfolk & W. Ry. Co. v. Hauser*, 211 Fed. 567, 128 C. C. A. 167. **D. C.**—*Moore v. Metropolitan R. Co.*, 2 Mackey 437. **Ill.**—*Chicago R. Co. v. Maloney*, 99 Ill. App. 623; *Terre Haute & I. R. Co. v. Jenuine*, 16 Ill. App. 209; *James v. Johnson*, 12 Ill. App. 286. **Ind.**—*Cleveland, C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723. **Ia.**—*Sikes v. Sheldon*, 58 Iowa 744, 13 N. W. 53. **Ky.**—*Jonas v. South Covington, etc. Co.*, 162 Ky. 171, 172 S. W. 131, Ann. Cas. 1916E, 965; *Connell v. Chesapeake & O. R. Co.*, 22 Ky. L. Rep. 501, 58 S. W. 374. **Mich.**—*Powers v. Pere Marquette R. Co.*, 143 Mich. 379, 106 N. W. 1117. **Miss.**—*Illinois Cent. R. Co. v. Boehms*, 70 Miss. 11, 12 So. 23. **Mo.**—*Yarnall v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 575. **N. H.**—*Hewett v. Woman's, etc. Assn.*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496. **N. J.**—*Walton v. Ackerman*, 49 N. J. L. 234, 10 Atl. 709. **N. Y.**—*Keiley v. New York Cent., etc. R. Co.*, 167 App. Div. 812, 152 N. Y. Supp. 1087; *Nelson v. Lehigh Val. R. Co.*, 25 App. Div. 535, 50 N. Y. Supp. 63. **N. C.**—*Fitzgerald v. Southern R. Co.*, 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N. S.) 337; *Bolden v. Southern Ry. Co.*, 123 N. C. 614, 31 S. E. 851. **Pa.**—*Kelchner*

v. Nanticoke, 209 Pa. 412, 58 Atl. 851; *Rauch v. Smedley*, 208 Pa. 175, 57 Atl. 359; *Cooley v. Philadelphia Traction Co.*, 189 Pa. 563, 42 Atl. 288. **S. C.**—*Rutherford v. Southern Ry. Co.*, 56 S. C. 446, 35 S. E. 136. **Tex.**—*Lindsey v. Storrie* (Tex. Civ. App.), 55 S. W. 370; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416. **W. Va.**—*Fisher v. West Virginia, etc. R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. 152. **Wis.**—*Friedrich v. Boulton*, 164 Wis. 526, 159 N. W. 803.

As to negligence being a question for the jury in actions against freight carriers, see 10 STANDARD PROC. 257.

In actions for injuries upon highways, see 11 STANDARD PROC. 283, et seq., and p. 282.

In other particular actions or proceedings, see the specific titles.

11. **Ala.**—*Koger v. Roden Coal Co.*, 197 Ala. 473, 73 So. 33. **Ga.**—*Whatley v. Block*, 95 Ga. 15, 21 S. E. 985. **Ill.**—*Jenkins v. LaSalle County C. C. Co.*, 264 Ill. 238, 106 N. E. 186. **Ia.**—*Sikes v. Sheldon*, 58 Iowa 744, 13 N. W. 53. **Md.**—*Northern Cent. Ry. Co. v. State*, 54 Md. 113. **Mich.**—*Bradley v. Ft. Wayne & E. Ry. Co.*, 94 Mich. 35, 53 N. W. 915. **Mo.**—*Boland v. Missouri R. Co.*, 36 Mo. 484. **N. J.**—*Kelly v. Central R. Co.*, 70 N. J. L. 190, 56 Atl. 145. **Pa.**—*Hoffman v. Philadelphia Rapid Transit Co.*, 214 Pa. 87, 63 Atl. 409. **Wis.**—*Langhoff v. Milwaukee, etc. Ry. Co.*, 19 Wis. 489.

12. **U. S.**—*Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; *New York, S. & W. R. Co. v. Thier*, 221 Fed. 571, 137 C. C. A. 295; *Norfolk & W. Ry. Co. v. Hauser*, 211 Fed. 567, 128 C. C. A. 167. **Cal.**—*Rudd v. Byrnes*, 156 Cal. 636, 165 Pac. 957, 26 L. R. A. (N. S.) 134; *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 Pac. 29. **Ia.**—*Harrigan v. Interurban Ry. Co.*, 167 Iowa 679, 149 N. W. 895. **Ky.**—*Louisville & N. R. Co. v. Derriekson*, 170 Kv. 334, 185 S. W. 1114. **Okla.**—*Patterson v. Seals*, 51

the facts are undisputed and admit of but one reasonable inference, the question of negligence must be decided by the court.¹³ But if more than one inference as to negligence can fairly be drawn from the facts, the question of negligence is properly for the jury,¹⁴ though

Okla. 347, 151 Pac. 591. **Pa.**—Martin v. Williamsport, 208 Pa. 590, 57 Atl. 1063. **Tex.**—St. Louis, B. & M. Ry. Co. v. Paine (Tex. Civ. App.), 188 S. W. 1033; St. Louis, S. F. & T. Ry. Co. v. West (Tex. Civ. App.), 174 S. W. 287. **Va.**—Bashford v. Rosenbaum Hdw. Co., 120 Va. 1, 90 S. E. 625; Norfolk v. Anthony, 117 Va. 777, 86 S. E. 68. **Wash.** Snodgrass v. Spokane, etc. R. Co., 87 Wash. 308, 151 Pac. 815.

[a] In order that the court may withdraw the question of negligence from the jury the evidence "must be so conclusive that all reasonable men, in the exercise of an honest and impartial judgment, can draw but one conclusion therefrom; and in determining such question, all the evidence and reasonable inferences therefrom must be considered in the light most favorable to the plaintiff." Sebald Brew. Co. v. Tompkins, 221 Fed. 895, 137 C. C. A. 465.

13. **Ala.**—Montgomery v. Wright, 72 Ala. 411, 47 Am. Rep. 422. **Ark.**—St. Louis & S. F. R. Co. v. Rie, 110 Ark. 495, 163 S. W. 149. **Cal.**—Flemming v. Western Pac. R. Co., 49 Cal. 253. **D. C.** Swart v. District of Columbia, 17 App. Cas. 407. **Ill.**—Porter v. Chicago City Ry. Co., 187 Ill. App. 28. **Ind.**—Pittsburgh, C. & St. L. Ry. Co. v. Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133. **Kan.**—Union Pac. Ry. Co. v. Brown, 73 Kan. 233, 84 Pac. 1026; Union Pac. Ry. Co. v. Lipprand, 5 Kan. App. 484, 47 Pac. 625. **Ky.** Louisville & N. R. Co. v. Cooper, 164 Ky. 489, 175 S. W. 1034, L. R. A. 1915E, 336; Henderson Trust Co. v. Stuart, 108 Ky. 167, 55 S. W. 1082, 48 L. R. A. 49. **Me.**—Maine Water Co. v. Knickerbocker S. T. Co., 99 Me. 473, 59 Atl. 953; Beaulieu v. Portland Co., 48 Me. 291. **Md.**—Knight v. Baltimore, 97 Md. 647, 55 Atl. 388. **Mass.** Stoddard v. Inhab. of Winchester, 154 Mass. 149, 27 N. E. 1014, 26 Am. St. Rep. 223. **Minn.**—Steindorff v. St. Paul Gaslight Co., 92 Minn. 496, 100 N. W. 221. **Mo.**—Fletcher v. Atlantic, etc. R. Co., 64 Mo. 484; Dale v. Smith (Mo. App.), 185 S. W. 1183. **Neb.** Brady v. Chicago, St. P., etc. Ry. Co.,

59 Neb. 233, 80 N. W. 809. **N. J.** Hammill v. Pennsylvania R. Co., 56 N. J. L. 370, 29 Atl. 151, 24 L. R. A. 531. **N. Y.**—Piper v. New York Cent. & H. R. R. Co., 56 N. Y. 630. **N. C.**—Brown v. Durham, 141 N. C. 249, 53 S. E. 513. **N. D.**—Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427. **Okla.**—Chicago, etc. Ry. Co. v. Matukas, 47 Okla. 302, 147 Pac. 1038. **Pa.**—Miller v. Republic Chemical Co., 251 Pa. 593, 97 Atl. 73; Reading & C. R. Co. v. Ritchie, 102 Pa. 425. **S. D.**—Keen v. Mitchell, 37 S. D. 247, 157 N. W. 1049, L. R. A. 1916F, 704. **Tex.**—Lee v. International & G. N. R. Co., 89 Tex. 583, 36 S. W. 63; Weatherford, M. W. & N. W. Ry. Co. v. Thomas (Tex. Civ. App.), 175 S. W. 822; International & G. N. R. Co. v. Wray, 43 Tex. Civ. App. 380, 96 S. W. 74. **Utah.**—Pool v. Southern Pac. Co., 20 Utah 210, 58 Pac. 326. **Va.** Virginia Iron, C. & C. Co. v. Hughes' Admr., 118 Va. 731, 88 S. E. 88. **W. Va.**—Williams v. Belmont Coal & Coke Co., 55 W. Va. 84, 46 S. E. 802; Thomas v. Wheeling Elec. Co., 54 W. Va. 395, 46 S. E. 217. **Wis.**—Delancy v. Milwaukee, etc. Ry. Co., 33 Wis. 67.

14. **Cal.**—Burr v. United Railroads of San Francisco, 163 Cal. 663, 126 Pac. 873; Kimie v. San Jose, etc. R. Co., 156 Cal. 379, 104 Pac. 986. **Conn.**—Beers v. Housatonic R. Co., 19 Conn. 566. **Ind.**—Cleveland, C. & St. L. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723. **Kan.**—Central Branch U. P. R. Co. v. Hotham, 22 Kan. 41. **Ky.**—Cincinnati, etc. Ry. Co. v. Black, 157 Ky. 149, 162 S. W. 800. **Me.**—Janilus v. International Paper Co., 112 Me. 519, 92 Atl. 653; Lasky v. Canadian Pac. Ry. Co., 83 Me. 461, 22 Atl. 367. **Minn.**—Bennett v. Syndicate Ins. Co., 39 Minn. 254, 39 N. W. 488. **Mo.**—Lamb v. Missouri Pac. R. Co., 147 Mo. 171, 48 S. W. 659, 51 S. W. 81; Dale v. Smith (Mo. App.), 185 S. W. 1183. **N. C.** McAttee v. Branning Mfg. Co., 166 N. C. 448, 82 S. E. 857. **Okla.**—Littlejohn v. Midland Valley R. Co., 47 Okla. 204, 148 Pac. 120. **Pa.**—Pennsylvania R. Co. v. Barnett, 59 Pa. 259, 98 Am. Dec. 346. **R. I.**—Hallstrom v. Lonsdale Co., 38 R. I. 1, 94 Atl. 852. **Utah.**

the facts established by the proof are undisputed. If the evidence is conflicting, the question of negligence necessarily is one for the jury.¹⁵

Where the doctrine of *res ipsa loquitur* applies, it is for the jury to determine whether the presumption is overcome by the evidence produced by the defendant.¹⁶

b. *Negligence in Respect to Children, etc.*—Whether a child was *sui juris* or *non sui juris* is a question of fact to be determined by the jury, in view of the existing circumstances and the child's capacity

Davis v. Denver & R. G. R. Co., 45 Utah 1, 142 Pac. 705. **Vt.**—Vinton v. Schwab, 32 Vt. 612.

[a] Even though under the doctrine of *res ipsa loquitur* the jury may infer that the injury resulted from defendant's negligence, still defendant's liability cannot be said to be established thereby as a matter of law, as long as reasonable minds may, from all the facts of the case, draw different inferences. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897.

[b] The right of a party "to expect the observance of specific legal duties by others does not excuse any one from observing the specific duties imposed by law upon himself; and his failure to do so, if the proximate cause of his injury, would as a matter of law defeat his right of recovery * * * When, however, the plaintiff has violated no specific legal duty so as to become guilty of negligence *per se*, the extent to which he may rely upon the defendant's observance either of specific duty or general due care * * * is a question for the jury under the circumstances of each case." Ray v. Brannan, 196 Ala. 113, 72 So. 16.

15. **U. S.**—New York & P. R. S. S. Co. v. Guania Centrale, 231 Fed. 820, 145 C. C. A. 640. **Cal.**—O'Connor v. United Railroads, 168 Cal. 43, 141 Pac. 809; Oliver v. Stoltzenberg, 24 Cal. App. 637, 142 Pac. 108. **Idaho.**—Tucker v. Palmberg, 28 Idaho 693, 155 Pac. 981. **Ia.**—Noyes v. Des Moines Club, 160 N. W. 215; Brossard v. Chicago, etc. Ry. Co., 167 Iowa 703, 149 N. W. 915. **Kan.** Kirby v. Union Pac. R. Co., 94 Kan. 485, 146 Pac. 1183. **La.**—Boylan v. New Orleans Ry. & L. Co., 139 La. 185, 71 So. 360, Ann. Cas. 1918 A, 287. **Mass.**—Smith v. New England Cotton Yarn Co., 225 Mass. 287, 114 N. E. 353; Hutchings v. Vacea, 224 Mass. 269, 112 N. E. 652. **Mich.**—Leary v.

Becker, 190 Mich. 697, 157 N. W. 359. **Neb.**—Craig v. Chicago St., etc. R. Co., 97 Neb. 586, 150 N. W. 648. **N. H.** Gage v. Boston & M. R. R., 77 N. H. 289, 90 Atl. 855, L. R. A. 1915 A, 363. **N. J.**—Sessler v. Vanderbeck & Sons, 83 N. J. L. 636, 96 Atl. 1009. **N. Y.** Hays v. Miller, 70 N. Y. 112; Holbrook v. Utica, etc. R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Sheldon v. Otsego & H. R. Co., 89 Misc. 482, 152 N. Y. Supp. 702. **N. C.**—McRainey v. Virginia & C. S. Ry. Co., 168 N. C. 570, 84 S. E. 851. **N. D.**—Farmers' Mercantile Co. v. Northern P. Ry. Co., 27 N. D. 302, 146 N. W. 550. **Okla.**—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 Pac. 1132; Chicago, R. I. & P. Ry. Co. v. Schands, 157 Pac. 349; Prickett v. Sulzberger & Sons Co., 157 Pac. 356; Littlejohn v. Midland Valley R. Co., 47 Okla. 204, 148 Pac. 120. **Pa.**—Simons v. Philadelphia & R. Co., 254 Pa. 507, 98 Atl. 1080; McVey v. Hughes, 244 Pa. 113, 96 Atl. 436. **Tex.**—St. Louis, B. & M. Ry. Co. v. Paine (Tex. Civ. App.), 188 S. W. 1033; Missouri, K. & T. Ry. Co. v. Cardwell (Tex. Civ. App.), 187 S. W. 1073; Luten v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.), 184 S. W. 798. **Va.**—Southern R. Co. v. Adkins, 119 Va. 746, 89 S. E. 847; Norfolk v. Anthony, 117 Va. 777, 86 S. E. 68; Higgins v. Southern R. Co., 116 Va. 890, 83 S. E. 380. **Wash.**—Hull v. Davenport, 93 Wash. 16, 159 Pac. 1072; Norman v. Alaska Coast Co., 81 Wash. 64, 142 Pac. 424; Gregg v. King County, 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916 C, 135. **W. Va.**—Jaggie v. Davis Colliery Co., 75 W. Va. 370, 84 S. E. 941.

16. **Cal.**—Lauder v. Currier, 3 Cal. App. 28, 84 Pac. 217. **Ga.**—Jones v. Tift, 63 Ga. 488. **Ill.**—Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624. **Mo.**—Kenney v. Hannibal, etc. R. Co., 80 Mo. 573. **N. Y.**—Kennedy

to take care of himself.¹⁷ If the child was non sui generis, it is for the jury to determine whether the parents or guardian exercised due care in permitting the child to be at the place where the accident occurred.¹⁸ So too, if it appears from the evidence that the child was sui generis, the question of the child's contributory negligence is to be submitted to the jury.¹⁹ The question whether or not certain premises were sufficiently attractive to entice children into danger, is a question of fact for the jury.²⁰

c. *Comparative Negligence*. — In jurisdictions in which the rule of comparative negligence prevails, the question as to which party was guilty of the greater negligence is one for the jury.²¹

v. McAllaster, 31 App. Div. 453, 52 N. Y. Supp. 714. **Pa.**—Dormer v. Alcatraz Pav. Co., 16 Pa. Super. 407.

17. **Ga.**—Savannah, F. & W. Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157. **Ill.**—Chicago & A. R. Co. v. Becker, 76 Ill. 25. **Ia.**—Edgington v. Burlington, etc. R. Co., 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561. **Kan.**—Biggs v. Consolidated Barb-Wire Co., 62 Kan. 492, 63 Pac. 740. **Ky.**—Kentucky Cent. R. Co. v. Gastineau's Admr., 83 Ky. 119. **Mass.**—Lovett v. Salem, etc. R. Co., 9 Allen 557. **Mo.**—Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760. **N. Y.**—Corsale v. Facini, 60 Misc. 100, 111 N. Y. Supp. 779. **Pa.**—Dynes v. Bromley, 208 Pa. 633, 57 Atl. 1123. **S. C.**—Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573. **Tex.**—St. Louis Southwestern R. Co. v. Shiflet, 94 Tex. 131, 58 S. W. 945. **Wis.**—Holdridge v. Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871.

18. **Cal.**—Higgins v. Deeney, 78 Cal. 578, 21 Pac. 428. **Ga.**—Ferguson v. Columbus & R. Ry. Co., 75 Ga. 637. **Ill.**—McNulta v. Jenkins, 91 Ill. App. 309. **Ia.**—Payne v. Humeston & S. Ry. Co., 70 Iowa 584, 31 N. W. 886. **Me.**—O'Brien v. McGlinchy, 68 Me. 552. **Mass.**—Walsh v. Loorem, 180 Mass. 18, 61 N. E. 222, 91 Am. St. Rep. 263; McNeil v. Boston Ice Co., 173 Mass. 570, 54 N. E. 257; Hewitt v. Taunton St. Ry. Co., 167 Mass. 483, 46 N. E. 106. **Mich.**—Keyser v. Chicago & G. T. Ry. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405. **Mo.**—Rosenkranz v. Lindell R. Co., 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588. **N. Y.**—Weil v. Dry-Dock, E. B. & B. R. Co., 119 N. Y. 147, 23 N. E. 487. **Pa.**—Jones v. United Traction Co., 201 Pa.

344, 50 Atl. 826. **Vt.**—Lindsay v. Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513. **W. Va.**—Bias v. Chesapeake & O. Ry. Co., 46 W. Va. 349, 33 S. E. 240. **Wis.**—O'Brien v. Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424.

19. **Ill.**—Illinois Cent. R. Co. v. Jer-nigan, 101 Ill. App. 1; East St. Louis Elect. St. Ry. Co. v. Burns, 77 Ill. App. 529. **Ky.**—Owensboro v. York's Admr., 117 Ky. 294, 77 S. W. 1130. **Md.**—McMahon v. Northern Cent. Ry. Co., 39 Md. 438. **Mich.**—Barger v. Bissell, 188 Mich. 366, 154 N. W. 107. **Mo.**—Spillane v. Missouri Pac. Ry. Co., 111 Mo. 555, 20 S. W. 293. **N. J.**—Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122. **N. Y.**—Barry v. New York Cent. R. Co., 92 N. Y. 289, 44 Am. Rep. 377. **N. C.**—Rolin v. R. J. Reynolds Tob. Co., 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335.

20. **Pekin v. McMahon**, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206.

[a] "Whether a machine is dangerous and known to be such and whether it be left in an attractive place, known to be frequented by children of tender years, and whether the proprietor of the premises be guilty of negligence in leaving it in a dangerous position, unprotected in some suitable manner, are questions of fact." Littlejohn v. Midland Valley R. Co., 47 Okla. 204, 148 Pac. 120.

21. **Schmidt v. Chicago & N. W. Ry. Co.**, 83 Ill. 405; **St. Louis, A. & T. H. R. Co. v. Todd**, 36 Ill. 409; **McCarthy v. Village of Ravenna**, 99 Neb. 674, 157 N. W. 629; **Disher v. Chicago, R. I. & P. R. Co.**, 93 Neb. 224, 140 N. W. 135.

2. As to Contributory Negligence.—Where from the state of facts established by the evidence different minds may reasonably draw opposing inferences,²² and the standard of duty is not fixed, but shifts with the circumstances of the case,²³ the question of contributory negligence is one of fact,²⁴ whether the evidence is undisputed,²⁵ or conflict-

22. U. S.—Shatto *v. Erie R. Co.*, 121 Fed. 678, 59 C. C. A. 1. **Ark.**—St. Louis, I. M. & S. R. Co. *v. Hitt*, 76 Ark. 227, 88 S. W. 908, 990. **Cal.**—Smith *v. Occidental & O. S. R. Co.*, 99 Cal. 462, 34 Pac. 84. **Colo.**—Florence *v. Snook*, 20 Colo. App. 356, 78 Pac. 994. **Del.**—Nailor *v. Maryland, etc. Ry. Co.*, 97 Atl. 418. **Ga.**—Williams *v. Southern R. Co.*, 126 Ga. 710, 55 S. E. 948. **Ill.**—Casey *v. Chicago Rys. Co.*, 184 Ill. App. 439. **Ind.**—Indianapolis St. R. Co. *v. Marschke*, 166 Ind. 490, 77 N. E. 945. **Ia.**—Harrigan *v. Interurban Ry. Co.*, 167 Iowa 679, 149 N. W. 895. **Ky.**—Chesapeake & O. Ry. Co. *v. Berry's Admr.*, 164 Ky. 280, 175 S. W. 340. **Mass.**—Fennell *v. Peterson*, 225 Mass. 598, 114 N. E. 744. **Mich.**—Leary *v. Becker*, 190 Mich. 697, 157 N. W. 359. **Mo.**—Thornberry *v. St. Louis Ry. Co.*, 178 S. W. 197; Ganey *v. Kansas City*, 259 Mo. 654, 168 S. W. 619. **Neb.**—Morrissey *v. Wharton*, 98 Neb. 544, 153 N. W. 564. **N. H.**—Blood *v. New Boston*, 77 N. H. 464, 92 Atl. 954. **N. J.**—Pesin *v. Jugovich*, 85 N. J. L. 256, 88 Atl. 1101. **N. Y.**—McCullough *v. Pennsylvania R. Co.*, 158 N. Y. Supp. 4. **N. C.**—Russell *v. Carolina Cent. R. Co.*, 118 N. C. 1098, 24 S. E. 512. **Ohio.**—Marietta & C. R. Co. *v. Pinksley*, 24 Ohio St. 654. **Okla.**—Clinton & O. W. Ry. Co. *v. Dunlap*, 156 Pac. 654. **Pa.**—Garris *v. Bell*, 253 Pa. 33, 97 Atl. 1034; McLaughlin *v. Pittsburgh Rys. Co.*, 252 Pa. 32, 97 Atl. 107; McCully *v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584. **Tenn.**—Knoxville *v. Cox*, 103 Tenn. 368, 53 S. W. 734. **Tex.**—Ft. Worth & D. C. Ry. Co. *v. Houston* (Tex. Civ. App.), 185 S. W. 919. **Utah.**—Davis *v. Denver & R. G. R. Co.*, 45 Utah 1, 142 Pac. 705; Hall *v. Ogden City St. Rys. Co.*, 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726. **Vt.**—Walker *v. Westfield*, 39 Vt. 246. **Wash.**—Hull *v. Davenport*, 93 Wash. 16, 159 Pac. 1072; Sundstrom *v. Puget Sound, etc. Co.*, 90 Wash. 640, 156 Pac. 828. **Wis.**—Steinhofel *v. Chicago, M. & St. P. Ry. Co.*, 92 Wis. 123, 65 N. W. 852.

23. Conn.—Bunnell *v. Berlin Iron Bridge Co.*, 66 Conn. 24, 33 Atl. 533. **Okla.**—Littlejohn *v. Midland Valley R. Co.*, 47 Okla. 204, 148 Pac. 120. **Tenn.**—Studer *v. Plumlee*, 130 Tenn. 517, 172 S. W. 305. **Wash.**—Harris *v. Bremer-ton*, 85 Wash. 64, 147 Pac. 638, Ann. Cas. 1916C, 160.

24. See the cases cited in the preceding notes, also 8 STANDARD PROC. 189, 194; 11 STANDARD PROC. 241.

25. Cal.—Wahlgren *v. Market St. R. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Herbert *v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651. **Ill.**—Christiansen *v. Navigato*, 185 Ill. App. 318. **Kan.**—Kansas Pac. Ry. Co. *v. Pointer*, 14 Kan. 37. **Ky.**—Dolfinger & Co. *v. Fishback*, 12 Bush 474. **Me.**—Lasky *v. Canadian Pac. Ry. Co.*, 83 Me. 461, 22 Atl. 367; Nugent *v. Boston, etc. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151. **Minn.**—Leonard *v. Minneapolis, etc. Ry. Co.*, 63 Minn. 489, 65 N. W. 1084. **Mo.**—Petty *v. Hannibal & St. J. R. Co.*, 88 Mo. 306. **Neb.**—Chicago, B. & Q. R. Co. *v. Landauer*, 36 Neb. 642, 54 N. W. 976. **N. Y.**—Sharp *v. Erie R. Co.*, 184 N. Y. 100, 76 N. E. 923. **Vt.**—Vinton *v. Schwab*, 32 Vt. 612. **Wash.**—Burian *v. Seattle Elect. Co.*, 26 Wash. 606, 67 Pac. 214. **Wis.**—Hoye *v. Chicago & N. W. Ry. Co.*, 62 Wis. 666, 23 N. W. 14.

[a] "The act relied on to establish as a matter of law the existence of contributory negligence must be distinct, prominent and decisive, and one about which ordinary minds would not differ in declaring it to be negligent. Where the nature and attributes of an act relied on to show negligence contributing to an injury sustained can only be determined correctly by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law." Taxicab Co. *v. Emanuel*, 125 Md. 246, 93 Atl. 807.

[b] If there is no direct testimony on the question of contributory negli-

ing.²⁶ But where the facts are uncontroverted and but one reasonable inference may fairly be drawn therefrom, the court determines the question of contributory negligence as a matter of law.²⁷ Where the constitution expressly provides that the defense of contributory negli-

gence, but circumstances such as physical conditions, unobstructed view or other like matters are relied on to rebut the presumption of due care, it depends upon the facts of each particular case in determining whether the question of contributory negligence is for the court or jury. *Schmidt v. Philadelphia & R. R. Co.*, 244 Pa. 205, 90 Atl. 569.

26. **U. S.**—*Cincinnati, N. O. & T. P. Ry. Co. v. Tharp*, 223 Fed. 615, 139 C. C. A. 161. **Ala.**—*Central of Georgia Ry. Co. v. Chambers*, 197 Ala. 93, 72 So. 351; *Louisville & N. R. Co. v. Webb*, 90 Ala. 185, 8 So. 518, 11 L. R. A. 674. **Ark.**—*Price v. St. Louis, I. M. & S. R. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79. **Ind.**—*Stroble v. New Albany*, 144 Ind. 695, 42 N. E. 806. **Ia.**—*Brossard v. Chicago, etc. Ry. Co.*, 167 Iowa 703, 149 N. W. 915. **Kan.**—*Davis v. Holton*, 59 Kan. 707, 54 Pac. 1050. **Ky.**—*Chesapeake & O. Ry. Co. v. Ransom's Admr.*, 164 Ky. 631, 176 S. W. 34. **Mass.**—*Follins v. Dill*, 221 Mass. 93, 108 N. E. 929. **Mich.**—*Weitzel v. Detroit United Ry.*, 186 Mich. 7, 152 N. W. 931, 153 N. W. 831. **Minn.**—*Carlson v. Superior T. Elev. Co.*, 129 Minn. 479, 152 N. W. 881. **Miss.**—*Fulmer v. Illinois Cent. R. Co.*, 68 Miss. 355, 8 So. 517. **Neb.**—*Omaha v. Houlihan*, 72 Neb. 326, 100 N. W. 415. **N. J.**—*New Jersey Exp. Co. v. Nichols*, 32 N. J. L. 166. **N. Y.**—*Swift v. Staten Island R. T. R. Co.*, 123 N. Y. 645, 25 N. E. 378, 3 Silv. 184. **N. C.**—*Russell v. Carolina Cent. R. Co.*, 118 N. C. 1098, 24 S. E. 512. **N. D.**—*Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359. **Okla.**—*Clinton & O. W. Ry. Co. v. Dunlap*, 156 Pac. 654. **Pa.**—*Gray v. Floersheim*, 164 Pa. 508, 30 Atl. 397. **W. Va.**—*Foley v. Huntington*, 51 W. Va. 396, 41 S. E. 113. **Wis.**—*Wolosek v. Chicago & M. E. R. Co.*, 158 Wis. 475, 149 N. W. 201.

[a] The court will not decide the question of contributory negligence "as one of law, although the weight of evidence may seem to be on one side or the other, if the testimony be conflicting, or where, from the evidence

a doubtful or uncertain conclusion only can be drawn. Under such circumstances the question should go to the jury." *Du Ross v. Philadelphia, etc. R. Co.*, 5 Boyce (Del.) 467, 94 Atl. 766.

27. **U. S.**—*Western Union Tel. Co. v. Baker*, 140 Fed. 315, 72 C. C. A. 87; *Shatto v. Erie R. Co.*, 121 Fed. 678, 59 C. C. A. 1. **Ala.**—*Ledbetter v. St. Louis & S. F. Ry. Co.*, 184 Ala. 457, 63 So. 987; *Columbus & W. Ry. Co. v. Bradford*, 86 Ala. 574, 6 So. 90. **Cal.**—*Larrabee v. Western Pac. Ry. Co.*, 173 Cal. 743, 161 Pac. 750; *Chrissinger v. Southern Pac. Co.*, 169 Cal. 619, 149 Pac. 175; *Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34. **Colo.**—*Colorado Cent. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118. **Conn.**—*Bona v. New York, N. H. & H. R. Co.*, 88 Conn. 731, 90 Atl. 931. **Del.**—*Nailor v. Maryland, etc. Ry. Co.*, 97 Atl. 418. **D. C.**—*Howes v. District of Columbia*, 2 App. Cas. 188. **Ill.**—*Porter v. Chicago City Ry. Co.*, 187 Ill. App. 28. **Ind.**—*Pittsburgh, C. C. & St. L. Ry. Co. v. Seivers*, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; *Ackerman v. Pere Marquette R. Co.*, 58 Ind. App. 212, 108 N. E. 144. **Ia.**—*Mabbott v. Illinois Cent. R. Co.*, 116 Iowa 490, 89 N. W. 1076. **Kan.**—*Cummings v. Wichita R. & L. Co.*, 68 Kan. 218, 74 Pac. 1104. **Ky.**—*Louisville & N. R. Co. v. Weldon*, 165 Ky. 654, 177 S. W. 459; *Wiley v. Cincinnati, etc. Ry. Co.*, 161 Ky. 305, 170 S. W. 652. **Me.**—*Grows v. Maine, etc. R. Co.*, 67 Me. 100. **Md.**—*Topp v. United Rys. & Elec. Co.*, 99 Md. 630, 59 Atl. 52; *Baltimore & P. R. Co. v. State*, 54 Md. 648. **Mass.**—*Maguire v. Fitchburg R. Co.*, 146 Mass. 379, 15 N. E. 904. **Mich.**—*Apsey v. Detroit, L. & N. R. Co.*, 83 Mich. 440, 47 N. W. 513. **Minn.**—*Brown v. Milwaukee & St. P. Ry. Co.*, 22 Minn. 165. **Miss.**—*Bridges v. Jackson Elect. Ry., L. & P. Co.*, 86 Miss. 584, 38 So. 788. **Mo.**—*Anderson v. Missouri G. Co.*, 178 S. W. 737; *Hudson v. Wabash W. Ry. Co.*, 101 Mo. 13, 14 S. W. 15. **N. J.**—*Pennsylvania R. Co. v. Middleton*, 57 N. J. L. 154, 31 Atl. 616, 51

gence shall in all cases be a question of fact, it is at all times to be left to the jury.²⁸

3. As to Proximate Cause.—The question as to what was the proximate cause of the injury is ordinarily one of fact for the jury.²⁹ But where but one inference can be reasonably drawn from the evidence, the question whether a certain act was the proximate cause of the injury is to be determined by the court.³⁰ If the evidence does not show that the injuries were produced by a cause for which the defendant is responsible, the jury cannot be permitted to speculate as to the cause thereof, but it follows as a matter of law that plaintiff cannot recover.³¹

Where there were several concurring causes, it is for the jury to

Am. St. Rep. 597. **N. Y.**—Lofsten v. Brooklyn, etc. R. Co., 184 N. Y. 148, 76 N. E. 1035; Halpin v. Third Ave. R. Co., 8 Jones & S. 175. **N. C.**—Neal v. Carolina Cent. R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684. **Ohio.** Pennsylvania Co. v. Alburn, 23 Ohio Cir. Ct. 130. **Pa.**—Bernstein v. Pennsylvania R. Co., 252 Pa. 581, 97 Atl. 933; Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 53 Atl. 808. **R. I.**—Raczewski v. New York, N. H. & H. R. Co., 38 R. I. 194, 94 Atl. 687. **Tex.** Beaty v. Missouri Ry. Co. (Tex. Civ. App.), 175 S. W. 450; Adams v. Galveston Ry. Co. (Tex. Civ. App.), 164 S. W. 853. **Utah.**—Hone v. Mammoth Min. Co., 27 Utah 168, 75 Pac. 381. **Wash.**—Williams v. Ballard Lumb. Co., 41 Wash. 338, 83 Pac. 323. **Wis.**—Crites v. New Richmond, 98 Wis. 55, 73 N. W. 322; Seefeld v. Chicago, M. & St. P. Ry. Co., 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168.

[a] Before a conclusion that plaintiff was guilty of contributory negligence can be arrived at, as a matter of law "all reasonable minds must reach the same decision, that under the undisputed testimony there was such contributory negligence as would bar recovery." Beach v. City of St. Joseph, 192 Mich. 296, 158 N. W. 1045.

28. Enid Mill & E. Co. v. Kester (Okla.), 157 Pac. 355.

29. **U. S.**—Cincinnati, N. O. & T. P. Ry. Co. v. Tharp, 223 Fed. 615, 139 C. C. A. 161. **Ala.**—Briggs v. Birmingham Ry., L. & P. Co., 188 Ala. 262, 66 So. 95. **Cal.**—Mansfield v. Eagle Box & Mfg. Co., 136 Cal. 622, 69 Pac. 425. **D. C.**—Guenther v. Metropolitan R. Co., 23 App. Cas. 493. **Ga.**—South Georgia R. Co. v. Niles, 131 Ga. 599, 62 S. E. 1042. **Ill.**—Cada v. The Fair, 187 Ill.

App. 111; Brownson v. Brown, 181 Ill. App. 546. **Ia.**—Albrook v. Western Union Tel. Co., 169 Iowa 412, 150 N. W. 75. **Ky.**—McCabe's Admx. v. Maysville, etc. R. Co., 28 Ky. L. Rep. 536, 89 S. W. 683. **Mo.**—Powell v. St. Louis, etc. R. Co., 229 Mo. 246, 129 S. W. 963. **N. Y.**—Miller v. Steinfeld, 174 App. Div. 337, 160 N. Y. Supp. 800. **N. C.**—Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134; Buchanan v. Ritter Lumb. Co., 168 N. C. 40, 84 S. E. 50. **Okla.**—St. Louis, etc. R. Co. v. Darnell, 42 Okla. 394, 141 Pac. 785. **Pa.**—Lenahan v. Crescent Coal Min. Co., 225 Pa. 218, 74 Atl. 58. **Tex.** Missouri, K. & T. Ry. Co. v. Cardwell (Tex. Civ. App.), 187 S. W. 1073; Texas Traction Co. v. Nennet (Tex. Civ. App.), 178 S. W. 797. **Utah.** Stone v. Union Pac. R. Co., 32 Utah 185, 89 Pac. 715.

[a] A constitutional provision declaring defense of contributory negligence a question of fact to be submitted to the jury does not deprive the court of the right to inquire whether or not the negligence of the defendant was the proximate cause of the injury. Chicago, R. I. & P. Ry. Co. v. Barton (Okla.), 159 Pac. 250.

30. **Colo.**—Denver, etc. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093. **N. Y.** Fanizzi v. New York, etc. R. Co., 113 App. Div. 440, 99 N. Y. Supp. 281. **N. C.**—Russell v. Carolina Cent. R. Co., 118 N. C. 1098, 24 S. E. 512. **Ohio.** Lake Shore & M. S. Ry. Co. v. Ludtke, 69 Ohio St. 384, 69 N. E. 653. **Pa.** Douglass v. New York, etc. R. Co., 209 Pa. 128, 58 Atl. 160. **W. Va.**—Schwartz v. Shull, 45 W. Va. 405, 31 S. E. 914.

31. Antler v. Cox, 27 Idaho 517, 149 Pac. 731.

determine which of the causes produced the injury.³² Whether the injury was sustained through accident,³³ or is attributable to an act of God,³⁴ is likewise to be decided by the jury from all the circumstances of the case.

C. INSTRUCTIONS.³⁵ — 1. **In General.** — The general rule obtains that the instructions must conform to the issues raised in the pleadings,³⁶ and be supported by the proof introduced in the cause.³⁷ It is error to charge the jury on an issue which is not pleaded or proven,³⁸ and it is proper to reject a proposed instruction on such issue.³⁹ But where an issue is raised by the pleadings, and evidence

32. **Ill.**—Chicago City Ry. Co. v. O'Donnell, 109 Ill. App. 616. **N. Y.** Van Houten v. Fleischmann, 1 Misc. 130, 20 N. Y. Supp. 643, 48 N. Y. St. 763. **Ore.**—Elliff v. Oregon R. & N. Co., 53 Ore. 66, 99 Pac. 76.

33. Daly v. J. M. Horton I. C. Co., 166 App. Div. 28, 151 N. Y. Supp. 657.

34. Harber v. Pennsylvania R. Co., 56 Pa. Super. 59.

35. See generally the title "Instructions."

36. **Colo.**—White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214. **Ga.**—Central R. & B. Co. v. Nash, 81 Ga. 580, 7 S. E. 808. **Ill.**—Washington Ice Co. v. Bradley, 70 Ill. App. 313. **Ind.**—Chicago, I. & L. R. Co. v. Thrasher, 35 Ind. App. 58, 73 N. E. 829. **Ia.**—Lanning v. Chicago, etc. R. Co., 68 Iowa 502, 27 N. W. 478. **Ky.**—Sandy River Cannel-Coal Co. v. Caudill, 22 Ky. L. Rep. 1175, 60 S. W. 180. **Mich.**—Brower v. Edson, 47 Mich. 91, 10 N. W. 121. **Mo.**—Pryor v. Metropolitan St. Ry. Co., 85 Mo. App. 367. **N. Y.**—Donohue v. Syracuse, etc. R. Co., 11 App. Div. 525, 42 N. Y. Supp. 808. **Ohio.**—Pittsburgh, C. & St. L. Ry. Co. v. Fleming, 30 Ohio St. 480. **Tex.**—Hirsch Bros. v. Ashe, 35 Tex. Civ. App. 495, 80 S. W. 650.

See generally 13 STANDARD PROC. 774, et seq.

37. **Ark.**—St. Louis, I. M. & S. R. Co. v. Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189. **Ill.**—Chicago, R. I. & P. Ry. Co. v. Eininger, 114 Ill. 79, 29 N. E. 196; Mester v. Wuest, 57 Ill. App. 122. **Ind.**—Lebanon L. H. & P. Co. v. Griffin, 139 Ind. 476, 39 N. E. 62. **Kan.**—Atchison, T. & S. F. Ry. Co. v. Wells, 56 Kan. 222, 42 Pac. 699. **Miss.**—Vicksburg v. McLain, 67 Miss. 4, 6 So. 774. **Mo.**—Marr v.

Bunker, 92 Mo. App. 651. **Neb.**—Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481. **N. Y.**—Pollock v. Brooklyn Cross-Town R. Co., 60 Hun 584, 15 N. Y. Supp. 189, 39 N. Y. St. 568. **Pa.**—Neff v. Harrisburg Traction Co., 192 Pa. 501, 43 Atl. 1020, 73 Am. St. Rep. 825. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Slater, 22 Tex. Civ. App. 583, 56 S. W. 216; International & G. N. R. Co. v. Eason (Tex. Civ. App.), 35 S. W. 208. **Va.**—Bowen v. Flanagan, 84 Va. 313, 4 S. E. 724; Moon's Admr. v. Richmond & A. R. Co., 78 Va. 745, 49 Am. Rep. 401.

See generally 13 STANDARD PROC. 792, et seq.

38. **Colo.**—White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214. **Ill.**—Chicago & A. R. Co. v. Robinson, 106 Ill. 142. **Mich.**—Denman v. Johnston, 85 Mich. 387, 48 N. W. 565. **Tex.**—San Antonio & A. P. R. Co. v. Jazo (Tex. Civ. App.), 25 S. W. 712.

[a] **Jury Must Have Been Misled.** Railway Co. v. Howard, 90 Tenn. 144, 19 S. W. 116.

39. **Colo.**—White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214. **Conn.**—Churchill v. Rosebeck, 15 Conn. 359. **D. C.**—West Disinfecting Co. v. Plummer, 44 App. Cas. 345. **Ga.**—Bain v. Athens Foundry & Mach. Works, 75 Ga. 718. **Ia.**—Lanning v. Chicago, etc. R. Co., 68 Iowa 502, 27 N. W. 478. **Ky.**—South Covington & C. St. Ry. Co. v. Nelson, 28 Ky. L. Rep. 287, 89 S. W. 200. **Mich.**—Brower v. Edson, 47 Mich. 91, 10 N. W. 121. **Mo.**—Kelly v. Stewart, 93 Mo. App. 47. **Ohio.**—Pittsburgh, C. & St. L. Ry. Co. v. Fleming, 30 Ohio St. 480. **Tex.**—Brush Elect. L. & P. Co. v. Lefevre (Tex. Civ. App.), 55 S. W. 396; Missouri, K. & T. R. Co. v. Tonahill, 16 Tex. Civ. App. 625, 41 S. W. 875.

is produced thereon, it is error to omit to charge the jury thereon.⁴⁰

The rule obtains that the court should not single out some facts in evidence and omit others.⁴¹ So also the court in its instructions should not assume facts as to which there is a conflict of evidence.⁴² The instructions should not be misleading.⁴³

2. Stating the Law Applicable to the Issues.—a. *Generally.* While negligence, as a rule, is a question of fact for the jury,⁴⁴ it is for the court to lay down the rules by which the jury is governed

40. **Colo.**—Denver Tramway Co. v. Lassasso, 22 Colo. 444, 45 Pac. 409. **Ga.**—Hilton & D. L. Co. v. Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204. **Ill.**—Chicago, B. & Q. R. Co. v. Housh, 12 Ill. App. 88. **Ia.**—Gamble v. Mullin, 74 Iowa 99, 36 N. W. 909. **Kan.**—Missouri Pac. Ry. Co. v. Cassity, 44 Kan. 207, 24 Pac. 88. **Mo.**—Guenther v. St. Louis, etc. Ry. Co., 95 Mo. 286, 8 S. W. 371; Burton v. Quincy, etc. R. Co., 111 Mo. App. 617, 86 S. W. 503. **N. Y.**—Bradley v. Second Ave. R. Co., 8 Daly 289. **Tex.**—St. Louis Southwestern R. Co. v. Everett, 40 Tex. Civ. App. 285, 89 S. W. 457; Gulf, C. & S. F. Ry. Co. v. Lankford, 9 Tex. Civ. App. 593, 29 S. W. 933. **Vt.**—Eastman v. Curtis, 67 Vt. 432, 32 Atl. 232. **Wis.**—Rylander v. Laursen, 124 Wis. 2, 102 N. W. 341.

41. **U. S.**—Mobile & O. R. Co. v. Wilson, 76 Fed. 127, 22 C. C. A. 101. **Colo.**—Deep Min. & D. Co. v. Fitzgerald, 21 Colo. 533, 43 Pac. 210. **N. J.**—Bliss v. F. & M. Schaeffer Brew. Co., 67 N. J. L. 29, 50 Atl. 351. **Ohio.**—Lake Shore & M. S. Ry. Co. v. Whidden, 23 Ohio Cir. Ct. 85. **Tex.**—White v. Houston & T. C. R. Co. (Tex. Civ. App.), 46 S. W. 382; Missouri, K. & T. R. Co. v. Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096. **Vt.**—Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

See generally 13 STANDARD PROC. 791, et seq.

[a] Should not single out the testimony of one witness and lay particular stress upon the weight thereof. *Stalling v. Selma Cotton Mills*, 171 N. C. 222, 88 S. E. 242.

42. **Ga.**—Georgia, C. & N. Ry. Co. v. Watkins, 97 Ga. 381, 24 S. E. 34. **Mo.**—Lynch v. Metropolitan St. Ry. Co., 112 Mo. 420, 20 S. W. 642. **N. Y.**—Garoni v. Compagnie, etc. Navigation, 14 N. Y. Supp. 797. **Ohio.**—Cincinnati Traction Co. v. Blackson, 27 Ohio Cir.

Ct. 191. **Tex.**—St. Louis, etc. R. Co. v. Christian, 8 Tex. Civ. App. 246, 27 S. W. 932.

[a] Thus (1) instructions assuming the fact of negligence (*Payne v. Reese*, 100 Pa. 301), or (2) want of due care on the part of the plaintiff (*Elwood v. Chicago, etc. Ry. Co.*, 90 Ill. App. 397; *San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922) constitute reversible error. See generally 13 STANDARD PROC. 854, et seq.

43. **Ark.**—St. Louis, I. M. & S. R. Co. v. Spearman, 64 Ark. 332, 42 S. W. 406, so as to warrant the jury in the belief that they are authorized to fix their own standard of care required of the parties. **Colo.**—Denver Tramway Co. v. Lassasso, 22 Colo. 444, 45 Pac. 409. **Ga.**—Varner v. Western & A. R. Co., 108 Ga. 813, 34 S. E. 166. **Ill.**—Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547. **Kan.**—Chicago, etc. R. Co. v. Prouty, 55 Kan. 503, 40 Pac. 909. **Mo.**—Buel v. St. Louis Transfer Co., 45 Mo. 562. **Tex.**—Missouri, K. & T. Ry. Co. v. Robertson (Tex. Civ. App.), 189 S. W. 284. **Va.**—Richmond & D. R. Co. v. Pickleseimer, 85 Va. 798, 10 S. E. 44. **Wis.**—Rhyner v. City of Menasha, 97 Wis. 523, 73 N. W. 41.

See generally the title "Instructions."

[a] Should not mislead as to the burden of proof which the law imposes. **Ala.**—Reiter Connolly Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. **Ind.**—Nichols v. Baltimore & O. S. W. R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170. **Mo.**—Cook v. Missouri Pac. Ry. Co., 94 Mo. App. 417, 68 S. W. 230.

[b] **Jury Not Misled.**—Heiss v. Lancaster, 203 Pa. 260, 52 Atl. 201; *Major v. Oregon Short Line R. Co.*, 21 Utah 141, 59 Pac. 522.

44. See *supra*, IV, B, 1, a.

in determining that question,⁴⁵ subject to the rule that it must not invade the province of the jury.⁴⁶ The court should define ordinary care,⁴⁷ and instruct the jury on the degree of care required of the parties.⁴⁸ The court need not give an abstract definition of the terms negligence,⁴⁹ and contributory negligence;⁵⁰ unless a request is made for such a charge.⁵¹ The court should limit plaintiff's right of recovery to the acts of negligence pleaded.⁵² Where concurrent acts of

45. *Langheim v. Swift*, 121 Fed. 416; *Joliet v. Fitzgerald*, 38 Ill. App. 483.

46. See *infra*, IV, C, 2, b.

47. Ill.—*Chicago & A. R. Co. v. Kelly*, 80 Ill. App. 675. Ky.—*South Covington & C. St. Ry. Co. v. Nelson*, 28 Ky. L. Rep. 287, 89 S. W. 200. Tex.—*Texas & N. O. R. Co. v. Black* (Tex. Civ. App.), 44 S. W. 673. Wis.—*Ollwell v. Skobis*, 126 Wis. 308, 105 N. W. 777.

[a] But where no request is made for an instruction defining same, omission to do so does not constitute reversible error. *Denison, B. & N. O. R. Co. v. Barry* (Tex. Civ. App.), 80 S. W. 634.

48. Ga.—*Savannah Elec. Co. v. Bell*, 124 Ga. 663, 53 S. E. 109. Ill.—*Chicago & A. R. Co. v. Kelly*, 80 Ill. App. 675. Ky.—*Covington, etc. Mfg. Co. v. Drexler*, 120 Ky. 493, 87 S. W. 266, 117 Am. St. Rep. 593. Mich.—*Wright v. Detroit, G. H. & M. Ry. Co.*, 77 Mich. 123, 43 N. W. 765. Mo.—*Lynch v. Metropolitan St. Ry. Co.*, 112 Mo. 420, 20 S. W. 642. N. H.—*Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700. N. Y.—*Hoyt v. New York, etc. R. Co.*, 118 N. Y. 399, 23 N. E. 565. Ohio.—*Pittsburg, C. & St. L. Ry. Co. v. Wernsing*, 7 Ohio Dec. (Reprint) 520. Pa.—*Hayes v. Pennsylvania R. Co.*, 195 Pa. 184, 45 Atl. 925. Tex.—*Missouri, K. & T. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. 152. Wash.—*Mitchell v. Tacoma R. & M. Co.*, 9 Wash. 120, 37 Pac. 341. Wis.—*Wills v. Ashland Light, P. & St. Ry. Co.*, 108 Wis. 255, 84 N. W. 998; *Chicago & N. W. Ry. Co. v. Goss*, 17 Wis. 428, 84 Am. Dec. 755.

[a] Error to charge that a greater degree of care is required than the law imposes. Ga.—*Savannah, T. & I. of H. Ry. v. Beasley*, 94 Ga. 142, 21 S. E. 285. Ill.—*West Chicago St. R. Co. v. Nilson*, 70 Ill. App. 171. Minn.—*Craig v. Benedictine, etc. Assn.*, 88

Minn. 535, 93 N. W. 669. N. H.—*Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700. Ohio.—*Kuchenmeister v. O'Connor*, 8 Ohio Dec. (Reprint) 502. Tex.—*Galveston, H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 15 S. W. 573.

49. Mass.—*Ellis v. Lynn & B. R. Co.*, 160 Mass. 341, 35 N. E. 1127. Mo.—*Sweeney v. Kansas City Cable Ry. Co.*, 150 Mo. 385, 51 S. W. 682. Tenn.—*Cherokee P. Co. v. Hilson*, 95 Tenn. 1, 31 S. W. 737, where the whole charge upon this point is well adapted to the comprehension of the jury. Tex.—*Siekles v. Missouri, K. & T. Ry. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493. Wash.—*Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111.

[a] Where the court defines negligence, it is not error to tell the jury that it is a question of fact. *Bowen v. Southern Ry. Co.*, 58 S. C. 222, 36 S. E. 590.

50. See *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74.

51. *Newport News & M. V. Co. v. Glenn*, 11 Ky. L. Rep. 579; *Galveston, H. & S. A. Ry. Co. v. Holyfield* (Tex. Civ. App.), 70 S. W. 221. Compare *McCracken v. Smathers*, 119 N. C. 617, 26 S. E. 157.

52. Ga.—*Central R. & B. Co. v. Nash*, 81 Ga. 580, 7 S. E. 808. Ill.—*Northern Milling Co. v. Mackey*, 99 Ill. App. 57. Ind.—*Chicago, I. & L. R. Co. v. Thrasher*, 35 Ind. App. 58, 73 N. E. 829. Ia.—*Edgington v. Burlington, etc. R. Co.*, 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561. Ky.—*Davis v. Paducah R. & L. Co.*, 24 Ky. L. Rep. 135, 68 S. W. 140. Mich.—*Mitchell v. Prange*, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182. Mo.—*Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581; *Marr v. Bunker*, 92 Mo. App. 651. N. J.—*Bliss v. F. & M. Schaeffer Brew. Co.*, 67 N. J. L. 29, 50 Atl. 351. N. Y.—*Lee v. Vacuum Oil Co.*, 54 Hun 156, 7 N. Y. Supp. 426.

negligence are charged, the court must instruct the jury on each negligent act alleged in the pleadings.⁵³ Where the issue of contributory negligence is not raised in the pleadings,⁵⁴ and there is no evidence thereon,⁵⁵ it is error to instruct upon the question; and it is proper to refuse a charge thereon.⁵⁶ If contributory negligence is properly pleaded, however,⁵⁷ and there is evidence tending to establish that issue,⁵⁸ it is error not to charge the jury thereon.⁵⁹ The court must charge the jury that the defendant is liable only if his alleged negli-

Ohio.—Cleveland, P. & E. R. R. Co. v. Nixon, 21 Ohio Cir. Ct. 736. **Tex.** Freeman v. Carter (Tex. Civ. App.), 81 S. W. 81.

[a] **Error to refuse an instruction** that plaintiff cannot recover for negligent acts not pleaded. Louisville & N. R. Co. v. Wade, 46 Fla. 197, 35 So. 863.

[b] **But where the instruction points out the negligence averred in the complaint**, it is not necessary in charging the jury that plaintiff is entitled to recover upon proof of defendant's negligence to expressly limit the jury's consideration of negligence to that charged in the complaint. Chicago, I. & L. Ry. Co. v. Lake County S. & T. Co. (Ind.), 114 N. E. 454.

[c] **Sufficient Instruction.**—A charge that the plaintiff must, by a preponderance of the evidence, establish one or more of the particular acts of negligence set forth in the complaint is proper as the court thereby limits the jury to the particular acts of negligence, whether of omission or commission, which are alleged in the complaint. Martindale v. Oregon & S. L. R. Co., 48 Utah 464, 160 Pac. 275.

[d] Court should enumerate all the facts which may have had some relation to the injury. Anderson v. Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. 1109.

53. Chicago, M. & St. P. Ry. Co. v. Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

54. **Colo.**—White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214. **Ia.** Lanning v. Chicago, etc. R. Co., 68 Iowa 502, 27 N. W. 478. **Ohio.**—Werner v. Cincinnati, 3 Ohio Cir. Ct. (N. S.) 276.

55. **Ga.**—Bain v. Athens Foundry & Mach. Works, 75 Ga. 718. **Mich.** Brower v. Edson, 47 Mich. 91, 10 N. W. 121. **Mo.**—Kelly v. Stewart, 93 Mo. App. 47. **Mont.**—Kelley v. Cable Co., 7 Mont. 70, 14 Pac. 633.

56. **Cal.**—Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Evarts v. Santa Barbara C. R. Co., 3 Cal. App. 712, 86 Pac. 830. **Colo.** Union Pac. Ry. Co. v. Tracy, 19 Colo. 331, 35 Pac. 537. **Ind.**—Indianapolis Union R. Co. v. Waddington, 169 Ind. 448, 82 N. E. 1030. **Mo.**—Yerkes v. Keokuk Northern Line R. Co., 7 Mo. App. 265. **Ohio.**—Pittsburgh, C. & St. L. Ry. Co. v. Fleming, 30 Ohio St. 480. **S. C.**—Scott v. Seaboard Air Line Ry. Co., 67 S. C. 136, 45 S. E. 129. **Tex.** Western Union Tel. Co. v. Bruner, 19 S. W. 149. **Va.**—Richmond & D. R. Co. v. Burnett, 88 Va. 538, 14 S. E. 372.

57. **Ia.**—Gamble v. Mullin, 74 Iowa 99, 36 N. W. 909. **Kan.**—Missouri Pac. Ry. Co. v. Cassity, 44 Kan. 207, 24 Pac. 88. **Tex.**—St. Louis Southwestern R. Co. v. Everett, 40 Tex. Civ. App. 285, 89 S. W. 457.

[a] **But such instructions should not go beyond the particular acts of contributory negligence pleaded in the answer.** Birmingham R. & Elect. Co. v. City Stable Co., 119 Ala. 615, 24 So. 558; International & G. N. R. Co. v. Wray, 43 Tex. Civ. App. 380, 96 S. W. 74.

58. **Colo.**—White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214. **Ill.**—Chicago, B. & Q. R. Co. v. Housh, 12 Ill. App. 88. **Miss.**—New Orleans, J. & G. N. R. Co. v. Mitchell, 52 Miss. 808. **Mo.**—Guenther v. St. Louis, etc. Ry. Co., 95 Mo. 286, 8 S. W. 371. **N. Y.** Kidd v. New York Cent. & H. R. R. Co., 218 N. Y. 313, 112 N. E. 1051. **Vt.**—Eastman v. Curtis, 67 Vt. 432, 32 Atl. 232.

59. See the cases cited in the preceding notes.

[a] **But it is not necessary to give a separate instruction where the jury by the instructions given is informed that freedom from contributory negligence must be established.** Dodge v. Lamont, 130 Iowa 721, 107 N. W. 948.

gence proximately caused the damage;⁶⁰ a charge on contributory negligence which omits to tell the jury that in order to defeat plaintiff's right to recover such negligence must have been the proximate cause of the injury constitutes error.⁶¹

Where the doctrine of comparative negligence does not prevail it is error to instruct the jury thereon.⁶²

b. *Invading Province of Jury.*—The court should not invade the province of the jury when it is its duty to say under all the circumstances of the case what is or is not negligence. Hence it is an invasion of the province of the jury to charge that certain acts do or do not constitute negligence,⁶³ or contributory negligence,⁶⁴ unless an act or omission to perform an act are made by law to con-

60. **Ill.**—Chicago & N. W. Ry. Co. v. Carroll, 12 Ill. App. 643. **Ky.**—Lockridge v. Fesler, 18 Ky. L. Rep. 469, 37 S. W. 65. **Pa.**—Baker v. Pennsylvania Co., 142 Pa. 503, 21 Atl. 979, 12 L. R. A. 698. **Tex.**—Houston & T. C. R. Co. v. Malone (Tex. Civ. App.), 37 S. W. 640. **Wis.**—Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777.

[a] Omission to define the term "proximate cause" is not error, however. **Ia.**—Miller v. Boone, 95 Iowa 5, 63 N. W. 352. **Mo.**—Anderson v. Union T. R. Co., 161 Mo. 411, 61 S. W. 874. **Tex.**—Houston & T. C. R. Co. v. Oram (Tex. Civ. App.), 92 S. W. 1029.

61. **U. S.**—Plant Inv. Co. v. Cook, 74 Fed. 503, 20 C. C. A. 625. **Ala.**—Thompson v. Duncan, 76 Ala. 334. **Mo.**—Gayle v. Missouri Car & F. Co., 177 Mo. 427, 76 S. W. 987. **N. Y.**—Ericius v. Brooklyn, etc. R. Co., 63 App. Div. 353, 71 N. Y. Supp. 596. **Ohio.**—Holmes v. Ashtabula, etc. Co., 10 Ohio Cir. Dec. 638. **S. C.**—Nelson v. Georgia, C. & N. Ry., 68 S. C. 462, 47 S. E. 722. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Mangham, 29 Tex. Civ. App. 486, 69 S. W. 80. **Wis.**—Lynch v. Waldwick, 123 Wis. 351, 101 N. W. 925.

62. **Kan.**—St. Louis, etc. R. Co. v. Stevens, 3 Kan. App. 176, 43 Pac. 434. **Tenn.**—East Tennessee, V. & G. R. R. Co. v. Hull, 88 Tenn. 33, 12 S. W. 419. **Tex.**—Missouri, K. & T. R. Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243.

[a] But under a statute providing that in case of contributory negligence the damages are to be diminished by the jury, the failure to charge thereon, when requested, constitutes re-

versible error. **Missouri**, K. & T. Ry. Co. v. Pace (Tex. Civ. App.), 184 S. W. 1051.

63. **Conn.**—Williams v. Clinton, 28 Conn. 264. **Ga.**—Central R. Co. v. Hamilton, 71 Ga. 461. **Ill.**—Pittsburgh, C., C. & St. L. Ry. Co. v. Banfill, 206 Ill. 553, 69 N. E. 499; Wachtel v. East St. Louis & St. L. E. Ry. Co., 77 Ill. App. 465. **Kan.**—Atehison, etc. R. Co. v. Dorsett, 6 Kan. App. 922, 50 Pac. 64. **Mo.**—Huelsenkamp v. Citizens' Ry. Co., 34 Mo. 45. **Neb.**—Omaha & C. B. R. & B. Co. v. Levinston, 49 Neb. 17, 67 N. W. 887. **N. Y.**—Locke v. Waldron, 75 App. Div. 152, 77 N. Y. Supp. 405. **Pa.**—Richards v. Willard, 176 Pa. 181, 35 Atl. 114. **S. C.**—Jones v. Charleston & W. C. Ry. Co., 61 S. C. 556, 39 S. E. 758. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Denham v. Trinity, etc. Co., 73 Tex. 78, 11 S. W. 151. **Wash.**—Carroll v. Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

64. **Ga.**—Central R. Co. v. Hubbard, 86 Ga. 623, 12 S. E. 1020. **Ill.**—Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406. **Ia.**—Garrett v. Chicago & N. W. Ry. Co., 36 Iowa 121. **Mo.**—Dowell v. Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598. **Pa.**—Musiek v. Latrobe, 184 Pa. 375, 39 Atl. 226. **Tex.**—Hillsboro v. Jackson, 18 Tex. Civ. App. 325, 44 S. W. 1010. **Wis.**—Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513.

[a] **Proper To Refuse Instruction.** **Ind.**—Teague v. Bloomington, 40 Ind. App. 68, 81 N. E. 103. **Pa.**—Chautauqua Lake Ice Co. v. McLuckey, 8 Sad. 464, 11 Atl. 16. **Tex.**—Gulf, etc. Ry. Co. v. Box, 81 Tex. 670, 17 S. W. 375.

stitute negligence per se,⁶⁵ or both the facts and the inferences therefrom are undisputable,⁶⁶ in which cases, the question of negligence is one for the court alone.⁶⁷

3. Presumptions and Burden of Proof.—It is error to refuse to charge the jury that the burden of proving defendant's negligence rests upon the plaintiff.⁶⁸ And it is error to charge that it is incumbent upon the defendant to prove his freedom from negligence.⁶⁹ It is proper to instruct that negligence ordinarily cannot be presumed, but requires affirmative proof.⁷⁰ But where it is proper to instruct the jury on a presumption of negligence from certain facts, to omit telling the jury that such presumption is not conclusive but may be rebutted is error.⁷¹

Where contributory negligence is a matter of defense and freedom therefrom need not be pleaded by plaintiff, it is proper to instruct the jury that the burden of proving contributory negligence rests upon the defendant;⁷² and it is error to charge that the plaintiff is required to prove the want thereof.⁷³ But where freedom from contributory negligence is alleged in the complaint, it is not error to instruct the jury that the plaintiff must prove such issue.⁷⁴ So too,

65. *Seragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *Atlanta & W. P. R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29; *Central of Georgia R. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430; *Savannah F. & W. Ry. Co. v. Evans*, 115 Ga. 315, 41 S. E. 631, 90 Am. St. Rep. 116; *Atlanta, K. & N. Ry. Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350.

66. *Ala.*—*Hibler v. McCartney*, 31 Ala. 501. *Neb.*—*Omaha & C. B. R. & B. Co. v. Levinston*, 49 Neb. 17, 67 N. W. 887. *N. J.*—*Moebus v. Becker*, 46 N. J. L. 41.

67. See *supra*, IV, B, 1, a.

68. *Mo.*—*Sanders v. Southern Elec. Ry. Co.*, 147 Mo. 411, 48 S. W. 855. *N. Y.*—*Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321; *Reaney v. Standard Oil Co.*, 10 App. Div. 326, 41 N. Y. Supp. 768. *Pa.*—*Cooley v. Philadelphia Traction Co.*, 189 Pa. 563, 42 Atl. 288. *Tex.*—*Sickles v. Missouri, K. & T. Ry. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493.

69. *Greer v. Union R. Co.*, 50 Misc. 560, 99 N. Y. Supp. 428.

70. *West Chicago St. R. Co. v. Peters*, 196 Ill. 298, 63 N. E. 662; *West Chicago St. R. Co. v. Peters*, 95 Ill. App. 479; *Wachtel v. East St. Louis & St. L. E. Ry. Co.*, 77 Ill. App. 465; *Bailey v. Citizens' Ry. Co.*, 152 Mo. 449, 52 S. W. 406.

[a] But where the doctrine of *res ipsa loquitur* is applicable to the cir-

cumstances of the case it is proper to refuse an instruction that negligence cannot be inferred from the mere happening of the accident. *Olson v. Great Northern Ry. Co.*, 68 Minn. 155, 71 N. W. 5.

71. *Chicago & N. W. Ry. Co. v. Jamieson*, 112 Ill. App. 69.

72. *U. S.*—*Mobile & O. R. Co. v. Wilson*, 76 Fed. 127, 22 C. C. A. 101. *Ind.*—*Cleveland, C. C. & St. L. R. Co. v. Miles*, 162 Ind. 646, 70 N. E. 985. *Mo.*—*Forrester v. Metropolitan St. Ry. Co.*, 116 Mo. App. 37, 91 S. W. 401. *Tex.*—*Houston & T. C. R. Co. v. Bulger*, 35 Tex. Civ. App. 478, 80 S. W. 557.

[a] A charge that the burden of proving contributory negligence rests upon defendant is not objectionable as eliminating the evidence introduced by plaintiff, where the jury is told in other instructions to consider all the evidence in the case. *Evansville & L. H. R. Co. v. Mills*, 37 Ind. App. 598, 77 N. E. 608; *Missouri, K. & T. Ry. Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857.

73. *Ala.*—*O'Brien v. Tatum*, 84 Ala. 186, 4 So. 158. *Ind.*—*Nichols v. Baltimore & O. S. W. R. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170. *Ore.*—*Ford v. Umatilla*, 15 Ore. 313, 16 Pac. 33.

74. *Ingram v. Hilton & D. Lumb. Co.*, 108 Ga. 194, 33 S. E. 961.

where the evidence introduced in behalf of the plaintiff tends to show his contributory negligence, it is proper to refuse to charge that the defendant has the burden of proof.⁷⁵ An instruction, that if the jury find the evidence as to defendant's negligence and plaintiff's freedom from contributory negligence evenly balanced to find for the defendant, is not erroneous.⁷⁶

D. VERDICT, FINDINGS AND JUDGMENT.—The general rules governing verdicts,⁷⁷ findings,⁷⁸ and judgments,⁷⁹ are applicable in actions based on negligence.

75. *North Birmingham St. Ry. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

76. *Citizens' St. Ry. Co. v. Reed*, 151 Ind. 396, 51 N. E. 477; *Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Civ. App.), 35 S. W. 488.

77. See the following: **Conn.**—*Fincken v. Elm City Brass Co.*, 73 Conn. 423, 47 Atl. 670. **Ind.**—*Louisville, N. A. & C. Ry. Co. v. Lynch*, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293; *Board of Comrs. of Huntington County v. Bonebrake*, 146 Ind. 311, 45 N. E. 470. **Kan.**—*Root v. Topeka Ry. Co.*, 96 Kan. 694, 153 Pac. 550; *McBeth v. Atchison, T. & S. F. R. Co.*, 95 Kan. 364, 148 Pac. 621. **N. C.**—*Holton v. Moore*, 165 N. C. 549, 81 S. E. 779, Ann. Cas. 1915D, 246; *Hamilton v. Hines Bros. Lumb. Co.*, 160 N. C. 47, 75 S. E. 1087. **Tex.**—*Behymer v. Mosher Mfg. Co.* (Tex. Civ. App.), 192 S. W. 1148; *Missouri, K. & T. Ry. Co. v. Pace* (Tex. Civ. App.), 184 S. W. 1051; *Turner v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 177 S. W. 204; *Martinez v. Medina Valley Irr. Co.* (Tex. Civ. App.), 171 S. W. 1035. **Wis.**—*Tidmarsh v. Chicago, M. & St. P. R. Co.*, 149 Wis. 590, 136 N. W. 337; *Astin v. Chicago, M. & St. P. R. Co.*, 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158; *Bratz v. Stark*, 138 Wis. 599, 120 N. W. 396; *Krueger v. Bronson*, 45 Wis. 198. And see generally the title "**Verdict.**"

[a] A general verdict finding for plaintiff is a finding against the issue of contributory negligence. *Michigan City v. Werner* (Ind.), 114 N. E. 636; *Louisville & S. I. Traction Co. v. Lot-tich*, 59 Ind. App. 426, 106 N. E. 903.

[b] Special verdict (1) should be limited to case made by pleadings, should find all facts proven under is-

suces, and should not embody statements of conclusions of law or fact. A finding that one of parties has been guilty of negligence is a mere statement of a conclusion. *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981. (2) That special verdict must be responsive to issues raised by pleadings, see also *Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445.

[c] **Special Findings Will Control General Verdict.**—*Williams v. Atchison, T. & S. F. R. Co.*, 100 Kan. 336, 164 Pac. 260; *Parks v. Atchison, T. & S. F. R. Co.*, 100 Kan. 219, 163 Pac. 1066; *Roberts v. Missouri, K. & T. Ry. Co.*, 98 Kan. 705, 161 Pac. 590. See also *Terre Haute, I. & E. Traction Co. v. Green*, 49 Ind. App. 309, 97 N. E. 343.

[d] **No inconsistency** in a special finding that plaintiff was injured while doing an act in a "casual and involuntary way" and one that in so doing he was negligent. *Root v. Topeka R. Co.*, 96 Kan. 694, 153 Pac. 550.

78. See *Cooley v. Brunswig Drug Co.*, 30 Cal. App. 58, 157 Pac. 13; *Talbot v. Ginocchio*, 18 Cal. App. 390, 123 Pac. 223, and generally the title "**Findings and Conclusions.**"

[a] **Omission to find in express terms** that defendant was negligent will not defeat judgment, if facts found show an omission of duty with a resultant injury. *Cooley v. Brunswig Drug Co.*, 30 Cal. App. 58, 157 Pac. 13.

[b] **A finding that want of ordinary care was the proximate cause** of the destruction of property negatives gross negligence or wilful destruction. *Lemma v. Searle*, 153 Wis. 24, 140 N. W. 65.

79. See generally the title "**Judgments.**"

V. REVIEW.—The review of a judgment in an action based on negligence is governed by the general rules.⁸⁰

80. See the following: **Ala.**—Tennessee Coal, I. & R. Co. *v.* Hayes, 97 Ala. 201, 12 So. 98. **Cal.**—Algier *v.* The Maria, 14 Cal. 167. **Ill.**—Devine *v.* Northwestern Elev. R. Co., 265 Ill. 641, 107 N. E. 118; Chicago City Ry. Co. *v.* Lace, 62 Ill. App. 535. **Ind.**—Elgin Dairy Co. *v.* Shepherd (Ind. App.), 103 N. E. 433; Citizens' St. Ry. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729. **Ky.**—Rossi *v.* Jewell J. Coal Co., 157 Ky. 332, 163 S. W. 220. **Me.**—Sawyer *v.* Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260. **Minn.**—Johnson *v.* Scott, 119 Minn. 470, 138 N. W. 694. **N. J.**—Gellatty *v.* Central R. Co., 86 N. J. L. 416, 92 Atl. 279; New Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722. **N. Y.**—Mertz *v.* Connecticut Co., 217 N. Y. 475, 112 N. E. 166; MacPherson *v.* Buick Motor Co., 160 App. Div. 55, 145 N. Y. Supp. 462; Hackett *v.* Edwards, 25 Misc. 778, 55 N. Y. Supp. 624. **Wash.**—Smith *v.* Union Trunk Line, 18 Wash. 351, 5 Pac. 400, 45 L. R. A. 169. **Wis.**—Hooker *v.* Chicago, etc. R. Co., 76 Wis. 542, 44 N. W. 1085.

And see generally the titles "Appeals;" "Writ of Error."

NEGOTIABLE INSTRUMENTS.—See Bills and Notes.

NEGROES.—See Civil Rights; Miscegenation.

NEUTRALITY LAWS

By the Editorial Staff.

I. PROCEEDINGS TO ENFORCE, 338

- A. *Detention of Vessels*, 338
- B. *Forfeiture of Vessels*, 339
- C. *Criminal Prosecution*, 339

II. WRONGFUL SEIZURE, 340

CROSS-REFERENCES:

Admiralty; Indictment and Information;
War.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROCEEDINGS TO ENFORCE. — A. DETENTION OF VESSELS. The president of the United States may authorize the withholding of clearance,¹ or the collectors of customs at United States ports may detain a vessel, when there is a probability that it is intended by the owners to be employed to commit acts of hostility against a foreign people with whom the United States is at peace.² A vessel thus detained will not be released until authorized by the president,³ or until the owner gives a sufficient bond.⁴

1. U. S. Comp. St., 1916, §10,182a; Act of Mar. 4, 1915, 38 St. at L. 1226, Fed. St. Ann., Sup. 1916, p. 180.

[a] **By Military Commander.** — A vessel which is probably to be used to violate the neutrality laws of the United States, may be detained by a military commander, acting under authority from the president, until it can be proceeded against in the method provided by law. *Stoughton v. Dimick*, 3 Blatchf. 356, 23 Fed. Cas. No. 13,500.

2. U. S. Comp. St., 1916, §10,181; U. S. Rev. St., §5290; 5 Fed. St. Ann. 377.

3. U. S. Comp. St., 1916, §10,181; U. S. Rev. St., §5290; 5 Fed. St. Ann. 377.

4. U. S. Comp. St., 1916, §10,181; U. S. Rev. St., §5290; 5 Fed. St. Ann. 377.

[a] **Merely because armed**, a vessel belonging to citizens of the United States is not prohibited from sailing out of our ports; it is only required that security be given that the vessel will not be employed by them in hostilities against foreign countries at peace with the United States. *United States v. Quincy*, 6 Pet. (U. S.) 445, 8 L. ed. 458. See also *Hendricks v. Gonzalez*, 67 Fed. 351, 14 C. C. A. 659; U. S. Comp. St., 1916, §10,180; U. S. Rev. St., §5289; 5 Fed. St. Ann. 376.

B. FORFEITURE OF VESSELS.—A proceeding to enforce a forfeiture of a vessel for violating the neutrality statute⁵ is an action in rem in admiralty,⁶ of which the federal courts have exclusive jurisdiction.⁷ A libel against a vessel for forfeiture is maintainable only in the name of the United States,⁸ and if instituted by an informer the United States may intervene.⁹ A conviction of the persons committing the acts alleged is not necessary.¹⁰ If two libels are filed, one for prize and one for forfeiture, an election to proceed on one and abandon the other cannot be required.¹¹ A foreign consul may intervene as claimant and assert the claim of his government.¹² An amendment of a libel for forfeiture is within the discretion of the court.¹³

C. CRIMINAL PROSECUTION.—Any one indicted for violating the neutrality laws of the United States should be tried where the offense is committed,¹⁴ or if committed at sea, then in the district where arrested.¹⁵

Indictment.—In drawing an indictment for an offense against the neutrality laws the general rules for drawing indictments should be observed.¹⁶ An indictment for setting on foot a military expedition

5. U. S. Rev. St., §5283; U. S. Comp. St., 1916, §10,175; 5 Fed. St. Ann. 358.

[a] **Release on Bond.**—(1) Pending the hearing of a libel for forfeiture for violating the neutrality laws of the United States, it has been held that the vessel should not be released on bond. *The Mary N. Hogan*, 17 Fed. 813. (2) But the rule is otherwise where the hearing is delayed and there is no reason to believe the vessel if released on bond will attempt any violation of the law. *The Three Friends*, 78 Fed. 173.

6. *The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897; *The Palmyra*, 12 Wheat. (U. S.) 1, 14, 6 L. ed. 531; *The Conserva*, 38 Fed. 431; *The Ambrose Light*, 25 Fed. 408; *The Meteor*, 17 Fed. Cas. No. 9,498, reversed on other grounds, 26 Fed. Cas. No. 15,760.

7. *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. ed. 381, affirming 13 Johns. (N. Y.) 561.

8. *The Venus*, 180 Fed. 635.

[a] **Enforcement of the neutrality laws** of the United States is of necessity under the control of the government of the United States. Where seizure is made on the complaint of an informer, and the United States intervenes, disavows, and declines to ratify the seizure, the informer has no such inchoate or other interest as will permit the further prosecution of the case

in his behalf. *Olivier v. Hyland*, 186 Fed. 843, 108 C. C. A. 576.

9. *The Venus*, 180 Fed. 635.

10. *The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897.

11. *The City of Mexico*, 28 Fed. 148.

12. *The Conserva*, 38 Fed. 431; *Williamson v. The Betsy*, 30 Fed. Cas. No. 17,750.

13. *The Meteor*, 17 Fed. Cas. No. 9,498, reversed on other grounds, 26 Fed. Cas. No. 15,760.

As to amendments generally see the title "Admiralty."

14. *United States v. O'Sullivan*, 27 Fed. Cas. No. 15,975.

[a] **Shipping Contraband.**—The court at the point where a shipment of arms and ammunition to an American country at a time of internal strife or civil war begins, has jurisdiction of the offense, and not the court at the point of interception. *United States v. Albert Steinfeld & Co.*, 209 Fed. 904.

15. *United States v. Hughes*, 70 Fed. 972.

16. See generally 12 STANDARD PROC. 294, and *infra*, this note.

[a] **Language of Statute.**—It is sufficient if the offense is charged in the words of the statute. *United States v. Quincy*, 6 Pet. (U. S.) 445, 8 L. ed. 458.

[b] **Disjunctive or Alternative Allegations.**—Where the statute prohibits fitting out or arming a vessel for

against a government with whom the United States are at peace, need not aver that such expedition actually set out.¹⁷ An indictment for exporting contraband must definitely name the point of destination,¹⁸ unless it contains an averment that such point was to the grand jury unknown.¹⁹

Trial.²⁰—In a prosecution for fitting out a military expedition or enterprise against a foreign country with which the United States is at peace, the existence of the military expedition is a question for the jury.²¹

II. WRONGFUL SEIZURE.—An action of trespass for damages may be maintained by the owner of a vessel wrongfully seized for violation of neutrality laws against the party responsible for the seizure,²² but not before a final decree is pronounced in the forfeiture proceeding.²³ Such an action is not maintainable against an officer

service, the indictment may charge either fitting or arming; it need not charge both. *United States v. Quincy*, 6 Pet. (U. S.) 445, 8 L. ed. 458.

[c] **Duplicity.**—(1) Where one is indicted under the statute against engaging in any military expedition to be carried on from the United States against a country with which it is at peace (U. S. Rev. St., §5286; U. S. Comp. St., 1916, §10,177; 5 Fed. St. Ann. 366), and (2) the indictment uses certain words describing the offense in the conjunctive which the statute uses in the disjunctive, but no objection is made by defendant, and the court in charging the jury limits the proof or evidence to one count in the indictment, the verdict will not be disturbed on the ground of duplicity. *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. ed. 289. See generally 12 STANDARD PROC. 499.

[d] **Recognition of a new government** is not a condition precedent to the issuance of a valid indictment against one for preparing or carrying on a military expedition or enterprise from this country against a people with whom the United States is at peace. *The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. ed. 897; *De Orozco v. United States*, 237 Fed. 1008, 151 C. C. A. 70; *The Lucy H.*, 235 Fed. 610.

17. *United States v. Chakraborty*, 244 Fed. 287.

18. *United States v. Phelps-Dodge Merc. Co.*, 209 Fed. 910; *United States v. Albert Steinfeld & Co.*, 209 Fed. 904.

19. *United States v. Phelps-Dodge*

Merc. Co., 209 Fed. 910; *United States v. Albert Steinfeld & Co.*, 209 Fed. 904.

[a] **Charging Shipment of Contraband.**—(1) Under the Act of March 14, 1912, 37 St. at L. 630, relative to the shipment of arms and munitions of war to other American countries during times of domestic violence therein, an indictment for initiating a shipment of contraband is sufficient, the word "export" in the statute referring to a shipment which is merely begun, as well as to a shipment which has been completed. *United States v. Chavez*, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. ed. 950. (2) But an indictment which charges the shipment of contraband from one point to another in the United States, "with the intent" to reship into the foreign country, is fatally defective, since the statute refers to an actual export and not an intent to export. *United States v. Albert Steinfeld & Co.*, 209 Fed. 904; *United States v. Phelps-Dodge Merc. Co.*, 209 Fed. 910.

20. See generally the title "**Trial.**"

21. *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. ed. 289; *Hart v. United States*, 84 Fed. 799, 28 C. C. A. 612 (*affirming* 78 Fed. 868); *United States v. O'Brien*, 75 Fed. 900.

22. *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. ed. 381 (*affirming* 13 Johns. [N. Y.] 561); *The Acteon*, 2 Dods. (Eng.) 51, 52, 53.

23. *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. ed. 381, *affirming* 13 Johns. (N. Y.) 561.

who has been granted a certificate of reasonable cause,²⁴ nor, it would seem, against one acting on authority from the president.²⁵ A plea justifying a seizure on account of a forfeiture incurred under the statute, should allege besides the actual forfeiture, the facts relied on to establish the same.²⁶

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| <p>24. U. S. Rev. St., 1878, §970; U. S. Comp. St., 1916, §1611; 2 Fed. St. Ann. 287; The City of Mexico, 25 Fed. 924.</p> <p>25. <i>Gelston v. Hoyt</i>, 3 Wheat. (U. S.) 246, 4 L. ed. 381 (<i>affirming</i> 13</p> | <p>Johns. [N. Y.] 561); <i>Stoughton v. Dimick</i>, 3 Blatchf. 356, 23 Fed. Cas. No. 13,500.</p> <p>26. <i>Gelston v. Hoyt</i>, 3 Wheat. (U. S.) 246, 4 L. ed. 381, <i>affirming</i> 13 Johns. (N. Y.) 561.</p> |
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NEW ASSIGNMENT. — See **Replication and Reply.**

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NEW CAUSE OF ACTION OR DEFENSE

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CROSS-REFERENCES:

Amendments and Jeofails; Parties.

Setting up new cause of action in supplemental pleadings, see the title "Supplemental Pleading."

Necessity for new process, see the title "Process."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INTRODUCTION OF NEW CAUSE OF ACTION BY AMENDMENT.—A. STATEMENT OF RULE GENERALLY.—It is a general rule at common law,¹ in chancery,² and under the codes and practice acts of most states,³ that an amendment which introduces a new, distinct,

1. **Colo.**—*Givens v. Wheeler*, 5 Colo. 598. **Conn.**—*Ross v. Bates*, 2 Root 198. **D. C.**—*Ex parte Mansfield*, 11 App. Cas. 558. **N. D.**—*Mares v. Wormington*, 8 N. D. 329, 79 N. W. 441. **Eng.**—*Billing v. Flight*, 6 Taunt. 419, 1 E. C. L. 682, 128 Eng. Reprint 1097.
2. **Ala.**—*Ward v. Patton*, 75 Ala. 207. **Miss.**—*Wright v. Frank*, 61 Miss. 32. **N. D.**—*Mares v. Wormington*, 8 N. D. 329, 79 N. W. 441. **Pa.**—*In re Wilhelm's Appeal*, 79 Pa. 120.
3. See the following: **U. S.**—*Western Wheeled S. Co. v. Gahagan*, 152 Fed. 648. **Ala.**—*Mohr v. Lemle*, 69 Ala. 180. **Alaska.**—*Nowell v. Behrends*, 3 Alaska 495. **Cal.**—*Scholle v. Finnell*, 173 Cal. 372, 159 Pac. 1179; *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Altpeter v. Postal Tel.-Cable Co.*, 26 Cal. App. 705, 148 Pac. 241. **Colo.**—*Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178; *Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826; *Anderson v. Groesbeck*, 26 Colo. 3, 55 Pac. 1086; *Johnson v. Cummings*, 12 Colo. App. 17, 55 Pac. 269. **Conn.**—*In re Donahue's Appeal*, 62 Conn. 370, 26 Atl. 399; *Johnston v. Sikes*, 56 Conn. 589, 594; *Nash v. Adams*, 24 Conn. 33. **D. C.**—*Ex parte Mansfield*, 11 App. Cas. 558. **Ga.**—*Dyson v. Southern Ry. Co.*, 113 Ga. 327, 38 S. E. 749; *Exposition Cotton Mills v. Western & A. R. Co.*, 83 Ga. 441, 10 S. E. 113, "unless expressly provided for by law." **Idaho.**—*Hallett v. Larcom*, 5 Idaho 492, 51 Pac. 108. **Ia.**—*Myers v. Chicago, B. & Q. R. Co.*, 152 Iowa 330, 131 N. W. 770. **Kan.**—*Kansas Pac. Ry. Co. v. Salmon*, 14 Kan. 512. **Ky.**—*Louisville & N. R. Co. v. Pointer's Admr.*, 113 Ky. 952, 69 S. W. 1108. **La.**—*Coleman v. Continental B. & T. Co.*, 139 La. 1078, 72 So. 742. **Me.**—*Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003; *Willoughby v. Atkinson Furn. Co.*, 93 Me. 185, 44 Atl. 612. **Mass.**—*Smith v. Palmer*, 6 Cush. 513. **Mich.**—*Musselman Grocer Co. v. Casler*, 138 Mich. 24, 100 N. W. 997. **Mo.**—*Red Diamond Clothing Co. v. Steidemmann*, 120 Mo. App. 519, 97 S. W. 220; *Knight v. Quincy, O. & K. C. R. Co.*, 120 Mo. App. 311, 322, 96 S. W. 716. **Mont.**—*Flaherty v. Butte Elec. R. Co.*, 43 Mont. 141, 115 Pac. 40 (amendments must not "change the nature of the action"); *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327. **Neb.**—*Johnson v. American S. & R. Co.*, 80 Neb. 255, 116 N. W. 517. *Compare Omaha & R. V. R. Co. v. Mosehel*, 38 Neb. 281, 56 N. W. 875, this is not necessarily a fatal objection. **N. H.**—*McIntire v. Eastern R. R.*, 58 N. H. 137; *Melvin v. Smith*, 12 N. H. 462. **N. Y.**—*Woodruff v. Dickie*, 5 Robt. 619, 31 How. Pr. 164. **N. C.**—*State ex rel. Clendenin v. Turner*, 96 N. C. 416. **Pa.**—*Rochester v. Kennedy*, 229 Pa. 251, 78 Atl. 133; *Fairechild v. Dunbar Furnace Co.*, 128 Pa. 485, 18 Atl. 443. **R. I.**—*Thayer v. Farrell*, 11 R. I. 305. **S. C.**—*Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375 (attempting to reconcile the cases); *Proctor v. Southern R. R.*, 64 S. C. 491, 42 S. E. 427. See *Kennedy v. Hill*, 79 S. C. 270, 60 S. E. 689, as to amendments before trial, "the only limitation is that it must be in furtherance of justice . . . by inserting other allegations material to the case." **Vt.**—*Sowles v. Hartford Life Ins. Co.*, 85 Vt. 56, 81 Atl. 98; *Downing v. Burnham*, 84 Vt. 149, 78 Atl. 789; *Dalex v. Gates*, 65 Vt. 591, 27 Atl. 193. **Va.**—*Standard Paint Co.*

and different cause of action, cannot be allowed, either before trial,⁴ during trial,⁵ or afterwards,⁶ unless consented to by the parties.⁷ Sometimes the rule is stated to be that amendments setting up new causes of action different from that which the party intended to declare on are not permissible.⁸ But in some states, with varying restrictions,⁹ amendments may be made before trial introducing new causes of action.¹⁰

v. E. K. Vietor & Co., 120 Va. 595, 91 S. E. 752; *Irvine v. Barrett*, 119 Va. 587, 89 S. E. 904, Ann. Cas. 1917C, 62. **W. Va.**—*Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454, L. R. A. 1916D, 220; *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198 (cannot be made after appearance of defendant); *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696.

See 4 STANDARD PROC. 802, and 1 STANDARD PROC. 919.

Whether statement of new cause of action by amendment constitutes a departure, see 6 STANDARD PROC. 119.

[a] A statute conferring unlimited power of amendment does not authorize the institution of a new suit by way of amendment. *Smith v. Palmer*, 6 Cush. (Mass.) 513.

4. *Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375.

5. **Cal.**—*Glougie v. Glougie*, 174 Cal. 126, 162 Pac. 118; *Koch v. Wilcoxson*, 30 Cal. App. 517, 158 Pac. 1048. **Colo.** *Anderson v. Groesbeck*, 26 Colo. 3, 55 Pac. 1086. **Mo.**—*Butcher v. Death*, 15 Mo. 271; *Shannon v. Mastin* (Mo. App.), 108 S. W. 1116. **Pa.**—*Diehl v. McGlue*, 2 Rawle 337.

6. **D. C.**—*Ex parte Mansfield*, 11 App. Cas. 558, on remand. **Ind.**—*Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92; *Thrall v. Gosnell*, 28 Ind. App. 174, 62 N. E. 462. **Ia.**—*Austin Western Co. v. Weaver Tp.*, 136 Iowa 709, 114 N. W. 189; *Bicklin v. Kendall*, 72 Iowa 490, 34 N. W. 283, after judgment. **Neb.**—See *Scott v. Spencer*, 44 Neb. 93, 62 N. W. 312. **Pa.**—*Reitzel v. Franklin*, 5 Watts & S. 33, after appeal from arbitrator's award.

7. *Thompson v. Phelan*, 22 N. H. 339; *State ex rel. Clendenin v. Turner*, 96 N. C. 416.

[a] Agreement to allow such an amendment must be clearly established; if there is any controversy it will not be permitted. *Thompson v. Phelan*, 22 N. H. 339.

8. **Mass.**—*Daley v. Boston & A. R.*

Co., 147 Mass. 101, 16 N. E. 690. **N. J.** *Hoboken v. Gear*, 27 N. J. L. 265. **Vt.**—*Sumner v. Brown*, 34 Vt. 194. **W. Va.**—*Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700.

Effect of element of intent upon conclusiveness of the determination of the identity of the causes of action, see *infra*, I, G, 1, d.

9. See *infra*, this note.

[a] Thus (1) it is variously required that the cause of action in the amended complaint must be warranted by the summons (*Brown v. Leigh*, 49 N. Y. 78, 12 Abb. Pr. [N. S.] 193), or (2) that it does not substantially change the claim (*Rae v. Chicago, M. & St. P. R. Co.*, 14 N. D. 507, 105 N. W. 721; *Wynnewood Cotton Oil Co. v. Moore* [Okla.], 153 Pac. 633; *St. Louis & S. F. R. Co. v. Keiffer*, 48 Okla. 434, 150 Pac. 1026; *Fort Prod. Co. v. Southwestern G. & P. Co.*, 26 Okla. 13, 108 Pac. 386), or (3) that it does not prejudice the defendant (*Williams v. Randon*, 10 Tex. 74), (4) and is not inconsistent with the cause of action originally stated (*Walker v. Howard*, 34 Tex. 478), or (5) that the plaintiff does not substitute an entirely new cause of action. *Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696; *Montgomery T. Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851; *Phillips v. Bradford*, 147 Ala. 346, 41 So. 657; *Crimm's Admrs. v. Crawford*, 29 Ala. 623, leading case.

[b] That (1) it is only when the amendment involves the statute of limitations that the right to amend is limited (see *Blake v. Minkner*, 136 Ind. 418, 36 N. E. 246), but (2) this is often considered as an additional reason for allowing the amendment, if it is otherwise proper. *McLaughlin v. West End St. R. Co.*, 186 Mass. 150, 71 N. E. 317.

10. **Ill.**—*De Moss v. Thomas*, 118 Ill. App. 467, allowing amendment changing action to recover for labor to one for money had and received.

Amendments To Conform to Proof.¹¹—The code provision allowing any amendment to conform the pleadings to the proof when the amendment does not substantially change the claim is held by some courts to forbid amendments changing the cause of action, when offered on the trial,¹² but by others to allow them.¹³

On Trial De Novo.—A party cannot amend so as to change his cause of action, on appeal from a justice's court where a trial is had de novo.¹⁴

B. WHERE AMENDMENT ADDS NEW COUNT.—Amendments by the addition of a new count which introduce a new cause of action are not allowable,¹⁵ although some cases permit an amendment setting

Ind.—Blake *v.* Minkner, 136 Ind. 418, 36 N. E. 246; Levy *v.* Chittenden, 120 Ind. 37, 22 N. E. 92, amendments are allowed "to almost any extent." **Minn.**—Myrick *v.* Purcell, 99 Minn. 457, 109 N. W. 995. **N. Y.**—Deyo *v.* Morss, 144 N. Y. 216, 39 N. E. 81; Brown *v.* Leigh, 12 Abb. Pr. (N. S.) 193, 49 N. Y. 78; Rowell *v.* Moeller, 91 Hun 421, 36 N. Y. Supp. 223, 70 N. Y. St. 797; Eighmie *v.* Taylor, 39 Hun 366. **N. D.**—Kerr *v.* Grand Forks, 15 N. D. 294, 107 N. W. 197; Rae *v.* Chicago, M. & St. P. R. Co., 14 N. D. 507, 105 N. W. 721. But see Finlayson *v.* Peterson, 11 N. D. 45, 89 N. W. 855; Mares *v.* Wormington, 8 N. D. 329, 79 N. W. 441. **Okla.**—Wynnewood Cotton Oil Co. *v.* Moore, 153 Pac. 633. **Ore.**—Zimmerle *v.* Childers, 67 Ore. 465, 136 Pac. 349; York *v.* Nash, 42 Ore. 327, 71 Pac. 59; Lieuellen *v.* Mosgrove, 37 Ore. 446, 61 Pac. 1022; Talbot *v.* Garretson, 31 Ore. 256, 49 Pac. 978. But see Hume *v.* Kelly, 28 Ore. 398, 406, 43 Pac. 380; Foste *v.* Standard Life & Acc. Ins. Co., 26 Ore. 449, 38 Pac. 617. **S. D.**—Driskill *v.* Rebbe, 22 S. D. 242, 117 N. W. 135; Murphy *v.* Plankinton Bank, 18 S. D. 317, 325, 100 N. W. 614. **Tex.**—Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Woods *v.* Huffman, 64 Tex. 98; Bender *v.* Bender (Tex. Civ. App.), 187 S. W. 735 (amendment is not allowable as a matter of right); Mitchell *v.* Lytle, 1 White & W. Civ. Cas., §702.

[a] After reversal and remand for further proceedings, a new cause of action may be introduced. Lieuellen *v.* Mosgrove, 37 Ore. 446, 61 Pac. 1022.

[b] In Wisconsin (1) the plaintiff cannot amend his complaint as of course, or by leave of court before trial so as to substitute a cause of action in equity for one in law, or

one on contract for one in tort or vice versa. Carmichael *v.* Argard, 52 Wis. 607, 9 N. W. 470. (2) A new and distinct cause of action accruing pendente lite cannot be brought in by amendment. Pape *v.* Carlton, 130 Wis. 123, 137, 109 N. W. 968; Shinnors *v.* Brill, 38 Wis. 648.

11. As to generally, see the title "Amendments and Joinders."

12. Freeman *v.* Grant, 132 N. Y. 22, 30 N. E. 247; Collyer *v.* Collyer, 50 Hun 422, 3 N. Y. Supp. 310, 21 N. Y. St. 118; Kuhn *v.* Brownfield, 34 W. Va. 252, 258, 12 S. E. 519, 11 L. R. A. 700.

[a] The municipal court of New York city is not within the application of this rule. Hawkes *v.* Burke, 34 Misc. 189, 68 N. Y. Supp. 798.

13. Kan.—Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987. Ohio.—Spice *v.* Steinruck, 14 Ohio St. 213. Okla.—E. Van Winkle G. & M. Wks. *v.* Brooks, 156 Pac. 1152.

[a] The limit of power of amendment is only exceeded by a departure from the subject of action. Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032. See Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987.

14. See 18 STANDARD PROC. 326, et seq.

15. Ala.—City Council *v.* Harris, 112 Ala. 614, 20 So. 955. Ill.—Eysenfeldt *v.* Illinois Steel Co., 165 Ill. 185, 46 N. E. 266. Ia.—Mather *v.* Butler County, 16 Iowa 59. Me.—Babb *v.* Oxford Paper Co., 99 Me. 298, 59 Atl. 290. Mo.—Red Diamond Clothing Co. *v.* Steidemann, 120 Mo. App. 519, 97 S. W. 220. N. H.—Thompson *v.* Phelan, 22 N. H. 339. Pa.—Smith *v.* Smith, 45 Pa. 403. Vt.—Brodek & Co. *v.* Hirschfield, 57 Vt. 12; Dewey & Co. *v.* Nicholas, 44 Vt. 24.

up a cause of action which is kindred in character to those already pleaded and which might have been originally joined.¹⁶

C. WHERE COURT GRANTS LEAVE TO AMEND. — A rule of court permitting the filing of a new declaration or complaint does not authorize an amendment stating a new cause of action.¹⁷ Nor does an order granting permission to file amendments to conform the pleadings to the proofs.¹⁸

D. WHERE CAUSE OF ACTION IS BARRED BY STATUTE OF LIMITATIONS. A new cause of action distinct from that averred in the declaration, cannot be set up by way of amendment,¹⁹ or by adding additional counts to the declaration,²⁰ after the time for suing upon such cause of action has expired by the statute of limitations. But in some jurisdictions, it is discretionary with the court whether such an amendment shall be allowed,²¹ although, in such case, the defendant cannot be deprived of his defense of the statute.²²

E. DETERMINING WHETHER NEW CAUSE OF ACTION IS INTRODUCED.
1. **Generally.** — A new cause of action, under the rule against allowing amendments introducing new causes of action, is, of course, one which has not been stated before.²³ In determining whether such a cause of action has been introduced each case must, of course, be decided on its own facts,²⁴ but there are several tests which are sometimes applied.²⁵ The decision is also sometimes influenced by the definition which the particular court gives to the term cause of

16. *Bowen v. Needles Nat. Bank*, 79 Fed. 49; *Freeman v. Webb*, 21 Neb. 160, 31 N. W. 656.

17. *Dewey & Co. v. Nicholas*, 44 Vt. 24.

18. *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011.

19. Cal.—*Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690; *Turner & Dahnken v. Bauer*, 28 Cal. App. 311, 152 Pac. 308. Ga.—*Smith v. Ardis*, 49 Ga. 602. Ill. *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266. Ia.—*Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119; *Box v. Chicago, R. I. & P. R. Co.*, 107 Iowa 660, 78 N. W. 694. Kan. *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938; *Atchison, T. & S. F. R. Co. v. Schroeder*, 56 Kan. 731, 44 Pac. 1093. Neb.—*Johnson v. American S. & R. Co.*, 80 Neb. 255, 116 N. W. 517. Pa.—*Allen v. Tuscarora Val. R. Co.*, 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096; *Mahoney v. Park Steel Co.*, 217 Pa. 20, 66 Atl. 90; *Grier v. Northern Assur. Co.*, 183 Pa. 334, 39 Atl. 10. Tex.—*Phoenix L. Co. v. Houston Water Co.* (Tex. Civ. App.), 59 S. W. 552.

[a] The court need not allow the

amendment with leave to plead the statute of limitations. *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690.

20. *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266; *Smith v. Smith*, 45 Pa. 403.

Adding new count setting up new cause of action, see *supra*, I, B.

21. *Mohr v. Lemle*, 69 Ala. 180; *Davis v. New York, L. E. & W. R. Co.*, 110 N. Y. 646, 17 N. E. 733; *Rowell v. Moeller*, 91 Hun 421, 36 N. Y. Supp. 223, 70 N. Y. St. 797; *Elting v. Dayton*, 67 Hun 425, 22 N. Y. Supp. 154; *Eighmie v. Taylor*, 39 Hun 366, *affirmed*, 105 N. Y. 680, 13 N. E. 931, *distinguishing* *Quimby v. Claffin*, 27 Hun (N. Y.) 611, as in that case the cause of action arose out of independent matters. See also *infra*, I, F, 2, b, (II), and I, G, 2.

22. See *infra*, I, G, 2.

23. *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266. See also *Bourdreaux v. Tucson G. E. L. & P. Co.*, 13 Ariz. 361, 114 Pac. 547, 30 L. R. A. (N. S.) 196.

24. *San Antonio & A. P. R. Co. v. Bracht* (Tex. Civ. App.), 157 S. W. 269.

25. See *infra*, I, E, 2.

action, as where treated as the subject matter of the action.²⁶

2. **Tests.**—Among the tests which have been applied in determining whether a new cause of action is stated are the following: Will a judgment on one be a bar to a judgment on the other?²⁷ Will the same evidence support each?²⁸ Is the same measure of damages applicable to both?²⁹ Is each claim open to the same pleas or de-

26. See *infra*, I, E, 3.

27. **U. S.**—*Meinshausen v. A. Gettelman Brew. Co.*, 133 Wis. 95, 113 N. W. 408, 13 L. R. A. (N. S.) 250. **Colo.** *East v. McClung*, 49 Colo. 502, 113 Pac. 517; *Messenger v. Northeutt*, 26 Colo. 527, 58 Pac. 1090; *Hinsdale Co. v. Crump*, 18 Colo. App. 59, 70 Pac. 159. **Ind.**—*Blake v. Minkner*, 136 Ind. 418, 426, 36 N. E. 246, 249; *United States Health & A. Ins. Co. v. Emerick*, 55 Ind. App. 591, 103 N. E. 435. **Ia.** *Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119. **Kan.**—*St. Louis & S. F. R. Co. v. Ludlum*, 63 Kan. 719, 66 Pac. 1045. **Mont.**—*Flaherty v. Butte Elec. R. Co.*, 43 Mont. 141, 115 Pac. 40. **N. Y.**—*Davis v. New York, L. E. & W. R. Co.*, 110 N. Y. 646, 17 N. E. 733; *Button v. Lusk*, 57 Hun 589, 10 N. Y. Supp. 582, 19 Civ. Proc. 111, 32 N. Y. St. 531. **N. D.**—*More v. Burger*, 15 N. D. 345, 107 N. W. 200. **Ore.** *Hume v. Kelly*, 28 Ore. 398, 43 Pac. 380. **S. C.**—*Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375. **Tex.**—*Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707; *San Antonio & A. P. R. Co. v. Bracht* (Tex. Civ. App.), 157 S. W. 269. **Va.**—*Irvine v. Barrett*, 119 Va. 587, 89 S. E. 904, Ann. Cas. 1917C, 62. **Wis.**—*Meinshausen v. A. Gettelman Brew. Co.*, 133 Wis. 95, 113 N. W. 408, 13 L. R. A. (N. S.) 250.

Judgment as bar, see 15 STANDARD PROC. 485, et seq.

[a] **Illustrations.**—A suit to compel specific performance of a contract for a sale of land is not a bar to an action for damages for nonperformance. Money may be due on a contract in instalments. An action for the first instalment may be defeated by proof of payment or set-offs. A second one upon the same contract, for another instalment, would be well founded. The owner of real estate being out of possession, may bring a possessory action at law to recover it, or, being in possession and having good title, he may sue for a trespass thereon, or to remove a cloud, and all

against the same person. In all these cases, the property and parties are the same, but the rights and wrongs giving rise to the actions and constituting the causes thereof, in the several cases are different. *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198.

28. **U. S.**—*Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70. **Colo.**—*Messenger v. Northeutt*, 26 Colo. 527, 58 Pac. 1090. **Ill.**—*Wabash R. Co. v. Bhymer*, 214 Ill. 579, 73 N. E. 879; *Chicago City R. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334. **Ind.**—*Blake v. Minkner*, 136 Ind. 418, 36 N. E. 246; *Williams v. Lowe*, 49 Ind. App. 606, 97 N. E. 809; *Thrall v. Gosnell*, 28 Ind. App. 174, 62 N. E. 462. **Ia.**—*Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119. **Mo.**—*Grigsby v. Barton*, 169 Mo. 221, 69 S. W. 296; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *Boeker v. Crescent B. & P. Co.*, 101 Mo. App. 429, 74 S. W. 385. **Ore.** *Hume v. Kelly*, 28 Ore. 398, 43 Pac. 380; *Foste v. Standard Life & Acc. Ins. Co.*, 26 Ore. 449, 38 Pac. 617. **S. C.** *Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375. **Tex.**—*Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707; *San Antonio & A. P. R. Co. v. Bracht* (Tex. Civ. App.), 157 S. W. 269; *Booth v. Houston Packing Co.* (Tex. Civ. App.), 105 S. W. 46.

29. **U. S.**—*Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70. **Colo.**—*Messenger v. Northeutt*, 26 Colo. 527, 58 Pac. 1090. **Ind.**—*Williams v. Lowe*, 49 Ind. App. 606, 97 N. E. 809. **Ia.**—*Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119. **Mo.**—*Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *Seovill v. Glanzer*, 79 Mo. 449. **Mont.**—*Flaherty v. Butte Elec. R. Co.*, 43 Mont. 141, 115 Pac. 40. **Ore.**—*Hume v. Kelly*, 28 Ore. 398, 43 Pac. 380. **S. C.**—*Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375. **Tex.**—*Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707; *San Antonio & A. P. R. Co. v. Bracht* (Tex. Civ. App.), 157 S. W. 269.

fenses?³⁰ It has been said that the true test is whether the effort is to introduce what is a new subject of controversy, or merely to amplify or correct the statement of the cause of action already set up.³¹ But the fact that two causes of action may be joined in separate counts is not a test by which to determine whether one cause can be substituted for another.³²

These tests taken separately may not always be decisive or infallible.³³ Indeed, causes of action concerning which some of the tests may be answered in the affirmative, may nevertheless be different; and conversely, causes of action may be identical although some of the tests may be answered in the negative; but no two causes of action can be identical if all the tests must be answered in the negative.³⁴

3. As Affected by Definition of Cause of Action.—In ascertaining whether the cause of action in an amendment is identical with that in an original pleading, the courts sometimes give different definitions to the expression "cause of action" from that which they give when merely determining whether a cause of action exists.³⁵

30. Ind.—*Williams v. Lowe*, 49 Ind. App. 606, 97 N. E. 809. **Ia.**—*Van Paten v. Waugh*, 122 Iowa 302, 98 N. W. 119. **Ore.**—*Hume v. Kelly*, 28 Ore. 398, 43 Pac. 380. **S. C.**—*Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375. **Tex.**—*Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707; *San Antonio & A. P. R. Co. v. Bracht* (Tex. Civ. App.), 157 S. W. 269; *Booth v. Houston Packing Co.* (Tex. Civ. App.), 105 S. W. 46.

[a] **Interpretation of Test.**—No more is meant than that the two demands must be such in their nature as to permit their joinder in the same suit. *Downer v. Shaw*, 23 N. H. 125. *Compare Scovill v. Glasner*, 79 Mo. 449.

31. Gensler v. Nicholas, 151 Mich. 529, 115 N. W. 458.

[a] **If the real parties in interest and the essential elements of the controversy remain the same, an amendment does not set up a new cause of action.** *Gibbs v. McCoy*, 70 Fla. 245, 70 So. 86.

Amplification of statement as a new cause of action, see *infra*, I, F, 1, b; (I).

32. Scovill v. Glasner, 79 Mo. 449.

33. See *Born v. Castle*, 22 Cal. App. 282, 134 Pac. 347, holding causes of action the same although the proof is not identical.

34. U. S.—*Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70. **Ind.**—*Williams v. Lowe*, 49 Ind. App. 606, 97

N. E. 809. **N. H.**—*Downer v. Shaw*, 23 N. H. 125.

35. See *Box v. Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 694.

[a] **By "cause of action"** (1), as here used, is meant, not the formal statement of the facts set forth in the petition as a cause of action, but the subject matter on which the plaintiff grounds his right of recovery. *Myers v. Moore*, 78 Neb. 448, 110 N. W. 989. (2) A "cause of action" is a legal right of action (*Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. [N. S.] 1003), or (3) the particular matter for which suit is brought (*Rochester v. Kennedy*, 229 Pa. 251, 273, 78 Atl. 133), or (4) that which produces the necessity for bringing action (*Doyle v. Southern Pac. Co.*, 56 Ore. 495, 108 Pac. 201, 211), or (5) the act or thing done or omitted to be done by one which confers a right of action on another (*Wabash R. Co. v. Bhymer*, 214 Ill. 579, 586, 73 N. E. 879; *Chicago City Ry. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334; *Metropolitan L. Ins. Co. v. People*, 106 Ill. App. 516), or (6) some right of the plaintiff and some violation of that right. *Insurance Co. v. Leader*, 121 Ga. 260, 48 S. E. 972; *Ft. Wayne Iron & S. Co. v. Parsell* (Ind. App.), 94 N. E. 770, 776.

[b] **In ejectment**, the cause of action has been held to be the possession of land by one to the exclusion of the one entitled thereto. *Rochester v. Kennedy*, 229 Pa. 251, 273, 78 Atl. 133.

F. APPLICATION OF RULES AND TESTS. — 1. Amendments to Pleadings. — *a. Amendments Changing Form of Action and Remedy.* (I.) **Generally.** — An amendment which merely changes the remedy does not offend the rule against introducing new causes of action,³⁶ although amendments changing the form of action are sometimes held to change the cause of action originally stated;³⁷ but it has been held that an amended petition which restates the gravamen of the charge does not set up a new cause of action although the original pleading was in tort and the amendment is on contract.³⁸

(II.) **From Law to Equity or Vice Versa.** — Although it has been held that the courts cannot ignore the inherent difference between law and equity in allowing amendments,³⁹ other courts which administer both

[c] **In an action for damages as a result of negligence,** (1) it has been held that the cause of action is the negligent act or acts which cause the injury (*Lee v. Republic Iron & Steel Co.*, 241 Ill. 372, 89 N. E. 655; *Chicago & A. R. Co. v. Reilly*, 75 Ill. App. 125; *Martin v. Pittsburg Rys. Co.*, 227 Pa. 18, 75 Atl. 837, 26 L. R. A. [N. S.] 1221), or (2) that it is the injury occasioned by the defendant (*Colo. Union Pac. R. Co. v. Brower*, 60 Colo. 579, 155 Pac. 312. **Kan.**—*Missouri Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343. **Ore.** *Doyle v. Southern Pac. Co.*, 56 Ore. 495, 108 Pac. 201, 211. **Tex.**—*Texas & P. R. Co. v. Johnson* (Tex. Civ. App.), 34 S. W. 186), (3) although on the other hand it has been held that the cause of action is not the injury wrongfully done (*Box v. Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 694), but (4) that it includes not only the injury, but all the facts fixing the responsibility. **Ia.**—*Box v. Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 694. **Neb.**—*Johnson v. American S. & R. Co.*, 80 Neb. 255, 116 N. W. 517. **N. C.**—*Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642.

36. *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; *Lackner v. Turnbull*, 7 Wis. 105.

37. **U. S.**—*Haas Bros. v. Hamburg-Bremen F. Ins. Co.*, 181 Fed. 916, 922, 104 C. C. A. 354. **Colo.**—*Givens v. Wheeler*, 6 Colo. 149. **Ga.**—*Gilleland v. Louisville & N. R. Co.*, 119 Ga. 789, 47 S. E. 336. **Kan.**—*Missouri Pac. Ry. Co. v. Henrie*, 63 Kan. 330, 65 Pac. 665.

See 1 STANDARD PROC. 925.

[a] "An action for tort cannot be for the same cause as an action on a

contract." *Haas Bros. v. Hamburg-Bremen F. Ins. Co.*, 181 Fed. 916, 922, 104 C. C. A. 354.

[b] **Trover and Assumpsit.**—In an action in trover, the addition of a count in assumpsit is the introduction of a new cause of action. *Mobile L. Ins. Co. v. Randall*, 74 Ala. 170.

[c] **The form of action does not control the right to amend.** If an amendment seeks a recovery upon the same state of facts no new cause of action is set up, but when the facts are essentially different and entirely change the nature of the right to recover from one *ex contractu* to one *ex delicto*, a new cause is set up. *Phoenix L. Co. v. Houston Water Co.* (Tex. Civ. App.), 59 S. W. 522.

38. *May v. Disconto Gesellschaft*, 211 Ill. 310, 71 N. E. 1001 (where both pleadings count on the same indebtedness); *Shoemaker v. Commercial U. A. Co.*, 72 Neb. 650, 101 N. W. 335.

39. **Colo.**—*Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826; *Gibbons v. Denver B. & C. Co.*, 17 Colo. App. 167, 67 Pac. 913. **Mass.**—*Darling v. Roarty*, 5 Gray 71; *Hayward v. Hapgood*, 4 Gray 437. **N. Y.**—See *Bockes v. Lansing*, 74 N. Y. 437, a referee cannot allow such an amendment. **Wis.** *North Side L. & B. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097; *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104.

[a] **An amendment changing an action on an unconditional promise to pay money into one based on an implied trust is not permissible.** *Jewett v. Malott*, 60 Kan. 509, 57 Pac. 100.

[b] **Enjoining Payment of Money by Officer.**—An amendment changing an action to enjoin payment of money by an officer into an action to recover money paid over by his successor sets

law and equity permit amendments claiming legal or equitable relief.⁴⁰

(III.) **From Tort to Contract or Vice Versa.** — An amendment from assumpsit to tort or vice versa does not state a new cause of action, where the substance of the action is not changed.⁴¹ Accordingly such amendments are permissible before trial,⁴² and sometimes even at trial.⁴³

b. *Amendments as to Subject Matter.* — (I.) **Generally.** — An amendment stating the same facts in a different form, which will best correspond with the nature of the complaint, the proof and the merits of the case, does not substitute a new and different cause of action.⁴⁴

forth a new cause of action. *Williams v. Hall*, 103 Ga. 796, 30 S. E. 606.

[c] **Injunction Suit Cannot Be Changed to Mandamus.**—*McNair v. Buncombe*, 93 N. C. 364, 367.

40. **Cal.**—*Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673. **Ia.**—*Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659; *Emmet v. Griffin*, 73 Iowa 163, 34 N. W. 792. **Minn.**—*Holmes v. Campbell*, 12 Minn. 221. **Miss.**—*Duff v. Snider*, 54 Miss. 245. **Neb.**—*Homan v. Hellman*, 35 Neb. 414, 53 N. W. 369. **N. C.**—*Robinson v. Willoughby*, 67 N. C. 84. **Tex.**—*Nye v. Gribble*, 70 Tex. 458, 8 S. W. 608, amending trespass to try title suit so as to obtain foreclosure of lien if plaintiff's title should prove to be a mortgage.

[a] **Illustrations.**—(1) An amendment changing an action from assumpsit for work and labor performed to one on a mechanic's lien, or vice versa (**Cal.**—*Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127. **Miss.**—*Duff v. Snider*, 54 Miss. 245. **Wis.**—*Lackner v. Turnbull*, 7 Wis. 105), or (2) an amendment which sets up a mortgage in an action on a note (*Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53), changes the remedy only but not the cause of action.

41. *Howard v. Chesapeake & O. R. Co.*, 11 App. Cas. (D. C.) 300.

42. **Mass.**—*Cunningham v. Hall*, 7 Gray 559, where there is an averment that both counts are for the same cause of action. **N. Y.**—*Hopf v. United States Bak. Co.*, 21 N. Y. Supp. 589, 48 N. Y. St. 729. **Tex.**—*San Antonio & A. P. R. Co. v. Bracht* (Tex. Civ. App.), 157 S. W. 269.

43. **Kan.**—*Culp v. Steere*, 47 Kan. 746, 28 Pac. 987. **Ohio.**—*Spice v. Steinruck*, 14 Ohio St. 213. **Okla.**—*E.*

Van Winkle G. & M. Wks. v. Brooks, 156 Pac. 1152.

Contra, *Neudecker v. Kohlberg*, 81 N. Y. 296; *North Side L. & B. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097; *Gates v. Paul*, 117 Wis. 170, 182, 94 N. W. 55; *Post v. Campbell*, 110 Wis. 378, 85 N. W. 1032.

44. **Ala.**—*Alabama C. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686. **Cal.**—*Annesley v. Victorino*, 30 Cal. App. 420, 158 Pac. 507 (citing local cases); *Union Lumber Co. v. J. W. Schouten Co.*, 25 Cal. App. 80, 142 Pac. 910. **Colo.**—*Kent Mfg. Co. v. Zimmerman*, 48 Colo. 388, 110 Pac. 187. **Del.**—*Goyce v. Philadelphia, B. & W. R. Co.*, 1 Boyce 293, 76 Atl. 56. **Ga.**—*Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385. **Ill.**—*Chicago City R. Co. v. Leach*, 182 Ill. 259, 55 N. E. 334; *Swift & Co. v. Foster*, 163 Ill. 50, 44 N. E. 837. **Ind.**—*Terre Haute R. R. v. Zehner*, 166 Ind. 149, 76 N. E. 169, 3 L. R. A. (N. S.) 277. **Me.**—*Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003. **Mass.**—*Ball v. Clafin*, 5 Pick. 303, 16 Am. Dec. 407. **Pa.**—*Cassell v. Cooke*, 8 Serg. & R. 268, 287, 11 Am. Dec. 610; *Diehl v. McGlue*, 2 Rawle 337. **Vt.**—*Daley v. Gates*, 65 Vt. 591, 27 Atl. 193. **Va.**—*Standard Paint Co. v. E. K. Vietor & Co.*, 120 Va. 595, 91 S. E. 752; *New River M. Co. v. Painter*, 100 Va. 507, 42 S. E. 300.

[a] **Where grounds of recovery or the original cause of action are restated.** *Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246; *Ft. Wayne Iron & S. Co. v. Parsell* (Ind. App.), 94 N. E. 770; *Taylor v. Canton Tp.*, 30 Pa. Super. 305

[b] **Where a new count was introduced stating the same acts in another form.** *Chicago, St. P. & K. C. Ry. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208; *Lambard v. Fowler*, 25 Me. 308.

Amendments which merely state evidential facts,⁴⁵ or matters in aggravation of damages,⁴⁶ which plead the facts with more particularity,⁴⁷ or which are a mere amplification of the original statement,⁴⁸ do not introduce new causes of action. Nor do amendments introduce new causes of action, which merely cure some imperfect or erroneous statement of the subject matter forming the basis of the cause of action,⁴⁹ which strike out words inaccurately describing the transaction sued on,⁵⁰ or which correct descriptions of property,⁵¹ or correct the names of persons mentioned,⁵² or which seek to make clear a description,⁵³ or to supply an averment of damages.⁵⁴ So also amendments do not change the cause of action which strike out irrelevant and redundant matter,⁵⁵ or conversely, which add averments which may be treated as redundant and surplusage.⁵⁶ And an assignment of further breaches of a duty allowing of several breaches does not state a new cause of action.⁵⁷

45. *East v. McClung*, 49 Colo. 502, 113 Pac. 517; *Grigsby v. Barton*, 169 Mo. 221, 69 S. W. 296.

46. *Garmong v. Henderson*, 112 Me. 383, 92 Atl. 322.

47. *Cal.*—*Henry v. Phillips*, 163 Cal. 135, 124 Pac. 837, Ann. Cas. 1914A, 39. *Colo.*—*Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809; *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041. *Ill.*—*Muren Coal & Ice Co. v. Howell*, 217 Ill. 190, 75 N. E. 469, cause of action for failure to keep tracks clear of obstructions. *Ia.*—*Kuhns v. Wisconsin, I. & N. Ry. Co.*, 76 Iowa 67, 40 N. W. 92. *Mo.*—*Longworth v. Kavanaugh*, 190 S. W. 315. *Neb.*—*Myers v. Moore*, 78 Neb. 448, 110 N. W. 989; *Citizens' Sav. Bank v. Pence*, 59 Neb. 579, 81 N. W. 623. *R. I.*—*Atlantic Mills v. Superior Court*, 32 R. I. 285, 79 Atl. 577. *Tex.*—*Meade v. Jones*, 13 Tex. Civ. App. 320, 35 S. W. 310.

48. *U. S.*—*Johnsonburg V. B. Co. v. Yates*, 177 Fed. 389, 101 C. C. A. 553; *Crotty v. Chicago G. W. R. Co.*, 169 Fed. 593, 598, 95 C. C. A. 91. *Colo.*—*Johnson v. Cummings*, 12 Colo. App. 17, 55 Pac. 269. *Ga.*—*National Surety Co. v. Farmers' State Bank*, 145 Ga. 461, 89 S. E. 581, 122 Am. St. Rep. 467; *Oglesby v. South Georgia G. Co.*, 18 Ga. App. 401, 89 S. E. 436. *Kan.*—*Wilber v. Ronnau*, 82 Kan. 171, 107 Pac. 772. *Me.*—*Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003. *Neb.*—*Witt v. Old Line Bankers' L. Ins. Co.*, 92 Neb. 763, 139 N. W. 639; *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, 80 N. W. 276. *N. H.*—*Steven-*

son v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155. *Tex.*—*Thouvenin v. Lea*, 26 Tex. 612; *Texas & P. R. Co. v. Hughes* (Tex. Civ. App.), 192 S. W. 1091; *Parlin & Orendorff Co. v. Glover*, 45 Tex. Civ. App. 93, 99 S. W. 592.

49. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155.

50. *Albany v. Cameron & Barkley Co.*, 121 Ga. 794, 49 S. E. 798.

51. *Gensler v. Nicholas*, 151 Mich. 529, 115 N. W. 458.

52. *Grace & Hyde Co. v. Strong*, 224 Ill. 630, 79 N. E. 967; *Wabash E. Co. v. Barrett*, 117 Ill. App. 315.

As to correcting misnomer as to parties, see *infra*, I, F, 2, b, (III) and c.

53. *Reynolds v. Lawrence*, 147 Ala. 216, 40 So. 576, 119 Am. St. Rep. 78.

54. *Lucchetti v. Philadelphia & R. R. Co.*, 233 Fed. 137; *National S. S. Co. v. Sheahan*, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782.

Adding allegation of damages in replevin, see *infra*, I, F, 1, b, (V), (F).

55. *Hitchcock v. Baere*, 17 Hun (N. Y.) 604; *Field v. Morse*, 8 How. Pr. (N. Y.) 47.

[a] The omission of epithets such as "wrongfully and unlawfully" does not change the cause of action. *St. Clair v. San Francisco & S. J. V. R. Co.*, 142 Cal. 647, 76 Pac. 485.

56. *Hasler v. Ozark Land & L. Co.*, 101 Mo. App. 136, 74 S. W. 465.

57. *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732,

Abandoning Counts.—Striking out one or more counts stating separate causes of action in a declaration or complaint, does not change the cause of action in the remaining counts.⁵⁸

(II.) **Where Original Complaint Is Insufficient or Demurrable.**—A complaint which states a cause of action imperfectly or defectively may be amended, even as to material matters, without stating a new cause of action.⁵⁹ But the statement of a defective cause of action cannot be amended.⁶⁰ According to the weight of authority, an amendment not attempting to state a new cause of action but merely adding essential matters or allegations which were omitted from the original complaint, does not add a new cause of action.⁶¹ But according to

20 S. E. 696, duty of railway to put in two cattle guards.

Setting up different acts of negligence, see *infra*, I, F, 1, b, (V), (A).

Assigning new breaches of contract, see *infra*, I, F, 1, b, (IV), (A).

58. *Downing v. Burnham*, 84 Vt. 149, 78 Atl. 789.

59. *Ariz.*—*Hagenauer v. Detroit Copper M. Co.*, 14 Ariz. 74, 124 Pac. 803, Ann. Cas. 1914C, 1016. *Colo.* *Denver & R. G. R. Co. v. Stinemeyer*, 59 Colo. 396, 148 Pac. 860. *Conn.* *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277. *Ill.*—*Lee v. Republic Iron & Steel Co.*, 241 Ill. 372, 89 N. E. 655; *Maier v. Chicago City Ry.*, 166 Ill. App. 500. *Ia.*—*Cahill v. Illinois Cent. R. Co.*, 137 Iowa 577, 115 N. W. 216. *Me.*—*Annis v. Gilmore*, 47 Me. 152. *Mo.*—*Williams v. Kansas City*, 177 S. W. 783; *Bricken v. Cross*, 163 Mo. 449, 453, 64 S. W. 99. *Neb.* *Witt v. Old Line Bankers' L. Ins. Co.*, 92 Neb. 763, 139 N. W. 639; *Merrill v. Wright*, 54 Neb. 517, 74 N. W. 955. *N. C.*—*Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642. *Ore.*—*Bailey v. Wilson*, 34 Ore. 186, 55 Pac. 973. *Tex.*—*Killebrew v. Stockdale*, 51 Tex. 529; *Scoby v. Sweatt*, 28 Tex. 713.

60. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277; *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642.

[a] The difference between a "defective statement of a good cause of action" and a "statement of a defective cause of action" is that the former can be amended by inserting other material allegations while the latter cannot be made a good cause by adding other allegations. *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642.

61. *Ala.*—*Simpson v. Memphis & C.*

R. Co., 66 Ala. 85, where a complaint based on an unconstitutional statute making a carrier liable irrespective of negligence was amended by setting up negligence. *Cal.*—*Ruiz v. Santa Barbara Gas & Elec. Co.*, 164 Cal. 188, 128 Pac. 330; *Rauer's Law & Collection Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427. *Ga.*—*Smith v. Georgia R. & B. Co.*, 87 Ga. 764, 13 S. E. 904; *Ellison v. Georgia R. & B. Co.*, 87 Ga. 691, 13 S. E. 809. *Ind.*—*Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191. *Me.*—*Pullen v. Hutchinson*, 25 Me. 249. *Md.*—*State v. Chesapeake B. R. Co.*, 98 Md. 35, 56 Atl. 385. *Mich.*—*Stanley v. Anderson*, 107 Mich. 384, 65 N. W. 247. *Mont.*—*Clark v. Oregon S. L. R. Co.*, 38 Mont. 177, 99 Pac. 298. *Neb.* *Johnson v. American Smelt. & Ref. Co.*, 80 Neb. 250, 114 N. W. 144; *Prokop v. Gourlay*, 65 Neb. 504, 91 N. W. 290; *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, 80 N. W. 276. *S. C.*—*Bell v. Floyd*, 64 S. C. 246, 42 S. E. 104. *Contra*, *Lilly v. Charlotte, C. & A. R. Co.*, 32 S. C. 142, 10 S. E. 932. *Tenn.*—*Love v. Southern Ry. Co.*, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471. *Tex.* *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 1062, 146 S. W. 332; *Texas & P. R. Co. v. Johnson* (Tex. Civ. App.), 34 S. W. 186.

[a] After sustaining a general demurrer to a complaint, an amendment adding essential allegations is permissible although the statute of limitations has run, as a new cause of action is not stated. *Clark v. Oregon S. L. R. Co.*, 38 Mont. 177, 99 Pac. 298; *Johnson v. American Smelt. & Ref. Co.*, 80 Neb. 250, 114 N. W. 144.

[b] The rule requiring "enough to amend by" does not mean the same as "enough to be good in substance without amendment." On the contrary the

some authorities, an amendment to a complaint wholly failing to state a cause of action adds a new cause of action,⁶² and is not permissible, in some states, after the lapse of the statutory period.⁶³ Although this statement is not strictly correct, as it involves the absurdity of asserting that the first paper stated a cause of action,⁶⁴ the effect of the rule is retained by holding that the statute of limitations may be pleaded to the amended pleading filed after the running of the statute.⁶⁵ An amendment to set up jurisdictional facts does not necessarily state a new cause of action,⁶⁶ but it may do so.⁶⁷

(III.) **Where Different Liability Is Set Up.**⁶⁸ — According to some authorities, an amendment which departs from law to law does not state a new cause of action if it is based upon the same state of facts as those originally pleaded,⁶⁹ although it may be otherwise if new

failure to be good in substance is the very reason why an amendment as to substance is needed. *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809.

[c] **A complaint alleging death due to negligence of fellow servants** may be amended by averring negligence of the master in selecting incompetent servants. *State v. Chesapeake B. R. Co.*, 98 Md. 35, 56 Atl. 385.

Whether filing of insufficient complaint constitutes the commencement of an action, see the title "**Suits and Actions.**"

62. **Ill.**—*Lee v. Republic Iron & Steel Co.*, 241 Ill. 372, 89 N. E. 655; *Illinois C. R. Co. v. Campbell*, 170 Ill. 163, 49 N. E. 314; *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266. **Ia.** *Cahill v. Illinois Cent. R. Co.*, 137 Iowa 577, 115 N. W. 216. **Kan.**—*Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259. *Compare* *Hobson v. Ogden's Exrs.*, 16 Kan. 388. **Pa.**—*Grier v. Northern Assur. Co.*, 183 Pa. 334, 39 Atl. 10, dictum.

Amendment where wrong person instituted action, see *infra*, I, F, 2, b, (I).

Necessity for something to amend by, see 1 STANDARD PROC. 853.

63. *Klawiter v. Jones*, 219 Ill. 626, 76 N. E. 673; *Mackey v. Northern Mill Co.*, 210 Ill. 115, 71 N. E. 448; *Foster v. St. Luke's Hospital*, 191 Ill. 94, 60 N. E. 803; *Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259, where plaintiff failed to allege a consideration for his contract.

64. *Hagenauer v. Detroit Copper M. Co.*, 14 Ariz. 74, 124 Pac. 803, Ann. Cas. 1914C, 1016.

65. **Ariz.**—*Hagenauer v. Detroit Copper M. Co.*, 14 Ariz. 74, 124 Pac. 803, Ann. Cas. 1914C, 1016; *Keppier v. Becker*, 9 Ariz. 234, 80 Pac. 334. See also *Boudreaux v. Tucson G. E. L. & P. Co.*, 13 Ariz. 361, 114 Pac. 547, 33 L. R. A. (N. S.) 196. **Ill.**—*Johnson v. Perkins*, 167 Ill. App. 611. *Compare* Illinois cases cited *supra*, this section. **Kan.**—*Elrod v. St. Louis & S. F. R. Co.*, 84 Kan. 444, 113 Pac. 1046; *Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259. **Mo.**—*Bricken v. Cross*, 163 Mo. 453, 64 S. W. 99.

Pleading statute of limitations to new cause of action, see *infra*, I, G, 2.

66. *Knight v. Quiney, O. & K. C. R. Co.*, 120 Mo. App. 311, 322, 96 S. W. 716.

67. *Knight v. Quiney, O. & K. C. R. Co.*, 120 Mo. App. 311, 322, 96 S. W. 716. See 17 STANDARD PROC. 915.

68. **Amendment as to parties**, see *infra*, I, F, 2.

Amendment changing form of action, see *supra*, I, F, 1, a, (I).

69. **U. S.**—*Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134. **Ala.**—*Townes v. Dallas Mfg. Co.*, 154 Ala. 612, 45 So. 696; *Alabama C. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686. **Me.**—*Brewer v. East Machias*, 27 Me. 489. **N. C.**—*Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642.

[a] In *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134, a parent sued in her individual capacity as sole surviving parent and as sole beneficiary for damages for the death of her unmarried son, averring the

facts are set up.⁷⁰ But according to other authorities it is held that

death resulted from negligence of the company and by reason of defects in one of its engines and setting up the law of Kansas. In her amended petition she set up the same facts and sued in her representative capacity under the federal employers' liability act. It was held that no new cause of action was set up. The court was presumed to be cognizant of the federal statute and to know that with reference to the liability of interstate carriers the federal statute superseded the state statute. The reference to the state statute did not vitiate the pleading any more than a reference to any other repealed statute. The court distinguished *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 983, in which the original petition was based on the common law of master and servant and averred that the injury was due to negligence in knowingly employing an incompetent fellow servant. The amendment eliminated the charge of incompetency of the servant and relied on the negligence of a fellow servant under the statute of a sister state. A new cause of action was stated as the amendment set up a different state of facts as well as a different rule of law as the ground of action. It was necessary to plead the statute as the action arose in a sister state. Accordingly in the *Wulf* case it was held "Since in the present case the federal statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, the decision in the *Wulf* case is not controlling," and a new cause of action is not introduced. But as to the ground on which the *Wulf* case was distinguished, the court in the *Wulf* case says (page 295): "It is argued, however, that as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law." Consequently it would seem

that the *Wulf* case overrules the *Wyer* case.

[b] Not even if some additional specification of negligence to an action for damages as a result of negligence is set up. *Alabama Consol. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686. As to addition of specifications of negligence, see *infra*, I, F, 1, b, (V), (A).

[c] An amendment alleging the nature of the law where the transaction took place which was omitted by inadvertence does not add to or change the cause of action. *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642. See *Lustig v. New York, L. & E. & W. R. Co.*, 65 Hun 547, 20 N. Y. Supp. 477, 48 N. Y. St. 916.

[d] In an action by one town against another on *indebitatus assumpsit* for materials furnished a pauper, an amendment showing liability under a statute relating to support of paupers does not introduce a new cause of action. *Brewer v. East Machias*, 27 Me. 489.

[e] In an action for damages for trespass, an amendment which asks double or treble damages under statute does not introduce a new cause of action. *Idaho*.—*Eklund v. B. R. Lewis Lumber Co.*, 13 Idaho 581, 92 Pac. 532. *Me*.—*Mitchell v. Chase*, 87 Me. 172, 32 Atl. 867, trespass for injuries caused by dog. *Utah*.—*Rhemke v. Clinton*, 2 Utah 230. But see: *Mo*.—*Holliday v. Jackson*, 21 Mo. App. 660. *N. H.* *Melvin v. Smith*, 12 N. H. 462. *Pa*. *Fairechild v. Dunbar Furnace Co.*, 128 Pa. 485, 18 Atl. 443.

[f] In an action on a note charging defendant as indorser, an amendment alleging he was a co-obligor does not change the cause of action. *Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454, L. R. A. 1916D, 220.

70. *Rowell v. Janvrin*, 69 Hun 305, 23 N. Y. Supp. 481, 53 N. Y. St. 312; *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198. See *Heins v. Savannah, F. & W. Ry. Co.*, 114 Ga. 678, 40 S. E. 710 (actions based on liability as lessor of railroad and upon liability for negligence of servants); *Central of Georgia Ry. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134. But see *Gatta v. Philadelphia, B. & W. R. Co.*, 1 Boyce (Del.) 293, 76 Atl. 56, where plaintiff

an amendment states a new cause of action if it departs from law to law.⁷¹

alleged himself to be an employe of the defendant railroad and then amended stating he was employed by the Pullman company.

[a] **Illustrations.**—(1) Action based on master and servant doctrine where liability as owner of premises is set up (*Westover v. Hoover*, 94 Neb. 596, 143 N. W. 946, 48 L. R. A. [N. S.] 984), or (2) where negligence of a fellow servant is set up (*Atchison, T. & S. F. Ry. Co. v. Schroeder*, 56 Kan. 731, 44 Pac. 1093, the amendment is permissible but the statute of limitations may be pleaded against it. See also *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 983); (3) where an action based on simple negligence of the defendant is changed to one based on the negligence of his servants (*Freeman v. Central of Ga. R. Co.*, 154 Ala. 619, 45 So. 898); (4) where an action for injuries based on a carrier's duty to pedestrians is changed to one based on its duty to its passengers. *Martin v. Pittsburgh Rys. Co.*, 227 Pa. 18, 75 Atl. 837, 26 L. R. A. (N. S.) 1221.

[b] **The amendment to a pleading for death under a state employer's liability act** which states facts showing the deceased was killed while engaged in interstate commerce so as to bring him within the federal statute sets out new facts and therefore introduces a new cause of action. *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 57 S. E. 198. See also *Allen v. Tuscarora Val. R. Co.*, 229 Pa. 97, 78 Atl. 34, 140 Am. St. Rep. 714, 30 L. R. A. (N. S.) 1096.

[c] **In an action by husband and wife for damages to wife**, an amendment on death of the wife in which the husband sues in his own right for injury resulting from her death is a statement of a new cause of action. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503.

[d] **Where petition alleged injury by defendant's predecessor and amendment alleged injury by defendant**, a new cause of action is stated. *Johnson v. American S. & R. Co.*, 80 Neb. 255, 116 N. W. 517.

[e] **Where action to recover excess paid for freight under statute is**

amended to add a common count, a new cause of action is set up. *Parmelee v. Savannah, F. & W. Ry.*, 78 Ga. 239, 2 S. E. 686.

[f] **In action to recover the value of property destroyed by city to stop a fire under statute**, an amendment setting up a cause of action for destruction by rioters under another statute making the city liable therefor sets up a new cause of action. *Farmer v. Portland*, 63 Me. 46.

Wrongful Death.—As to amendments changing action for loss of services to one for damages to plaintiff as next of kin for wrongful death, see 6 STANDARD PROC. 434.

71. Ga.—*Bolton v. Georgia Pac. Ry. Co.*, 83 Ga. 659, 10 S. E. 352. **Kan.** *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938. **Pa.**—*Allen v. Tuscarora Val. R. Co.*, 229 Pa. 97, 78 Atl. 34, 140 Am. St. Rep. 714, 30 L. R. A. (N. S.) 1096.

[a] **Applying Tests.**—It is true both pleadings allege the same injury, but they are founded on different rights, and testimony which would support one will not support the other, and different rules as to measurement of damages apply. *Kansas City v. Hart*, 60 Kan. 684, 694, 57 Pac. 938.

[b] **As where an amendment to a pleading founded upon a common law liability sets up a liability under a statute, or vice versa.** **U. S.**—See *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 983; *Lucchetti v. Philadelphia & R. R. Co.*, 233 Fed. 137. But see federal cases *supra*, this section. **Ga.**—*Charleston & W. C. R. Co. v. Miller*, 113 Ga. 15, 38 S. E. 338; *Bolton v. Georgia Pac. R. Co.*, 83 Ga. 659, 10 S. E. 352; *Exposition Cotton Mills v. Western & A. R. Co.*, 83 Ga. 441, 10 S. E. 113 (action against connecting carrier); *Yesbik v. Central of Georgia R. Co.*, 19 Ga. App. 252, 91 S. E. 274; *Southern R. Co. v. Waxelbaum Prod. Co.*, 19 Ga. App. 64, 90 S. E. 987. **Kan.**—*Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938. **Mo.** *Hansberger v. Pacific R. Co.*, 43 Mo. 196, action against carrier for injury to cattle on tracks. **N. D.**—See *Rae v. Chicago, M. & St. P. R. Co.*, 14 N. D. 507, 105 N. W. 721. **Pa.**—*Allen*

(IV.) **Actions Ex Contractu.**—(A.) **IN GENERAL.**—Where the gravamen of an action is the breach of contract, an amendment setting up a breach in a different form does not amount to a change in the nature of the action.⁷² And amendments merely correcting mistakes or defects of statement as to the contract do not change the cause of action within the meaning of the rule.⁷³ The same is true of amendments rendering general averments more specific,⁷⁴ setting out additional

v. Tuscarora Val. R. Co., 229 Pa. 97, 78 Atl. 34, 140 Am. St. Rep. 714, 30 L. R. A. (N. S.) 1096.

[c] **Where an Amendment Departs From Statute to Statute.**—*Hughes v. New York O. & W. R. Co.*, 158 App. Div. 443, 143 N. Y. Supp. 603, where it was sought to bring an action instituted under the state law within a federal law. *Compare Miller v. Erie R. Co.*, 109 App. Div. 612, 96 N. Y. Supp. 244, disallowing an amendment to a complaint for negligence setting up the giving of notice required by the employers' liability act.

72. *Ala.*—*Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 304, 7 So. 762, 18 Am. St. Rep. 119. *Cal.*—*Hughes v. Chung Sun Tung Co.*, 28 Cal. App. 371, 154 Pac. 299. *Ga.*—*Dundee Woollen Mills v. Edison*, 17 Ga. App. 245, 86 S. E. 414. *Neb.*—*Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. M. Co.*, 96 Neb. 458, 147 N. W. 1128. *Pa.* *Yost v. Eby*, 23 Pa. 327; *Stewart v. Kelly*, 16 Pa. 160, 55 Am. Dec. 487.

[a] "In actions ex contractu, so long as the plaintiff adheres to the original instrument or contract on which the declaration is founded, an alteration of the grounds of recovery on that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action." *Coxe v. Tilghman*, 1 Whart. (Pa.) 282, 287, *quoted in Wilhelm's Appeal*, 79 Pa. 120, and *Yost v. Eby*, 23 Pa. 327.

[b] **Illustrations.**—In an action on a contract of sale, a declaration alleging a delivery may be amended without changing the cause of action by alleging a tender and a refusal of the defendant to receive. *Stewart v. Kelly*, 16 Pa. 160, 55 Am. Dec. 487. To same effect, see *Hughes v. Chung Sun Tung Co.*, 28 Cal. App. 371, 154 Pac. 299.

73. See *Wilson v. Jamieson*, 7 Pa. 126 (where note was alleged to be by defendant and the amendment showed

the note to be by another with the defendant as surety), and the cases cited *infra*, this note.

[a] **Thus** (1) an amendment which changes the alleged date of the contract (*Ind.*—*Miller v. State*, 42 Ind. App. 630, 86 N. E. 493. *Me.*—See *Garmong v. Henderson*, 112 Me. 383, 92 Atl. 322. *N. H.*—*Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155. *Pa.* *Little v. Fairchild*, 195 Pa. 614, 46 Atl. 133. *S. C.*—*American Cotton Oil Co. v. Saluda Oil Mill Co.*, 105 S. C. 317, 89 S. E. 1067. *Va.*—*Standard Paint Co. v. E. K. Viator & Co.*, 120 Va. 595, 91 S. E. 752), (2) the sum to be paid (*Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155; *Rabinowitz v. Smith Co.* [Tex. Civ. App.], 190 S. W. 197), or (3) any particular of the matter to be performed (*Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155), or (4) the time (*San Jose S. D. Bank v. Bank of Madera*, 156 Cal. 38, 103 Pac. 225 [where time of maturity was changed]; *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155), or (5) manner (*Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155) of performance does not change the cause of action within the meaning of the rule.

[b] **Change in description of contracting parties** does not violate rule. *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827; *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661.

[c] **Contract for Benefit of Another.** Where a petition sets up a contract made with the plaintiff, an amendment setting up that the contract was made with another for plaintiff's benefit does not set up a new cause of action. *Hankins v. Young*, 174 Iowa 383, 156 N. W. 380. See also *Dilcher v. Neilany*, 52 Misc. 364, 102 N. Y. Supp. 264.

74. *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40. See also *supra*, I, F, 1, b, (1).

provisions of the contract sued on,⁷⁵ or of amendments stating the damage sustained in different form and words,⁷⁶ or inserting the amount of the plaintiff's claim where the sum was originally left blank.⁷⁷ And amendments inserting the words "for a valuable consideration,"⁷⁸ striking out allegations of fraud,⁷⁹ or striking out a recital of consideration from a petition on a sealed note,⁸⁰ do not set up new causes of action. If the authority of defendant's agent is not shown, an amendment setting up facts amounting to an estoppel to deny agency does not introduce a new cause of action.⁸¹

(B.) AMENDMENT SEEKING RECOVERY ON DIFFERENT CONTRACT. — An amendment attempting to recover on a different contract from that originally set up constitutes a new cause of action,⁸² as does one setting up new

75. *Sweet v. Richvale Land Co.*, 29 Cal. App. 111, 154 Pac. 608; *Thouvenin v. Lea*, 26 Tex. 612; *Silver Valley H. C. v. Evans & Co.* (Tex. Civ. App.), 190 S. W. 794.

76. *International H. Co. v. Lanpher* (Mo. App.), 183 S. W. 1105.

77. *Burleigh & Co. v. Merrill*, 49 N. H. 35.

78. *Frey v. Vignier*, 145 Cal. 251, 78 Pac. 733.

79. *Hitchcock v. Baere*, 17 Hun (N. Y.) 604; *Field v. Morse*, 8 How. Pr. (N. Y.) 47, the allegation is unnecessary.

80. *Prontaut v. H. C. Lorick & Co.*, 17 Ga. App. 495, 87 S. E. 716.

81. *First Nat. Bank v. American Bangor Slate Co.*, 229 Pa. 27, 77 Atl. 1100.

82. Colo.—See *Adamson v. Bergen*, 15 Colo. App. 396, 62 Pac. 629. Ga. *Oliver v. Empire L. Ins. Co.*, 145 Ga. 603, 89 S. E. 685; *Moore v. Smith*, 121 Ga. 479, 49 S. E. 601. Ill.—*Phelps v. Illinois Cent. R. Co.*, 94 Ill. 548, contract for failure to receive and carry goods and one for failure to carry and safely deliver them. Ia.—*Van Patten v. Waugh*, 122 Iowa 302, 98 N. W. 119, an amendment to a claim based on ownership of a note which sets up that claimant is a surety thereon is a different cause of action. Ore. *Bailey v. Wilson*, 34 Ore. 186, 55 Pac. 973 (an account stated to one on an open account); *Poste v. Standard Life & Acc. Ins. Co.*, 26 Ore. 449, 38 Pac. 617, an account for labor and services and an account stated. Pa.—*Reitzel v. Franklin*, 5 Watts & S. 33. Vt.—*Broddek & Co. v. Hirschfield*, 57 Vt. 12 (contract of sale to defendant and contract of guaranty); *Dewey & Co. v. Nicholas*, 44 Vt. 24, contract for

goods sold and delivered and one for work and labor. Wyo.—*Royal Ins. Co. v. O. L. Walker L. Co.*, 24 Wyo. 59, 155 Pac. 1101, 1103, Ann. Cas. 1917E, 1174, holding words "contract to insure" and "contract of insurance" were used interchangeably.

[a] Illustrations.—(1) A contract made with plaintiff and a contract made with plaintiff's assignor (*Bigham v. Talbot*, 63 Tex. 271), or (2) other person (*Thayer v. Farrell*, 11 R. I. 305), (3) are distinct, as is a cause of action in which plaintiff claims as transferee or assignee and one in which he claims as an original contracting party. *Ivy Coal & Coke Co. v. Long*, 139 Ala. 535, 36 So. 722. But (4) in an action by a party on a contract made with another, an amendment setting up an assignment to the plaintiff does not introduce a new cause of action. *McCarn v. Rivers*, 7 Iowa 404.

[b] Where amendment counted on renewals of a contract as distinct contracts, a new cause of action is stated. *Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. 754.

[c] Amendment relying on an indorsement of a life insurance policy which makes plaintiff the beneficiary, and reducing the amount claimed does not introduce a new cause of action. *American Nat. Ins. Co. v. Burnside* (Tex. Civ. App.), 175 S. W. 169.

[d] In an action by a personal representative on the common counts in which he alleges a promise to himself, an amendment setting up a note to his intestate does not state a new cause of action. *Spear's Admr. v. Armstrong* (Vt.), 84 Atl. 817.

[e] Breach of Promise.—As each protestation of a promise of marriage

items and seeking a recovery on them also.⁸³ But allegations which set out changes provided for in the contract counted on,⁸⁴ or which set up a special agreement respecting the time of maturity of a contract,⁸⁵ do not introduce a new cause of action.

(C.) INTRODUCING OR SUBSTITUTING AN IMPLIED OR EXPRESS CONTRACT. The fundamental facts involved in a transaction being unchanged, an amendment does not change the cause of action which changes a complaint based on express contract to one based on implied contract, or which introduces a count on implied contract, or vice versa,⁸⁶ although there are cases in conflict with this rule.⁸⁷ Of course, if it affirmatively appears that common counts are intended to present new causes of action they cannot be added by amendment.⁸⁸

(V.) Actions Ex Delicto. — (A.) ACTIONS FOR DAMAGES FOR NEGLIGENCE.⁸⁹

does not constitute a new contract, an amendment in a breach of promise case which sets up a promise at an earlier time and another place and seduction and pregnancy does not set up a new cause of action. *Garmong v. Henderson*, 112 Me. 383, 92 Atl. 322.

83. *Willoughby v. Atkinson Furn. Co.*, 93 Me. 185, 44 Atl. 612, where in the amendment plaintiff sought to recover on a quarter's rent not originally declared on.

84. *People's Lumber Co. v. Gillard*, 5 Cal. App. 435, 90 Pac. 556.

85. *San Jose S. D. Bank v. Bank of Madera*, 156 Cal. 38, 103 Pac. 225.

86. **U. S.**—See *Tiernan v. Woodruff*, 5 McLean 135, 23 Fed. Cas. No. 14,027. **Cal.**—*Roullard v. Gray*, 30 Cal. App. 757, 159 Pac. 457. **Ga.**—*Gray v. Bass*, 42 Ga. 270. **Kan.**—*School Dist. No. 2 v. Boyer*, 46 Kan. 54, 26 Pac. 484. **Mass.** *Smith v. Palmer*, 6 Cush. 513. **Mo.** *Gunther Bros. & Co. v. Aylor*, 92 Mo. App. 161. **Nev.**—*Tucker v. Virginia City*, 4 Nev. 20. **N. H.**—*Brackett v. Crooks*, 24 N. H. 173; *Downer v. Shaw*, 23 N. H. 125, adding a count for money had and received to a count on a note. **N. Y.**—*Turnow v. Hochstadter*, 7 Hun 80, substituting count for services rendered. **Pa.**—*Yost v. Eby*, 23 Pa. 327; *Robinson v. Taylor & Co.*, 4 Pa. 242. **Vt.**—*Vaughn v. Rugg*, 52 Vt. 235.

[a] Illustrations.—(1) Where a complaint on a note is amended by setting forth an action for goods sold and delivered (*Roullard v. Gray*, 30 Cal. App. 757, 159 Pac. 457); (2) Where a complaint on an account stated is amended to set up a cause of action on the contract out of which the action arose (*Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978); (3) where a complaint for goods sold is amended by adding

a count for an account stated covering the same transaction (*Union Lumber Co. v. J. W. Schouten Co.*, 25 Cal. App. 80, 142 Pac. 910), or (4) by adding a count on a promissory note (*Brackett v. Crooks*, 24 N. H. 173); (5) where in a complaint containing counts for money had and received and for conversion, the common counts are set up. *Nashville, C. & St. L. R. Co. v. Abramson-Boone Prod. Co. (Ala.)*, 74 So. 350. (6) In an action on an account annexed, where an amendment by adding a count for goods bargained and sold is made. *Wade v. Curtis*, 96 Me. 309, 52 Atl. 762.

[b] If a complaint upon an express contract contains all the facts necessary to support a judgment on quantum meruit, an amendment so as to aver a quantum meruit or setting up an additional count in quantum meruit does not state a new cause of action. *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Turner v. Bauer*, 28 Cal. App. 311, 152 Pac. 308; *Merchants' C. Agency v. Gopcevic*, 23 Cal. App. 216, 137 Pac. 609; *Idelson v. Robinson*, 27 Colo. App. 507, 150 Pac. 322.

87. *Green v. Hoppe* (Tex. Civ. App.), 175 S. W. 1117 (citing local cases); *Booth v. Houston Pack. Co.* (Tex. Civ. App.), 105 S. W. 46; *Meinshausen v. A. Gettelman Brew. Co.*, 133 Wis. 95, 113 N. W. 408, 13 L. R. A. (N. S.) 250. Compare *Kretser v. Cary*, 52 Wis. 374, 9 N. W. 161; *Schieffelin v. Whipple*, 10 Wis. 81.

88. *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

89. Changing liability from common law to statute, see *supra*, I, F, 1, b, (III).

(1.) *In General.* — An amendment changing a misdescription of the contract, pleaded by way of inducement in an action *ex delicto*, does not change the cause of action.⁹⁰ But an amendment changing a cause of action for negligence to one for nuisance changes the cause of action.⁹¹

(2.) *Amendment as to Negligent Acts.* — An amendment does not introduce a new cause of action which is substantially a repetition of the original allegation of negligence,⁹² or which specifies more definitely the ground of negligence,⁹³ or which characterizes the defendant's act as careless or negligent,⁹⁴ or which corrects the pleader's misconception of the facts occurring at the time of the injury,⁹⁵ or which corrects a description of the instrument causing the injury.⁹⁶ The same has been held to be true of amendments setting up wantonness and willfulness.⁹⁷ If there is no change in the injury originally sued on, an amendment alleging other negligent acts contributing thereto does not state a new cause of action;⁹⁸ but some cases have arrived at an

90. U. S.—*Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485. Ala.—*Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119. Kan.—*Kansas Pac. Ry. Co. v. Salmon*, 14 Kan. 512. W. Va.—*Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700, in action for malpractice of physician.

[a] Where the destination in a contract of carriage, which was misdescribed, was changed. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; *Fell v. Union Pac. R. Co.*, 32 Utah 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1.

91. *Fisher v. Rankin*, 55 Hun 606, 7 N. Y. Supp. 837, 25 Abb. N. C. 191, 27 N. Y. St. 582, 5 Silv. 265.

92. Ark.—*St. Louis, I. M. & S. R. Co. v. Goss*, 92 Ark. 372, 123 S. W. 390. D. C.—*District of Columbia v. Frazer*, 21 App. Cas. 154. Mont.—*Knuckey v. Butte Elec. R. Co.*, 45 Mont. 106, 122 Pac. 280.

93. Ala.—*Birmingham R. L. & P. Co. v. Jung*, 161 Ala. 461, 49 So. 434; *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 304, 7 So. 762, 18 Am. St. Rep. 119. Kan.—*Ballard v. Kansas C., M. & O. R. Co.*, 95 Kan. 343, 148 Pac. 764; *Missouri Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343. Me.—*Babb v. Oxford Paper Co.*, 99 Me. 298, 59 Atl. 290; *Chapman v. Nobleboro*, 76 Me. 427. N. Y.—*Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226. N. C.—*Williams v. May*, 173 N. C. 78, 91 S. E. 604.

Pa.—*Mahoney v. Park Steel Co.*, 217 Pa. 20, 66 Atl. 90. W. Va.—*Merrill v. Marietta Torpedo Co.*, 92 S. E. 112.

94. *Southern R. Co. v. Horine*, 121 Ga. 386, 49 S. E. 285.

95. Mich.—*Leonard v. Leahy*, 169 Mich. 406, 135 N. W. 335. R. I.—*Butler v. Rhode Island Co.*, 68 Atl. 425, where amendments described plaintiff's position differently and changed the direction in which his buggy was moving. Tex.—*Texas & N. O. R. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 155.

96. *Rick v. New York, C. & St. L. R. Co.*, 232 Pa. 553, 81 Atl. 650.

97. Cal.—*Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500. Colo.—*Missouri P. R. Co. v. Atkinson*, 23 Colo. App. 357, 129 Pac. 566. Ky.—*Louisville, C. & L. R. Co. v. Case's Admr.*, 9 Bush 728. Wis.—*See Williams v. North Wis. L. Co.*, 124 Wis. 328, 102 N. W. 589.

Contra, *Pitkin v. New York & N. E. R. Co.*, 64 Conn. 482, 490, 30 Atl. 772.

98. U. S.—*Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829. Ala.—*Louisville & N. R. Co. v. Travis*, 192 Ala. 453, 68 So. 342 (where, in an action for illness caused by tainted food, the amendment charged the food was eggs instead of oysters); *Atlanta & B. A. L. R. v. Wheeler*, 154 Ala. 530, 46 So. 262; *Alabama C. C. & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686. Ark.—*St. Louis, I. M. & S. R. Co. v. Power*, 67 Ark. 142, 53 S. W. 572, an action for negligently carrying plaintiff by her station in which an

opposite conclusion because of the different manner in which they define cause of action.⁹⁹

(3.) *Amendment as to Injury and Acts of Injured.*—The negligent act remaining the same, a new cause of action is not introduced by stating differently the mode or manner in which the negligence resulted in injury to the plaintiff,¹ or by setting up more fully the items of dam-

amendment set up intoxication of conductor and wanton running past station. **Colo.**—Union P. R. Co. v. Brower, 60 Colo. 579, 155 Pac. 312; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404. **Ga.**—Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; Harris v. Central R. R., 78 Ga. 525, 3 S. E. 355. **Ill.**—Swift & Co. v. Foster, 163 Ill. 50, 44 N. E. 837; Gassmann v. Hetzel, 175 Ill. App. 404 (action by employee); Muren C. & I. Co. v. Howell, 119 Ill. App. 209; Chicago City R. Co. v. Leach, 80 Ill. App. 354, reversed, 182 Ill. 359, 55 N. E. 334. But see Chicago & A. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826. **Ia.**—Kuhns v. Wisconsin, I. & N. Ry. Co., 76 Iowa 67, 40 N. W. 92. **Kan.** St. Louis & S. F. R. Co. v. Ludlum, 63 Kan. 719, 66 Pac. 1045. **Ky.**—Smith v. Bogenschutz, 14 Ky. L. Rep. 305, 19 S. W. 667, 20 S. W. 390; Greer v. Louisville & N. R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345. **Me.** Babb v. Oxford Paper Co., 99 Me. 298, 59 Atl. 290; Chapman v. Nobleboro, 76 Me. 427. **Mass.**—Berube v. Horton, 199 Mass. 421, 85 N. E. 474. **Mo.** Holtzclaw v. Chicago, B. & Q. R. Co. (Mo. App.), 190 S. W. 91. **Mont.** Flaherty v. Butte Elec. R. Co., 43 Mont. 141, 115 Pac. 40. **N. H.**—McIntire v. Eastern R. R., 58 N. H. 137, where declaration set up unsafeness of crossing and amendment set up negligence in managing the train. **N. Y.**—Davis v. New York, L. E. & W. R. Co., 110 N. Y. 646, 17 N. E. 733; Straus v. Buchman, 96 App. Div. 270, 89 N. Y. Supp. 226. **Ore.**—Doyle v. Southern Pac. Co., 56 Ore. 495, 108 Pac. 201, 211. **R. I.**—Chobanian v. Washburn Wire Co., 33 R. I. 289, 80 Atl. 394, Ann. Cas. 1913D, 730, note; Wilson v. New York, N. H. & H. R. Co., 18 R. I. 593, 29 Atl. 300. **S. C.**—Pickett v. Southern Ry., 74 S. C. 236, 54 S. E. 375. **S. D.**—Edwards v. Chicago, M. & St. P. R. Co., 21 S. D. 504, 110 N. W. 832. **Tex.**—Texas & P. R. Co. v. Myers (Tex. Civ. App.), 151 S. W. 337; Galveston, H. & S. A. R. Co. v. Perry, 38

Tex. Civ. App. 81, 85 S. W. 62; Caswell v. Hopson (Tex. Civ. App.), 47 S. W. 54.

[a] An alteration in the modes in which the defendant caused the injury by negligence is not an introduction of a new cause of action. Union Pac. R. Co. v. Brower, 60 Colo. 579, 155 Pac. 312. To same effect, see Kent Mfg. Co. v. Zimmerman, 48 Colo. 388, 110 Pac. 187; Flaherty v. Butte Elec. R. Co., 43 Mont. 141, 115 Pac. 40.

[b] If the original cause of action is wholly insufficient, the rule does not apply. Illinois Cent. R. Co. v. Campbell, 170 Ill. 163, 49 N. E. 314. See *supra*, I, F, 1, b, (II).

99. **Ill.**—Wabash R. Co. v. Bhymer, 214 Ill. 579, 73 N. E. 879; Chicago City R. Co. v. Leach, 182 Ill. 359, 55 N. E. 334; Gassmann v. Hetzel, 175 Ill. App. 404; Chicago & A. R. Co. v. Reilly, 75 Ill. App. 125. **Ia.**—Box v. Chicago, R. I. & P. Ry. Co., 107 Iowa 660, 78 N. W. 694, negligence in using an unimproved type of bumpers on trains and negligence in having bumpers out of repair. **La.**—Mercantile F. & M. I. Co. v. Cumberland T. & T. Co., 126 La. 621, 52 So. 851, where original petition alleged defective electric wiring outside a house and amendment alleged it inside. **Minn.**—Byard v. Palace Clothing House Co., 85 Minn. 363, 88 N. W. 998. **Pa.**—Mahoney v. Park Steel Co., 217 Pa. 20, 66 Atl. 90 (where amendment charged defects in another and different machine and failure to instruct plaintiff); Peterson v. Pennsylvania R. Co., 195 Pa. 494, 46 Atl. 112.

1. Mobile L. & R. Co. v. Portiss, 195 Ala. 320, 70 So. 136 (where the amendment changed the allegation of injury to cow "after its discovery on the track" to after "discovering it trying to cross the track"); Evanston v. Richards, 224 Ill. 444, 79 N. E. 673 (in which plaintiff tripped on loose boards in a sidewalk and fell, and the amendment alleged he stepped upon and broke through a defective board);

age suffered,² or by supplying a statement that plaintiff exercised due care.³

Place of Injury. — Where the allegation of place is material, an amendment charging the same acts of negligence at a different place from that alleged in the original pleading is held to charge a new cause of action.⁴ But an amendment merely making the description of the place more certain does not.⁵

(B.) **TRESPASS.** — New causes of action cannot be introduced by amendment in actions of trespass.⁶ But in trespass *quare clausum*, an amendment alleging any torts in the same close,⁷ or giving a more accurate description of the close⁸ is permissible, as it does not vary the defense.

(C.) **FRAUD AND DECEIT.** — In actions of fraud and deceit, amendments which introduce new causes of action are not allowed.⁹

(D.) **LIBEL AND SLANDER.**¹⁰ — To set up slanderous statements which do not purport to have been spoken at the same time or place or to the same persons as those originally alleged and which do not amplify them is to introduce a new cause of action.¹¹ But an amendment

Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437.

2. Ark.—Little Rock T. & E. Co. v. Miller, 80 Ark. 245, 96 S. W. 993. Mich. Leonard v. Leahy, 169 Mich. 406, 135 N. W. 335. Tex.—The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

3. Madl v. Chicago City R. Co., 121 Ill. App. 602; Cahill v. Illinois Cent. R. Co., 137 Iowa 577, 115 N. W. 216.

4. Gillmore v. Chicago, 224 Ill. 490, 79 N. E. 596 (an action for injury for failing to keep sidewalk in repair, in which the court distinguished Chicago City R. Co. v. McMeen, 206 Ill. 108, 68 N. E. 1093, which was for injury to a passenger by collision of street cars); Carlin v. Chicago, 177 Ill. App. 89, where a pipe was allowed to remain on the street.

5. Palmer v. Waterloo, 138 Iowa 296, 115 N. W. 1017.

6. See *infra*, this note.

[a] An amendment substituting an action of trover for an action of trespass cannot be made. Wilcox v. Sherman, 2 R. I. 540.

[b] In trespass *quare clausum* for taking away annual profits, the addition of a count for usurpation of the fee is not permissible. Bartlett v. Perkins, 13 Me. 87.

Claiming treble damages under amendment as stating new cause of action, see *supra*, I, F, 1, b, (III).

7. Cuminge v. Rawson, 7 Mass. 440,

where in addition to throwing down plaintiff's wall and fence, the erection of a stone wall was charged.

8. Cuminge v. Rawson, 7 Mass. 440; Gilman v. Cate, 56 N. H. 160.

9. Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

[a] An amendment introducing an additional false representation, in an action of deceit does not set up a new cause of action. Duffy v. McKenna, 82 N. J. L. 62, 81 Atl. 1101.

[b] Fraud and Mutual Mistake.—A cause of action on contract based on fraud and one based on mutual mistake are distinct. Connell v. El Paso G. M. & M. Co., 33 Colo. 30, 78 Pac. 677. See also Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757.

[c] A warranty may be set up. Culp v. Steere, 47 Kan. 746, 28 Pac. 987.

Striking allegations of fraud from actions on contract, see *supra*, I, F, 1, b, (IV), (A).

10. See generally the title "Libel and Slander."

11. Ala.—Mohr v. Lemle, 69 Ala. 180, it introduces a new cause of action but not "an entirely new cause of action." N. Y.—Weston v. Worden, 19 Wend. 648. N. C.—Hester v. Mullen, 107 N. C. 724, 12 S. E. 447. Pa. Smith v. Smith, 45 Pa. 403. Va.—Irvine v. Barrett, 119 Va. 587, 89 S. E. 904, Ann. Cas. 1917C, 62.

See also 18 STANDARD PROC. 941.

which merely inserts words which are embraced in those alleged and which are proved to have been actually spoken,¹² or which only changes the language in which the words were spoken,¹³ does not change the cause of action.

(E.) ACTIONS FOR LOSS OF SERVICES AND SOCIETY.—The general rules and tests under discussion apply in actions for loss of services and for loss of society.¹⁴

(F.) REPLEVIN, TROVER AND DETINUE. — Amendments setting up new causes of action are not generally allowable in replevin,¹⁵ detinue,¹⁶ or trover.¹⁷

(G.) MALICIOUS PROSECUTION. — Amendments introducing new causes

Contra, *Snediker v. Poorbaugh*, 29 Iowa 488.

12. Cal.—*Smullen v. Phillips*, 92 Cal. 408, 28 Pac. 442. Ind.—*Lister v. McNeal*, 12 Ind. 302. N. Y.—*Collyer v. Collyer*, 50 Hun 422, 3 N. Y. Supp. 310. Pa.—*Conroe v. Conroe*, 47 Pa. 198.

See also 18 STANDARD PROC. 941.

13. *Rahausen v. Barth*, 3 Watts (Pa.) 28. See also *Trower v. Roberts*, 30 Okla. 215, 120 Pac. 617.

14. See *infra*, this note.

[a] Death of son may be set up. *Bradford City v. Downs*, 126 Pa. 622, 17 Atl. 884.

[b] Charging Assault and Battery. In an action for loss of society of the wife due to fright resulting in a miscarriage occasioned by defendant engaging plaintiff in a combat in her presence, an amendment setting up that defendant hit the wife in the abdomen thereby causing injury resulting in miscarriage does not state a new cause of action. *Mulvay v. Hanes*, 76 W. Va. 721, 86 S. E. 758.

[c] Charging Criminal Conversation. An amendment to a declaration for enticing away a husband per quod which charges criminal conversation per quod does not state a new cause of action. *Daley v. Gates*, 65 Vt. 591, 27 Atl. 193.

15. Neb.—*Gosnell v. Webster*, 70 Neb. 705, 97 N. W. 1060, where amendment gives a more accurate description of the mortgage, a new cause is not stated. N. Y.—*Button v. Lusk*, 57 Hun 589, 10 N. Y. Supp. 582, 19 Civ. Proc. 111, 32 N. Y. St. 531, alleging the taking and detention are wrongful does not state a new cause. But see *Goddard v. Cassell*, 84 Hun 43, 31 N.

Y. Supp. 1044, 65 N. Y. St. 74. N. C. *King v. Dudley*, 113 N. C. 167, 18 S. E. 110.

See the title "Replevin."

[a] Changing an action of replevin to one of trover is permissible after the evidence is in when it appears that the plaintiff did not know that the defendant disposed of the property before action brought. *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110; *Ricciotto v. Clement*, 94 Cal. 105, 29 Pac. 414; *Dart v. Horn*, 20 Ill. 212.

[b] Amendment as to Plaintiff's Title.—*Messenger v. Northcutt*, 26 Colo. 527, 58 Pac. 1090.

[c] Setting Up Damages.—In replevin for property, an allegation embracing a claim for damages does not constitute a new cause of action, but an amendment seeking the recovery of money otherwise than as damages would constitute a new cause of action. *National S. S. Co. v. Sheahan*, 122 N. Y. 461, 466, 25 N. E. 858, 10 L. R. A. 782. See generally, I, F, 1, b, (I).

16. 7 STANDARD PROC. 482, and see *infra*, this note.

[a] Setting up wrongful taking (1) in an action for wrongful detention does not introduce a new cause under the code. *Willis v. De Witt*, 3 S. D. 281, 52 N. W. 1090. (2) It is otherwise, however, if the common law forms of action are preserved. *Harris v. Hillman*, 26 Ala. 380.

17. *Parker v. Rodes*, 79 Mo. 88 (changing trover to fraud and deceit is not permissible); *Tryon v. Miller*, 1 Whart. (Pa.) 11, in trover for bond, an amendment setting up conversion of instrument not under seal is not permissible. See the title "Trover and Conversion."

of action are not permissible in actions of malicious prosecution.¹⁸
 (H.) SEDUCTION AND RAPE. — Causes of action for seduction and rape are distinct causes of action.¹⁹

(I.) MALFEASANCE IN OFFICE. — New causes of action cannot be set up by way of amendment in actions against officers for failure to properly perform their duties.²⁰

(VI.) Actions Relating to Real Property. — New causes of action cannot be introduced by amendment in actions of ejectment,²¹ partition,²² in actions to quiet title,²³ or in actions of waste.²⁴ An amendment in a real action which embraces a different piece of land from that de-

18. See the title "Malicious Prosecution," and *infra*, this note.

[a] The addition of a cause of action for false imprisonment is not permissible. *Cumber v. Schoenfeld*, 16 Daly (N. Y.) 454.

[b] Changing to conspiracy is not permissible. *Ross v. Bates*, 2 Root (Conn.) 198.

Alleging malicious prosecution in a libel and slander case, see 18 STANDARD PROC. 941.

[c] But an amendment by omitting the allegation of want of probable cause and alleging that the imprisonment was illegally made with force may be made, as this does not substantially change the claim. *Spice v. Steinruck*, 14 Ohio St. 213. But see *Langrueter v. Iroquois Co.*, 10 Ohio N. P. (N. S.) 81.

19. *Van der Haas v. Van Domselar*, 56 Iowa 671, 10 N. W. 227.

20. See *infra*, this note.

[a] In an action for not retaining property attached for a stated time after rendition of judgment, an amendment setting up a new breach of duty, that of failure to return the execution, states a new cause of action. *Annis v. Gilmore*, 47 Me. 152.

[b] In an action against an officer for malfeasance of his deputy, an amendment setting up other acts of the officer himself instead of the deputy states a distinct cause of action. *Lambard v. Fowler*, 25 Me. 308. Compare *Bishop v. Williamson*, 11 Me. 495. As to setting up different liability, see *supra*, I, F, 1, b, (III).

21. *Sweet v. Richvale L. Co.*, 29 Cal. App. 111, 154 Pac. 608 (addition of allegation of a provision of the contract of purchase does not set up a new cause of action); *White v. Moss*, 67 Ga. 89, setting up issues as to cancellation of deeds and declaring a sale

void, etc. See also 7 STANDARD PROC. 1042.

Adding demise in name of new lessor as adding a new cause of action, see 7 STANDARD PROC. 1044.

[a] Amendment attacking sale of land does not set up new cause. *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826.

[b] Adverse possession may be set up. *Rochester v. Kennedy*, 229 Pa. 251, 273, 78 Atl. 133.

[c] Setting up an equitable title in plaintiff does not add a new cause of action where the complaint alleged title under certain deeds. *McCandless v. Inland Acid Co.*, 115 Ga. 968, 42 S. E. 449.

[d] Setting Up Right of Action in Another.—*Thomas v. Young*, 81 Conn. 702, 71 Atl. 1100. See also *Hughes v. McDivitt*, 102 Mo. 77, 83, 14 S. W. 660, 15 S. W. 756.

[e] An omission of the question of title and a reliance on the allegations of damages only is not the assertion of a new cause of action. *Gulf, C. & S. F. R. Co. v. Doran*, 2 Posey Unrep. Cas. (Tex.) 442.

[f] Changing ejectment to a suit for foreclosure of mortgage does not violate rule. *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; *Robinson v. Willoughby*, 67 N. C. 84.

22. See the title "Partition."

[a] Setting Up Different Title in Plaintiff.—*Haskins v. Glezen (R. I.)*, 55 Atl. 639.

23. See the title "Quieting Title."

[a] An amended pleading which gives the details of the defendant's claim does not on that account merely state a distinct cause of action. *Henry v. Phillips*, 163 Cal. 135, 124 Pac. 837, Ann. Cas. 1914A, 39; *Koch v. Wilcox*, 30 Cal. App. 517, 158 Pac. 1048.

24. See the title "Waste."

[a] Setting Up Different Ground of

scribed in the declaration sets up a new cause of action;²⁵ but one giving a more particular description of the land originally declared for,²⁶ or correcting a description,²⁷ does not.

(VII.) **Actions for Penalties.** — The question whether an amendment introduces a new cause of action sometimes arises in actions to recover penalties.²⁸

(VIII.) **Quo Warranto.** — Amendments changing the cause of action are not permitted in actions of quo warranto.²⁹

c. *Amendments as to Prayer of Relief.*³⁰ — Amendments to the prayer for relief do not set up or introduce new causes of action.³¹

2. **Amendment as to Parties.**³² — a. *Generally.* — A change of parties which would involve a change of the cause of action is not within the province of amendments.³³

Waste.—*Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

25. *Atkinson v. Amador & S. Canal Co.*, 53 Cal. 102; *Cilley v. Limerock R. Co.*, 107 Me. 117, 77 Atl. 776; *Wyman v. Kilgore*, 47 Me. 184.

[a] **Where Omitted by Mistake.** *Noyes v. Richardson*, 59 N. H. 490.

26. *Wyman v. Kilgore*, 47 Me. 184.

27. *Heilbron v. Heinlen*, 72 Cal. 376, 14 Pac. 24, ejection.

28. **U. S.**—*Venable Bros. v. Louisville & N. R. Co.*, 137 Fed. 981, action for penalty cannot be changed into an action on contract. **Colo.**—*Clough v. Rocky Mountain Oil Co.*, 25 Colo. 520, 55 Pac. 809, where the corporation was dropped as a party. **N. Y.**—*People v. Bremer*, 69 App. Div. 14, 74 N. Y. Supp. 570, in an action charging the keeping for sale of oleomargarine, an amendment charging the sale of it "as butter" changes the nature of the action.

See the title "**Penalties, Forfeitures and Fines.**"

29. *People v. Davidson*, 2 Cal. App. 100, 83 Pac. 161 (holding amendment did not change cause of action); *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Hunnicut v. State*, 75 Tex. 233, 238, 12 S. W. 106. See the title "**Quo Warranto.**"

30. See generally the title "**Prayer.**"

31. *Mullen v. McKim*, 22 Colo. 468, 474, 45 Pac. 416; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282.

[a] **Accordingly,** (1) amendments increasing the amount of damages sued for (**U. S.**—*Northrop v. Mercantile T. & D. Co.*, 119 Fed. 969; *Chamberlain v. Mensing*, 51 Fed. 511. **Mo.**—*Knight v. Quincy, O. & K. C. R. Co.*, 120 Mo. App. 311, 322, 96 S. W. 716. **S. C.**

Pickett v. Southern Ry., 74 S. C. 236, 54 S. E. 375; *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112, 629. **W. Va.**—*Merrill v. Marietta Torpedo Co.*, 92 S. E. 112; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 739, 20 S. E. 696), or (2) enlarging the scope of the recovery prayed for (*Johnson v. Carter*, 143 Iowa 95, 120 N. W. 320; *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526), (3) so as to demand other relief consistent with the cause of action described (**Cal.** *Myers v. Holton*, 9 Cal. App. 114, 98 Pac. 197. **Ga.**—*Jordan v. Downs*, 118 Ga. 544, 45 S. E. 439; *Williams v. Lancaster*, 113 Ga. 1020, 39 S. E. 471. **Ia.**—*Cook v. Chicago, R. I. & P. R. Co.*, 75 Iowa 169, 171, 39 N. W. 253. **Miss.**—*Belzoni Oil Co. v. Yazoo & M. V. R. Co.*, 94 Miss. 58, 47 So. 468. **Neb.**—*McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614. **Tex.**—*McIlhenny v. M. C. Lee & Co.*, 43 Tex. 205. **Wis.** *North Side L. & B. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097), or (4) striking out a prayer for relief to which the plaintiff is not entitled (*St. Clair v. San Francisco & S. J. V. R. Co.*, 142 Cal. 647, 76 Pac. 485; *Cook v. Chicago, R. I. & P. R. Co.*, 75 Iowa 169, 171, 39 N. W. 253) do not change the cause of action.

32. **Generally,** see the title "**Parties.**"

33. **U. S.**—*State v. Hayden*, 89 Fed. 46. **Ark.**—*Chicago, R. I. & P. R. Co. v. Young*, 85 Ark. 444, 108 S. W. 831. **N. C.**—*Bennett v. North Carolina R. Co.*, 159 N. C. 345, 74 S. E. 883; *Mills v. Callahan*, 126 N. C. 756, 36 S. E. 164; *State ex rel. Clendenin v. Turner*, 96 N. C. 416. **Pa.**—*Power v. Grogan*, 232 Pa. 387, 397, 81 Atl. 416. **Vt.**

b. As to Parties Plaintiff.—(I.) **Substitution.**—Where a cause of action exists on the part of or on behalf of a particular person or class of persons and an action to enforce that cause of action is begun by one whom the law does not recognize as the proper person to bring it, an amendment substituting the proper person as plaintiff does not change the cause of action.³⁴ But this is not true where one person claiming a cause of action in his own right brings an action on it and then seeks to substitute as plaintiff another person not in privity with him, but to whom it is claimed the cause of action belonged.³⁵ Accordingly, the cause of action is not changed, where the

Emerson v. Wilson, 11 Vt. 357, 34 Am. Dec. 695.

34. U. S.—*McDonald v. State*, 101 Fed. 171, 41 C. C. A. 278 (where the state was substituted for the state treasurer in an action to recover money deposited in an insolvent bank); *State v. Hayden*, 89 Fed. 46. **Ala.**—*Johnson v. Martin*, 54 Ala. 271, where suit in name of transferee was converted to one in the name of the plaintiff in the judgment for the use of the transferee. **Ill.**—*McCall v. Lee*, 120 Ill. 261, 11 N. E. 522 (where the proper party was substituted for the administrator); *Thomas v. Fame Ins. Co.*, 108 Ill. 91, 99, in which, in an action on an insurance policy taken out by T., loss payable to M. as his interest may appear, T. was substituted for M. as plaintiff and the action proceeded in the name of T. for use of M. **Ia.** *Wells v. Stomback*, 59 Iowa 376, 13 N. W. 339, where township clerk was substituted for the township, the latter having no capacity to sue. **Mich.** *Wood v. Lane*, 84 Mich. 521, 47 N. W. 1103 (where the heirs were substituted for the administrator); *Morford v. Dieffenbacher*, 54 Mich. 593, 20 N. W. 600. **Mo.**—*Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887. **Ohio.**—*Van Camp v. McCulley*, 104 N. E. 1004, where trustee in bankruptcy was substituted for creditor who began suit. **Utah.**—*Sargent v. Union Fuel Co.*, 37 Utah 392, 108 Pac. 928 (where in an action for wrongful death by the widow, the personal representative is substituted); *Pugmire v. Diamond C. & C. Co.*, 26 Utah 115, 72 Pac. 385.

[a] **Illustrations.**—(1) The cause of action is not changed where plaintiffs suing as a firm amend to sue as individuals (*Mayes v. Magill*, 48 Tex. Civ. App. 548, 107 S. W. 363), or (2) where

a partnership is substituted for a person suing individually on a partnership debt (*Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827; *Van Dyke v. Mosterd*, 171 Iowa 3, 153 N. W. 206. See also *Mayes v. Magill*, 48 Tex. Civ. App. 548, 107 S. W. 363), or (3) where the successor in interest on dissolution of a partnership is substituted for a partnership plaintiff. *Heenan v. Parmele* (Neb.), 118 N. W. 324.

[b] **In an action (1) begun by a corporation**, an amendment setting up the names of the members and suing as a partnership does not change the cause of action. *Ward v. Pine*, 50 Mo. 38. (2) Conversely, *Hackett v. Van Frank*, 119 Mo. App. 648, 96 S. W. 247. See also *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887, where individual members of an unincorporated church are substituted for the church.

[c] **Substituting Assignee.**—(1) In an action brought by a lessor for rent of a term of years accrued after he had assigned the reversion, the court may amend by substituting the assignee as plaintiff. *Bullard v. Johnson*, 65 N. C. 436. (2) In an action on a note brought by mistake by the payee after indorsement, the substitution of the indorsee does not introduce a new cause of action. *Service v. Farmington Sav. Bank*, 62 Kan. 857, 62 Pac. 670.

35. Cal.—*Reclamation District No. 673 v. Diepenbrock*, 168 Cal. 577, 143 Pac. 763; *Dubbers v. Goux*, 51 Cal. 153 (where it was sought to substitute the wife for the husband as plaintiff); *Merced Bank v. Price*, 9 Cal. App. 177, 98 Pac. 383. **Ga.**—*Neal v. Robertson*, 18 Ga. 399, where in ejectment the heirs of the grantee were substituted. **Idaho.** *Hallett v. Larcom*, 5 Idaho 492, 51 Pac.

beneficiary is substituted for the administrator as plaintiff or vice versa,³⁶ or where an amendment corrects the designation of the capacity in which the plaintiff should sue.³⁷ Should the amendment allow the recovery of a different character of damages, however, there is no doubt but what it would change the cause of action.³⁸ Similarly the cause of action is not changed by an amendment which substitutes for the nominal plaintiff the person for whose use the action is brought,³⁹ or conversely which substitutes the name of another suing for the use of the original plaintiff.⁴⁰

(II.) Adding and Striking Out Parties.⁴¹ — Generally the mere addition of parties plaintiff does not change the cause of action,⁴² provided

108. **Mo.**—School District *v.* Wallace, 75 Mo. App. 317.

[a] **Rule Stated.**—A court should not permit a person to be substituted as plaintiff in the place of the plaintiff who brought the suit when the person substituted was the real and only party in interest at the commencement of the action. *Hallett v. Larcom*, 5 Idaho 492, 51 Pac. 108. See the title "**Parties.**"

36. *Myers v. Chicago, B. & Q. R. Co.*, 152 Iowa 330, 131 N. W. 770; *Upson v. Boston & M. R. R.*, 211 Mass. 446, 98 N. E. 32. But see *Harshman v. Northern Pac. R. Co.*, 14 N. D. 69, 103 N. W. 412.

In actions for death by wrongful act, see 6 STANDARD PROC. 435.

37. **U. S.**—Taylor *v.* Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. ed. 638; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134 (affirming 192 Fed. 919, 113 C. C. A. 665); *Sandeen v. Tschider*, 205 Fed. 252, 123 C. C. A. 456; *Reardon v. Balaklala*, etc. Co., 193 Fed. 189. **Ala.**—*Randolph v. Hubbert*, 190 Ala. 610, 67 So. 416 (where all parties but one were stricken out and his capacity was changed); *Henry v. Frohlichstein*, 149 Ala. 330, 43 So. 126, where plaintiff sued individually and as guardian. **Cal.**—*Cox v. San Joaquin Light & Power Co.*, 33 Cal. App. 522, 166 Pac. 578. **Fla.**—*Phifer v. Abbott*, 69 Fla. 162, 67 So. 917. **Ga.**—*Atlanta, K. & N. R. Co. v. Smith*, 1 Ga. App. 162, 58 S. E. 106, under express statute. But see *Smith v. Ardis*, 49 Ga. 602, decided before the statute. **Ia.**—*Hunt v. Collins*, 4 Iowa 56. **Kan.**—*Mott v. Long*, 90 Kan. 110, 132 Pac. 998. **Ky.**—*Gray v. Alderson's Admr.*, 123 S. W. 317. **Neb.**—*Burlington V. R. Dept.*, etc. R. Co. *v.* Moore, 52 Neb.

719, 73 N. W. 15. **N. H.**—*Mann v. Marshall*, 76 N. H. 162, 80 Atl. 336. **Ore.**—*Hume v. Kelly*, 28 Ore. 398, 407, 43 Pac. 380. **Pa.**—*Power v. Grogan*, 232 Pa. 387, 81 Atl. 416, citing local cases. **S. D.**—*Hardy v. Woods*, 33 S. D. 416, 146 N. W. 568, Ann. Cas. 1916C, 398. **Tex.**—*Texarkana & Ft. S. R. Co. v. Casey* (Tex. Civ. App.), 172 S. W. 729; *St. Louis, S. F. & T. R. Co. v. Smith* (Tex. Civ. App.), 171 S. W. 512.

But see: **Ill.**—*Staunton Coal Co. v. Fischer*, 119 Ill. App. 284. **N. C.**—*Bennett v. North Carolina R. Co.*, 159 N. C. 345, 74 S. E. 883. **Tenn.**—*Flatley v. Memphis & C. R. Co.*, 9 Heisk. 230.

In actions of death by wrongful act, see 6 STANDARD PROC. 436.

[a] Especially when the complainant is the sole party in interest. *Phifer v. Abbott*, 69 Fla. 162, 67 So. 917.

38. *Walker v. Lansing & S. Tr. Co.*, 144 Mich. 685, 108 N. W. 90, where a husband suing for damages suffered as husband by the death of wife substituted himself as administrator.

[a] Where Different Persons Are Entitled to Damages.—*Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660.

39. *Wood v. Lenawee Circ. Judge*, 84 Mich. 521, 47 N. W. 1103; *Hume v. Kelly*, 28 Ore. 398, 407, 43 Pac. 380.

40. *Union City R. & T. Co. v. Wright*, 138 Ga. 703, 76 S. E. 35; *Metropolitan L. Ins. Co. v. Morrow*, 10 Ga. App. 433, 73 S. E. 607; *Atlanta, K. & N. R. Co. v. Smith*, 1 Ga. App. 162, 58 S. E. 106. See the title "**Parties.**"

41. Amendments adding and striking out parties generally, see the title "**Parties.**"

42. **Cal.**—*Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661, where other judgment debtors were joined in an action

always the original plaintiff has a cause of action in himself.⁴³ And in an action brought by several plaintiffs, an amendment striking one of the parties plaintiff does not change the cause of action generally.⁴⁴

(III.) **Correcting Mistake as to Description.**⁴⁵ — An amendment which merely corrects the name of a plaintiff does not introduce a new cause of action.⁴⁶ The same is true of amendments striking out the descriptive words,⁴⁷ or adding the words "doing business" under a certain firm name.⁴⁸

c. *As to Parties Defendant.* — An amendment correcting a misnomer of the defendant does not introduce a new cause of action, there being no change in the party.⁴⁹ So also where a defendant is sued by a fictitious name, an amendment inserting his real name does not change the cause of action.⁵⁰ And an amendment adding omitted parties defendant,⁵¹ or striking out parties defendant, improperly joined,⁵² does not state a new cause of action. But a complaint can-

on judgment. **Mo.**—Grigsby v. Barton, 169 Mo. 221, 69 S. W. 296, where sureties are added. **N. C.**—Mills v. Callahan, 126 N. C. 756, 36 S. E. 164, where heirs were joined with widow in ejectment. **Okla.**—See Motsenbocker v. Shawnee G. & E. Co., 49 Okla. 304, 152 Pac. 82, L. R. A. 1916B, 910. **Tex.**—McIlhenny v. M. C. Lee & Co., 43 Tex. 205; Galveston, H. & S. A. R. Co. v. House, 4 Tex. Civ. App. 263, 23 S. W. 332. **Vt.**—Wyman v. Wilcox, 63 Vt. 487, 21 Atl. 1103.

[a] **Where the other partner is brought in.** **Cal.**—Bogart v. Crosby, 91 Cal. 278, 27 Pac. 603. **Colo.**—Adamson v. Bergen, 15 Colo. App. 396, 62 Pac. 629. **Kan.**—Hucklebridge v. Atchison, T. & S. F. R. Co., 66 Kan. 443, 71 Pac. 814. **Mo.**—Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512; Gunther Bros. & Co. v. Aylor, 92 Mo. App. 161, where a partner was brought in and the form of action is changed from a suit individually to one in their names as partners. **Tex.**—McIlhenny v. M. C. Lee & Co., 43 Tex. 205; Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551.

[b] **Amendment dismissing as to an alleged partner and substituting the real partner does not change the claim.** Dwyer Brick Wks. v. Flanagan Bros., 87 Mo. App. 340.

[c] **Where the party for whose benefit the action was brought is joined.** Hume v. Kelly, 28 Ore. 398, 43 Pac. 380.

[d] **Where Another Use Is Joined.** Glenn v. Black, 31 Ga. 393.

[e] **Where Plaintiff Joins Himself**

in Another Capacity.—Smith v. Anderson, 39 Tex. 496.

43. **State v. Rottaken**, 34 Ark. 144, 157; **Courtney v. Sheehy**, 38 Mo. App. 290. See 11 STANDARD PROC. 758, note 17.

44. **McIlhenny v. M. C. Lee & Co.**, 43 Tex. 205.

[a] **But in an action on a joint contract**, an amendment omitting one of the promisees changes a joint cause of action into a several one and is not permitted. **Slaughter v. Davenport**, 151 Mo. 26, 33, 51 S. W. 471, overruling **Davis v. Ritchie**, 85 Mo. 501. But compare **King v. Caldwell**, 26 Ark. 405; **Metz v. Wood**, 39 Ill. App. 131.

45. **Correcting misnomer as to parties**, see the title "Parties."

46. **Kan.**—**Hanlin v. Baxter**, 20 Kan. 134. **Mo.**—**School District v. Wallace**, 75 Mo. App. 317. **Tex.**—**McIlhenny v. M. C. Lee & Co.**, 43 Tex. 205, where Christian name is corrected.

47. **American Bonding Co. v. Dickey**, 74 Kan. 791, 88 Pac. 66.

48. **Lister v. Vowell**, 122 Ala. 264, 25 So. 564.

49. **Corrick v. Western Md. R. Co.** (W. Va.), 91 S. E. 458, although there may be another person in existence by the name originally stated. See **Boyd v. United States Mtg. & Tr. Co.**, 84 App. Div. 466, 82 N. Y. Supp. 1001, and the title "Parties."

50. **Farris v. Merritt**, 63 Cal. 118.

51. **Steed v. McIntyre**, 68 Ala. 407.

52. **Clough v. Rocky Mountain Oil Co.**, 25 Colo. 520, 55 Pac. 809, where in an action against a corporation and its directors to enforce a penalty, the

not be amended so as to entirely change the parties defendant as this would be a different suit.⁵³ So also, amendments which change the capacity in which the defendant is sued are not permissible.⁵⁴

G. REMEDIES. — 1. **Objection to Amendment Because it States a New Cause of Action.** — a. *Generally.* — Objections on the ground that an amendment introduces a new cause of action must be timely made.⁵⁵

How Made. — On application for leave to amend, the adverse party may oppose the granting of the motion; on this ground,⁵⁶ or after allowance of the amendment, he may move to strike it out,⁵⁷ except

corporation was dropped by amendment.

[a] **An amendment dismissing a joint tortfeasor** and alleging the injury was occasioned solely by the remaining defendant does not introduce a new cause of action. *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485. See the title "**Parties.**"

53. *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Altpeter v. Postal Tel. Cable Co.*, 26 Cal. App. 705, 148 Pac. 241 (rule applicable where defendant corporation); *Myers v. Chicago, B. & Q. R. Co.*, 152 Iowa 330, 131 N. W. 770. See *Austin Western Co. v. Weaver Tp.*, 136 Iowa 709, 114 N. W. 189, and the title "**Parties.**"

[a] **Amendment of complaint against corporation to one against members as individuals** not permissible. *Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178.

[b] **But a lessor of a railroad whose liabilities are assumed by the lessee may be substituted in an action against the latter.** *McLaughlin v. West End St. R. Co.*, 186 Mass. 150, 71 N. E. 317.

[c] **In an action against a principal and his agent, a dismissal as to the agent and the substitution of another person as agent is not a change in the cause of action.** *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643.

54. Cal.—*Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695. Ga.—See *Moore v. Smith*, 121 Ga. 479, 49 S. E. 601. Tex.—*McIlhenny v. M. C. Lee & Co.*, 43 Tex. 205.

But see *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385 (where in an action against a trustee, an amendment sued him in his individual capacity), and the title "**Parties.**"

55. See *infra*, this note.

[a] **Too late (1) to object for first time** when cause is at issue on the merits (*Johnson v. Cummings*, 12 Colo. App. 17, 55 Pac. 269), (2) at the trial (*Mo.*—*Spurlock v. Missouri P. R. Co.*, 93 Mo. 530, 6 S. W. 349. *Tex.*—*Greenwood v. Anderson*, 8 Tex. 225, where sought to be made by objection to introduction of evidence under new count. *Vt.*—*Bachop v. Hill*, 54 Vt. 507, where made on hearing referee's report), or (3) on appeal. Cal.—*Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503. Colo.—*Mullen v. McKim*, 22 Colo. 468, 473, 45 Pac. 416; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084. Kan.—*Parsons Water Co. v. Hill*, 46 Kan. 145, 26 Pac. 412. Mo.—*Spurlock v. Missouri P. R. Co.*, 93 Mo. 530, 6 S. W. 349; *Boeker v. Crescent B. & P. Co.*, 101 Mo. App. 429, 74 S. W. 385. Neb.—*Busch v. Hagenrick*, 10 Neb. 415, 6 N. W. 474. Vt.—*Benton v. Beattie*, 63 Vt. 186, 195, 22 Atl. 422.

56. Alaska.—*Nowell v. Behrends*, 3 Alaska 495. Cal.—*Wheeler v. West*, 78 Cal. 95, 20 Pac. 45. Ia.—*Wade v. Clark*, 52 Iowa 158, 2 N. W. 1039, 35 Am. Rep. 262, holding where an amendment is allowed without objection, it will not be treated as a new action. Ky.—*Hancock v. Johnson*, 1 Met. 242. N. Y.—*Cumber v. Schoenfeld*, 16 Daly 454. Vt.—*Bachop v. Hill*, 54 Vt. 507; *Blodget v. Skinner*, 15 Vt. 716. W. Va.—*Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198.

57. Ala.—*Ivy Coal & Coke Co. v. Long*, 139 Ala. 535, 36 So. 722; *Turner v. Roundtree*, 30 Ala. 706. Cal.—*Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503; *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45. Mo.—*Purdy v. Pfaff*, 104 Mo. App. 331, 78 S. W. 824. Vt.—*Geroux's Admr. v. Graves*, 62 Vt. 280, 19 Atl. 987; *Bachop v. Hill*, 54 Vt. 507; *Blodget*

in those jurisdictions in which such an amendment is proper,⁵⁸ in which case the defense of the statute of limitations may be interposed,⁵⁹ but judgment on the pleadings cannot be obtained.⁶⁰ A demurrer is a proper remedy in some states;⁶¹ but this is not true under the codes and practice acts.⁶² Nor is an answer a proper method of raising the objection,⁶³ although it has been held that a plea is a proper remedy.⁶⁴ A new trial may be granted in a proper case.⁶⁵

b. *Waiver of Objection and Estoppel.*—Any error or irregularity in the allowance of an amendment setting up an independent⁶⁶ cause

v. Skinner, 15 Vt. 716, motion to dismiss the count.

But see *Dyson v. Southern Ry. Co.*, 113 Ga. 327, 38 S. E. 749, holding that after the amendment was ordered filed "it became a part of the petition, which as thus amended set forth a cause of action and should not have been dismissed on motion."

[a] **Objecting to Second Amended Pleading After Answering First.**—*Spurlock v. Missouri Pac. R. Co.*, 104 Mo. 658, 16 S. W. 834, *overruling* *Fields v. Maloney*, 78 Mo. 172.

[b] **Motion to strike the amendment because it constitutes a departure** is not appropriate. *Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777.

58. *Providence Gold Min. Co. v. Marks*, 7 Ariz. 74, 60 Pac. 938.

59. See *infra*, I, G, 2.

60. *Providence Gold Min. Co. v. Marks*, 7 Ariz. 74, 60 Pac. 938.

61. **Ga.**—*Exposition Cotton Mills v. Western & A. R. Co.*, 83 Ga. 441, 10 S. E. 113, sustaining demurrer. *Miss. Wright v. Frank*, 61 Miss. 32. **Tenn.** *Scott v. Turley*, 9 Lea 631, 639, departure. **W. Va.**—See *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198.

[a] **Failure to object to the order granting leave to amend** does not preclude the defendant from demurring to the amended bill when filed. *Wright v. Frank*, 61 Miss. 32.

Departure as a ground of demurrer, see 6 STANDARD PROC. 907. Whether introduction of a new cause of action is a departure, strictly speaking, see 6 STANDARD PROC. 119.

62. **Ala.**—*Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777; *Turner v. Roundtree*, 30 Ala. 706. See, however, *Ward v. Patton*, 75 Ala. 207, holding sustaining of demurrer to be proper as the amendment was a departure. **Cal.**—*Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503. **Tex.**—*Pyle v. Park* (Tex.

Civ. App.), 196 S. W. 243, not by exception. **Vt.**—*Blodget v. Skinner*, 15 Vt. 716.

[a] Although a demurrer goes back to the first substantial defect in pleading, it does not reach extrinsic matter not disclosed on the face of the pleading. On the filing of an amended pleading it becomes the first in order and a demurrer cannot raise the question of variance between it and the original pleading. *Turner v. Roundtree*, 30 Ala. 706.

63. *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45, such an answer is immaterial and surplusage and will be stricken out on motion.

64. *Pyle v. Park* (Tex. Civ. App.), 196 S. W. 243.

65. *Milburn v. Davis*, 92 Ga. 362, 17 S. E. 286, on the ground the verdict is contrary to the law and evidence, in that the evidence does not support the original declaration. See the title "New Trial."

66. *Church v. Syracuse C. & S. Co.*, 32 Conn. 372.

[a] **By Failing To Raise the Objection in Apt Time.**—*Johnson v. Cummings*, 12 Colo. App. 17, 55 Pac. 269; *Bachop v. Hill*, 54 Vt. 507; *Blodget v. Skinner*, 15 Vt. 716, where the defendant demurred on this ground, he was held to have waived the objection. See *supra*, I, F, 1, a.

[b] **By filing an answer to the amended complaint without objection.** **Cal.**—*Witkowski v. Hern*, 82 Cal. 604, 23 Pac. 132. **Colo.**—*Mullen v. McKim*, 22 Colo. 468, 473, 45 Pac. 416; *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041. See *White v. Nuckolls*, 49 Colo. 170, 112 Pac. 329, query. **Mo.**—*Spurlock v. Missouri P. R. Co.*, 93 Mo. 530, 6 S. W. 349; *Holtzclaw v. Chicago, B. & Q. R. Co.* (Mo. App.), 190 S. W. 90. **Tenn.**—*Scott v. Turley*, 9 Lea 631.

[c] **Where defendant has no knowl-**

of action may be waived; or the party may be estopped from raising the objection.⁶⁷

c. *Determination*.—The questions of whether a new cause of action is introduced is a question of law,⁶⁸ to be determined by an inspection of the original and amended declaration,⁶⁹ without reference to extrinsic facts,⁷⁰ unless the intention of the pleader is an element by which the power of allowing amendments is to be governed,⁷¹ in which case, the question is one largely of fact,⁷² and the court may consider the extrinsic circumstances of the case,⁷³ hear testimony,⁷⁴ or receive affidavits.⁷⁵ In determining the question, the court will look to the substantial nature of the claim introduced and not to the formal manner in which it is declared on;⁷⁶ and will give the original complaint a liberal construction.⁷⁷

d. *Review*.—Orders refusing amendments for want of power,⁷⁸ and allowing amendments inserting an entirely new cause of action,⁷⁹ have been held to be appealable; but an order denying a motion to strike an amended pleading from the files on this ground is not an appealable order,⁸⁰ although the matter may be brought before the appellate

edge of the amendment, pleading to the declaration is not a waiver. *Church v. Syracuse C. & S. Co.*, 32 Conn. 372.

[d] *Filing of an answer after overruling of a proper objection* is not a waiver. *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011. *Contra*, *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757; *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981.

67. *Sargent v. Union Fuel Co.*, 37 Utah 392, 103 Pac. 928, by consenting to the amendment.

68. *Gillmore v. Chicago*, 224 Ill. 490, 79 N. E. 596; *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643; *Chicago, St. P. & K. C. R. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208; *Bishop v. Williamson*, 11 Me. 495.

69. *Colo.*—*Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826. *Ill.*—*Gillmore v. Chicago*, 224 Ill. 490, 79 N. E. 596; *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367. *Me.*—*Bishop v. Williamson*, 11 Me. 495.

[a] Although several amended pleadings were filed, the original petition remains the standard by which to determine whether there has been a statement of a new cause of action. *Purdy v. Pfaff*, 104 Mo. App. 331, 78 S. W. 824. *Compare* *Denver & R. G. R. Co. v. Stinemeyer*, 59 Colo. 396, 148 Pac. 860, all former pleadings may be compared.

As to superseding of original pleading by amendments, see 1 STANDARD PROC. 927, and supplement thereto.

70. *Heffron v. Rochester German Ins. Co.*, 220 Ill. 514, 77 N. E. 262.

71. See *supra*, I, A.

72. *Batchelder v. Pierce*, 170 Mass. 260, 49 N. E. 310; *Geroux's Admr. v. Graves*, 62 Vt. 280, 19 Atl. 987.

73. *Nash v. Adams*, 24 Conn. 33, 39.

74. *Driscoll v. Holt*, 170 Mass. 262, 49 N. E. 309; *Mann v. Brewer*, 7 Allen (Mass.) 202; *Spear's Admr. v. Armstrong (Vt.)*, 84 Atl. 817 (citing local cases); *Geroux's Admr. v. Graves*, 62 Vt. 280, 19 Atl. 987.

75. *Gilman v. Cate*, 56 N. H. 160, 167 (an affidavit showing the plaintiff intended to describe the land in the amendment, but that by mistake did not); *Brackett v. Crooks*, 24 N. H. 173; *Tilton v. Parker*, 4 N. H. 142.

76. *Shirk v. Coyle*, 2 Ind. App. 354, 27 N. E. 638; *Johnson v. American S. & R. Co.*, 80 Neb. 255, 116 N. W. 517.

77. *Nevada County & S. C. Co. v. Kidd*, 28 Cal. 673.

78. *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642.

79. *Sheldon v. Adams*, 18 Abb. Pr. 405, 41 Barb. (N. Y.) 54, 27 How. Pr. 179, it being an order of a special term from which a right of appeal exists "when it involves the merits of the action or some part thereof, or affects a substantial right."

80. *Myers v. Holton*, 9 Cal. App. 114,

court by bill of exceptions on appeal from the judgment roll.⁸¹ It is sometimes provided that the allowance of an amendment shall be conclusive evidence of the identity of the cause of action.⁸²

2. Pleading Statute of Limitations to New Cause of Action.⁸³

If an amendment sets up a new cause of action, even if permissible under the local practice, it does not relate back to the filing of the original pleading or commencement of the action, and the defense of the bar of the statute of limitations is available against it,⁸⁴ even though the party may have consented to the filing of the amendment.⁸⁵ The defense of the bar of the statute of limitation may be presented by answer or plea,⁸⁶ and in some states, it may be by de-

98 Pac. 197. See 2 STANDARD PROC. 172.

81. *Myers v. Holton*, 9 Cal. App. 114, 98 Pac. 197 (if an exception is preserved); *Cumber v. Schoenfeld*, 16 Daly (N. Y.) 454, formal exception is not necessary.

82. *McLaughlin v. West End St. R. Co.*, 186 Mass. 150, 71 N. E. 317; *Driscoll v. Holt*, 170 Mass. 262, 49 N. E. 309 (as against the defendant); *Batchelder v. Pierce*, 170 Mass. 260, 49 N. E. 310; *Spear's Admr. v. Armstrong* (Vt.), 84 Atl. 817, citing local cases. See *Heffron v. Rochester German Ins. Co.*, 220 Ill. 514, 77 N. E. 262 (distinguishing the Illinois and Massachusetts statutes); *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545.

83. See generally the title "Limitation of Actions."

84. *U. S.*—*Patillo v. Allen-West Com. Co.*, 131 Fed. 680, 65 C. C. A. 508. *Ala.*—*Mohr v. Lemle*, 69 Ala. 180; *King v. Avery*, 37 Ala. 169. *Cal.*—*Anderson v. Mayers*, 50 Cal. 525; *Rauer's Law & Collection Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427. *Ill.*—*Secord-Hopkins Co. v. Lincoln*, 173 Ill. 357, 50 N. E. 1074; *Fish v. Farwell*, 160 Ill. 236, 247, 43 N. E. 367. *Ind.*—*Blake v. Minkner*, 136 Ind. 418, 36 N. E. 246; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48, 62; *Lagow v. Neilson*, 10 Ind. 183; *Fleming v. Anderson*, 39 Ind. App. 343, 76 N. E. 266; *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475. *Ia.*—*Gordon v. Chicago, R. I. & P. Ry. Co.*, 129 Iowa 747, 106 N. W. 177. *Kan.*—*Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259; *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938. *Miss.*—*Cox v. American Freehold & L. Mort. Co.*, 88 Miss. 88, 40 So. 739. *Mo.*—*Bricken v. Cross*, 163

Mo. 449, 64 S. W. 99. *Neb.*—*Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, 77 N. W. 1094. *N. Y.*—*Davis v. New York, L. E. & W. R. Co.*, 110 N. Y. 646, 17 N. E. 733; *Serrell v. Forbes*, 106 App. Div. 482, 94 N. Y. Supp. 805. *N. C.*—*Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881. *Okla.*—*Butt v. Carson*, 5 Okla. 160, 48 Pac. 182. *Tenn.*—*Love v. Southern R. Co.*, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471. *Tex.*—*McIlhenry v. M. C. Lee & Co.*, 43 Tex. 205.

See 1 STANDARD PROC. 929; and *supra*, I, F, 1, b, (II).

In ejectment, see 7 STANDARD PROC. 1044.

85. *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 983; *Serrell v. Forbes*, 106 App. Div. 482, 94 N. Y. Supp. 805.

[a] Failure to object and except (1) to the filing of the amended pleading is not a waiver of the right to plead the bar of the statute of limitations (*Heffron v. Rochester German Ins. Co.*, 220 Ill. 514, 77 N. E. 262), (2) but by a waiver of the right to object to the amendment by going to the trial on the issues tendered without objection, he waives the benefit of the plea of the statute. *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416.

86. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337. See generally 18 STANDARD PROC. 1052, et seq.

[a] Plea should be to whole declaration even where the added cause is in a separate count. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337.

[b] Demurrer will lie to the answer or plea if a new cause of action is not set up. *Lee v. Republic Iron & Steel Co.*, 241 Ill. 372, 89 N. E. 655;

murrer.⁸⁷ A motion to strike out the amendment on this ground is not a proper remedy.⁸⁸

II. NEW DEFENSE. — A. RIGHT TO INTRODUCE NEW DEFENSE BY AMENDMENT. — While it has been held that a party defendant cannot by way of amendment, at any stage of the case, change his defense,⁸⁹ or set up a new and distinct one,⁹⁰ unless the plaintiff consents thereto,⁹¹ many courts extend their liberality in allowing amendments to answers to such as may change the defense,⁹² or introduce new defenses in addition to those originally pleaded,⁹³ and this regardless of when such amendments are made.⁹⁴ Code provisions al-

Shirk *v.* Coyle, 2 Ind. App. 354, 27 N. E. 638.

87. **Ga.**—Smith *v.* Ardis, 49 Ga. 602. **Ia.**—Gordon *v.* Chicago, R. I. & P. Ry. Co., 129 Iowa 747, 106 N. W. 177; Van de Haas *v.* Van Domselar, 56 Iowa 671, 10 N. W. 227. **Kan.**—Parsons Water Co. *v.* Hill, 46 Kan. 145, 26 Pac. 412. **Neb.**—Clifford *v.* Thun, 74 Neb. 831, 104 N. W. 1052.

Contra, Jeffersonville, M. & I. R. Co. *v.* Hendricks, 41 Ind. 48, 62.

See generally 6 STANDARD PROC. 918; 18 STANDARD PROC. 1045, et seq.

88. Providence Gold Min. Co. *v.* Marks, 7 Ariz. 74, 60 Pac. 938; Jeffersonville, M. & I. R. Co. *v.* Hendricks, 41 Ind. 48, 62.

89. **Ala.**—Sunflower L. Co. *v.* Turner S. Co., 158 Ala. 191, 48 So. 510, 132 Am. St. Rep. 20. Compare Jones *v.* Ritter's Admr., 56 Ala. 270, holding that the filing of additional pleas is not an amendment but despite this, the court has discretion to allow them to be filed. **Alaska.**—Lindbloom *v.* Kidston, 2 Alaska 292. **Mo.**—Clark *v.* St. Louis T. R. Co., 127 Mo. 255, 269, 30 S. W. 121. **Wash.**—See Brown *v.* Baruch, 24 Wash. 572, 64 Pac. 789. Compare Van Lehn *v.* Morse, 16 Wash. 672, 48 Pac. 404.

90. **Ia.**—Dumont *v.* Peet, 152 Iowa 524, 132 N. W. 955. **La.**—Smith *v.* Rock Island A. & L. R. Co., 119 La. 537, 44 So. 290; Calvert *v.* Tunstall, 2 La. 207. **R. I.**—Battey *v.* Warner, 28 R. I. 312, 67 Atl. 63, new pleas cannot be set up by amendment on trial. **Tex.**—San Antonio & A. P. R. Co. *v.* Miller (Tex. Civ. App.), 137 S. W. 1194, where the amendment was offered when the case was called for trial.

91. Woodward *v.* Williamson, 39 S. C. 333, 17 S. E. 778, implied consent.

[a] A stipulation allowing a defendant to file an amended answer should

not be construed to allow the filing of an amended answer that cannot be legally filed, because it states a different defense for instance. Brown *v.* Baruch, 24 Wash. 572, 64 Pac. 789. See generally the title "Stipulations."

92. **Cal.**—Gould *v.* Stafford, 101 Cal. 32, 35 Pac. 429. **Ga.**—National Bank *v.* Southern P. Mfg. Co., 59 Ga. 157. **Kan.**—Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38. **Wis.**—Brown *v.* Bosworth, 62 Wis. 542, 22 N. W. 521.

[a] It is only when such amendments are so made as to affect the substantial rights of the adverse party that they constitute error. Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38.

93. **Ark.**—Kansas City S. R. Co. *v.* Bull, 120 Ark. 43, 179 S. W. 172; Hall & Brown W. Mach. Co. *v.* Louisiana & N. W. R. Co., 78 Ark. 536, 95 S. W. 799. See Dickerson *v.* Hamby, 96 Ark. 163, 131 S. W. 674, holding amendment was not a departure. **Cal.**—Harney *v.* Corcoran, 60 Cal. 314. **Colo.**—Cartwright *v.* Ruffin, 43 Colo. 377, 96 Pac. 261; Gougar *v.* Buffalo Specialty Co., 26 Colo. App. 8, 141 Pac. 511. **Del.**—Waples *v.* M'Gee, 2 Harr. 444. **Neb.**—Dunn *v.* Bozarth, 59 Neb. 244, 80 N. W. 811; Omaha & R. V. R. Co. *v.* Moschel, 38 Neb. 281, 56 N. W. 875. **N. Y.**—Marx *v.* Gross, 26 Jones & S. 221, 9 N. Y. Supp. 719, 18 Civ. Proc. 352, 31 N. Y. St. 403 (at special term an amendment setting up a new defense is allowable); Harrington *v.* Slade, 22 Barb. 161; Bowman *v.* De Peyster, 2 Daly 203. **Ore.**—Lieualten *v.* Mosgrove, 37 Ore. 446, 61 Pac. 1022; Osmun *v.* Winters, 30 Ore. 177, 46 Pac. 780, before trial. **Wis.**—Brown *v.* Bosworth, 62 Wis. 542, 22 N. W. 521; Hanson *v.* Michelson, 19 Wis. 498.

94. **Ga.**—J. I. Case Threshing Mach. Co. *v.* Donalson, 12 Ga. App. 121, 76 S. E. 1049, at any stage of the case.

lowing amendments to conform the answer to the proof, if the amendments do not substantially change the defense,⁹⁵ do not prohibit such amendments before trial,⁹⁶ but are applicable to amendments offered at trial,⁹⁷ after submission of the case,⁹⁸ or after judgment.⁹⁹

After transfer of a cause from a justice's court to a superior court upon an answer setting up an issue which the justice cannot try, an amendment abandoning this issue cannot be made.¹

B. DISCRETION OF COURT.—The power to allow the amendment existing, it is within the discretion of the court whether leave to file an amendment changing or introducing a new defense shall be granted in a particular case.² And, if it appears that the defendant knew the facts constituting the defense at the time of the filing of his original answer,³ or if his application to amend is tardy and there is no showing why it was not pleaded earlier,⁴ or if the defense set up is

Neb.—*Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811, though made during trial. **Ore.**—*Osmun v. Winters*, 30 Ore. 177, 46 Pac. 780, whether made before trial. 95. See the statutes.

96. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684; *Murphy v. Plankinton*, 18 S. D. 317, 325, 100 N. W. 614.

97. **Ia.**—*Gallagher v. Head*, 108 Iowa 588, 79 N. W. 387; *Denzler v. Rieckhoff*, 97 Iowa 75, 66 N. W. 147; *Thoman v. Chicago & N. W. R. Co.*, 92 Iowa 196, 60 N. W. 612. **Kan.**—See *Barrett v. Kansas & T. C. Co.*, 70 Kan. 649, 79 Pac. 150 (not referring to any statute); *Russell v. Gregg*, 49 Kan. 89, 30 Pac. 185. **N. Y.**—*Cruver Mfg. Co. v. Spooner*, 147 App. Div. 471, 131 N. Y. Supp. 866; *Mercantile Bank v. Anderson*, 27 App. Div. 94, 50 N. Y. Supp. 176. See *Sternback v. Friedman*, 23 Misc. 173, 50 N. Y. Supp. 1025. *Compare Van Ness v. Bush*, 14 Abb. Pr. 33, 22 How. Pr. 481, decided under §173 of the old code. **S. C.**—*Pickett v. Fidelity & C. Co.*, 60 S. C. 477, 38 S. E. 160, 629; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684. **S. D.**—*Murphy v. Plankinton*, 18 S. D. 317, 325, 100 N. W. 614.

98. *Le Mars B. & L. Assn. v. Burgess*, 129 Iowa 422, 105 N. W. 641.

99. *First Nat. Bank v. Myers*, 44 Neb. 306, 62 N. W. 459; *Scott v. Spencer*, 44 Neb. 93, 62 N. W. 312.

1. See the title "Justices of the Peace."

2. **Ala.**—*Jones v. Ritter's Admr.*, 56 Ala. 270. **Ark.**—*American Bonding Co. v. Morris*, 104 Ark. 276, 148 S. W. 519. **Cal.**—*In re Redfield's Est.*, 116 Cal. 637, 643, 48 Pac. 794; *Beronio v. Southern*

Pac. R. Co., 86 Cal. 415, 24 Pac. 1093. **Colo.**—*Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261. **Conn.**—*Goodale v. Rohan*, 76 Conn. 680, 58 Atl. 4. **Ill.** *Wilson v. Wilson*, 125 Ill. App. 385. *Compare People v. McWatton*, 7 Ill. 731, if the party wishes to plead a new defense he should obtain leave to file an additional plea instead of presenting it by amendment. **Ind.** *Case v. Moorman*, 25 Ind. App. 293, 58 N. E. 85. **Kan.**—*Robertson v. Lombard L. Co.*, 73 Kan. 779, 85 Pac. 528. **Mich.**—*Walbridge v. Tuller*, 125 Mich. 218, 84 N. W. 133. **Minn.**—*Wasser v. Western L. S. Co.*, 97 Minn. 460, 107 N. W. 160; *Lamm v. Armstrong*, 95 Minn. 434, 104 N. W. 304. **N. D.** *Paulsen v. Modern Woodmen*, 21 N. D. 235, 130 N. W. 231. **Okla.**—*Piper v. Choctaw N. T. & I. Co.*, 16 Okla. 436, 85 Pac. 965. **Wis.**—*Brown v. Bosworth*, 62 Wis. 542, 22 N. W. 521.

3. **Ark.**—*Chapman & Dewey L. Co. v. Woodruff*, 116 Ark. 189, 173 S. W. 188. **Mo.**—*Lucas Market Sav. Bank v. Goldsoll*, 8 Mo. App. 596, amendment on day of trial. **N. D.**—*Paulsen v. Modern Woodmen*, 21 N. D. 235, 130 N. W. 231. **W. Va.**—*Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266. **Wyo.** *Halleck v. Bresnahan*, 3 Wyo. 73, 80, 2 Pac. 537, where the amendment was offered after most of the evidence is in.

4. **Cal.**—*In re Redfield's Estate*, 116 Cal. 637, 643, 48 Pac. 794. **Ill.**—*Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314; *Wilson v. Wilson*, 125 Ill. App. 385. **Wis.**—*St. Clara F. Academy v. Northwestern N. Ins. Co.*, 101 Wis. 464, 77 N. W. 893.

uncensorable,⁵ the court will disallow the amendment, although it has been held that no discrimination should be made between defenses.⁶

C. PARTICULAR DEFENSES CONSIDERED.—The court has power to allow an amendment which strikes out an admission and sets up facts inconsistent therewith;⁷ but generally the court will deny the right to file such an amendment, in the exercise of its discretion, when offered on the day of trial or during the trial.⁸ The insertion of an omitted denial is not necessarily inconsistent if there is no express admission, but only an admission implied from silence.⁹

An amendment which merely changes the mode of stating the defense,¹⁰ or which merely elaborates it¹¹ does not change the defense.

D. REMEDY AND WAIVER OF OBJECTION.—An amendment changing the defense or setting up a new defense may be stricken from the files on motion,¹² or an election between inconsistent defenses may be

5. Cal.—*Bank of Woodland v. Heron*, 122 Cal. 107, 54 Pac. 537; *Reed & Co. v. Marshall*, 12 Cal. App. 697, 108 Pac. 719. Del.—*Waples v. M'Gee & Salmon*, 2 Harr. 444. Wis.—*Collins v. Singer Mfg. Co.*, 53 Wis. 305, 10 N. W. 477.

6. *Sheldon v. Adams*, 18 Abb. Pr. 405, 41 Barb. (N. Y.) 54, 27 How. Pr. 179; *Harrington v. Slade*, 22 Barb. (N. Y.) 161. Compare *Utica Ins. Co. v. Scott*, 6 Cow. (N. Y.) 606.

7. Colo.—*Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284. Ga.—*Moore v. Calvert Mort. & Dep. Co.*, 13 Ga. App. 54, 78 S. E. 1097. Wash.—*Stone v. Ins. Co. of North America*, 56 Wash. 427, 105 Pac. 856. Wis.—*Durkee v. Felton*, 54 Wis. 405, 11 N. W. 588, after the evidence is closed.

[a] If the defendant verified the answer under a misapprehension of facts, his affidavit should be procured showing how the misapprehension arose, and in what particulars the facts are misstated. *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284.

[b] The amendment will be allowed only on very satisfactory evidence that the party has been deceived or misled or that his pleading was put in under a clear mistake as to the facts. *Miller v. Moore*, 1 E. D. Smith (N. Y.) 739; *National Pipe Bending Co. v. Fisher*, 87 Hun (N. Y.) 175, 33 N. Y. Supp. 1035, 67 N. Y. St. 721.

[c] Where the plaintiff opens the door and gives evidence in support of his allegation which the defendant meets with evidence inconsistent with his admission, the court may permit

the amendment. *Charlton v. Seoville*, 68 Hun 348, 22 N. Y. Supp. 883, affirmed, 144 N. Y. 691, 39 N. E. 394.

8. Cal.—*Wixon v. Devine*, 91 Cal. 477, 27 Pac. 777. Colo.—*Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284. La.—*Bancher & Co. v. Marti*, 22 La. Ann. 461, it changes the issue. Mo. *Clark v. St. Louis T. R. Co.*, 127 Mo. 255, 270, 30 S. W. 121; *Greene v. Gallagher*, 35 Mo. 226; *Harrison's Admr. v. Hastings*, 28 Mo. 346. N. Y.—*Smith v. Athens*, 74 Hun 26, 26 N. Y. Supp. 180, 57 N. Y. St. 743; *Demuth Glass Mfg. Co. v. Early*, 131 App. Div. 203, 115 N. Y. Supp. 672. Ohio.—*Broch v. Becher*, 5 Ohio Dec. (Reprint) 519, 6 Am. L. Rec. 380, 2 Wkly. L. Bul. 262. Okla.—*Engle v. Legg*, 39 Okla. 475, 135 Pac. 1058; *First State Bank v. Bridges*, 39 Okla. 355, 135 Pac. 378. Wash. *Stone v. Insurance Co. of North America*, 56 Wash. 427, 105 Pac. 856; *Gould v. Gleason*, 10 Wash. 476, 39 Pac. 123. Wis.—*Ballston Spa Bank v. Marine Bank*, 16 Wis. 120, denying such amendment at trial.

[a] It is an abuse of discretion to allow such an amendment on the day of trial without good cause being shown therefor. *Gould v. Gleason*, 10 Wash. 476, 39 Pac. 123.

9. *Spencer v. Tooker*, 21 How. Pr. (N. Y.) 333, 12 Abb. Pr. 353.

10. *Woodward v. Williamson*, 39 S. C. 333, 17 S. E. 778.

11. *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789. See *Woodward v. Williams*, 39 S. C. 333, 17 S. E. 778, query.

12. *Chapman & Drew L. Co. v. Woodruff*, 116 Ark. 189, 173 S. W. 188;

compelled.¹³ It has been held that an order allowing the filing of an amendment to the answer is an appealable order.¹⁴

Waiver. — An objection that an amendment which changes the defense is improperly filed may be waived.¹⁵

Dumont v. Peet, 152 Iowa 524, 132 N. W. 955.

13. Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811.

14. Harrington v. Slade, 22 Barb. (N. Y.) 161. See Woodward v. Williamson, 39 S. C. 333, 17 S. E. 778, query. *Contra*, Bowman v. De Pevster, 2 Daly (N. Y.) 203, but affirming the case on other grounds.

[a] Review.—If on allowing an

amendment during trial a continuance is granted, the amendment will be considered, on review, as though it had been made before trial. Woodward v. Williamson, 39 S. C. 333, 17 S. E. 778.

15. Stainback v. Henderson, 79 Ark. 176, 95 S. W. 786, holding that any error in permitting an amendment changing the defense is waived by a failure to set out the ruling as a ground for new trial.

NEWLY DISCOVERED EVIDENCE. — See Bills of Review; Continuances; New Trial; Review.

NEW MATTER. — See Answers; Bills and Answers; Confession and Avoidance; Denials; Departure.

NEWSPAPERS

By the Editorial Staff.

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CROSS-REFERENCES:

Copyright Proceedings;

Libel and Slander;

Post Office.

As to reading newspapers to the jury, see the title "Juries and Jurors."

As to service of process by publication, see the title "Service of Process and Papers."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROCEEDINGS IN CASE OF CONTEST OVER SELECTION OF OFFICIAL NEWSPAPERS. — A. IN GENERAL. —

The power to hear contests concerning the selection of official newspapers is usually vested by statute¹ in such bodies exercising the right of selection, as boards of county supervisors,² or commissioners.³ Though formal pleadings are not as a rule required in these contests,⁴ nevertheless appropriate issues should be framed and presented.⁵

1. See generally the statutes.

2. *Cory v. Hamilton*, 84 Iowa 594, 51 N. W. 54.

3. *Com. ex rel. Bressler v. Clinton County Comrs.*, 34 Pa. Co. Ct. 321.

4. *Ashton v. Story*, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584; *Runion*

v. Haislet, 90 Iowa 376, 57 N. W. 902.

5. *Ashton v. Story*, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584.

[a] When fraud is relied on it should be alleged before the hearing is had on the selection made. *Ashton v. Story*, 96 Iowa 197, 64 N. W. 804, 30

Costs. — Unless the statute specially provides for the taxation of costs, each party must pay his own costs.⁶

B. REVIEW.⁷ — The action of the board of supervisors or commissioners is sometimes reviewable by appeal,⁸ taken at the proper time,⁹ and in accordance with the usual procedure relating to notice and appeal bond.¹⁰ On such appeal the review is generally confined to questions raised at the hearing below.¹¹

Certiorari. — Within its customary limits,¹² certiorari is an available remedy; but the board's exercise of discretion will not be thus reviewed.¹³

II. MANDAMUS TO OFFICERS AND BOARDS.¹⁴ — Provided publication is required,¹⁵ and is possible,¹⁶ the officer or board empowered to select a newspaper therefor may be compelled by mandamus to proceed with such selection;¹⁷ but its choice, if resting¹⁸ in

L. R. A. 584; *Cory v. Hamilton*, 84 Iowa 594, 51 N. W. 54.

6. *State Line Democrat v. Keosauqua Independent*, 161 Iowa 566, 143 N. W. 409.

7. By mandamus, see *infra*, II.

8. *Cory v. Hamilton*, 84 Iowa 594, 51 N. W. 54.

[a] The appeal is not limited to cases wherein fraud is in issue although the statute provides generally that an appeal may be taken from the award and also specifies that when fraud is alleged an appeal may be taken. *Brown v. Lewis*, 76 Iowa 159, 40 N. W. 698.

9. *Hoxie v. Shaw*, 75 Iowa 427, 39 N. W. 673.

[a] Until the award is made, an appeal will not lie. *Hoxie v. Shaw*, 75 Iowa 427, 39 N. W. 673.

10. *In re Cherokee County Printing*, 156 Iowa 282, 136 N. W. 765; *Starr v. Ingham*, 84 Iowa 580, 51 N. W. 175. See generally the title "Appeals."

11. *Ross v. Campbell*, 98 Iowa 1, 66 N. W. 1064. See also *Ashton v. Story*, 96 Iowa 197, 64 N. W. 804, 30 L. R. A. 584; *People ex rel. Press Pub. Co. v. Martin*, 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592.

[a] A charge of fraud, not made at the hearing, cannot be considered on appeal. *Ross v. Campbell*, 98 Iowa 1, 66 N. W. 1064.

[b] **Additional Affidavits.**—Refusal to consider additional affidavits as to circulation after an award has been made is not a good ground for reversal. *People ex rel. Press Pub. Co.*

v. Martin, 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592.

12. See the title "Certiorari."

13. *People ex rel. R. & J. Co. v. Wiggins*, 199 N. Y. 382, 92 N. E. 789; *People ex rel. Press Pub. Co. v. Martin*, 142 N. Y. 228, 36 N. E. 885, 40 Am. St. Rep. 592; *People ex rel. Elmira A. Assn. v. Gorman*, 169 App. Div. 891, 155 N. Y. Supp. 727.

14. See generally the title "Mandamus."

15. *Milwaukee v. State*, 97 Wis. 437, 73 N. W. 23.

[a] After expiration of the time for publication, it will not be compelled. *Register Newspaper Co. v. Yeiser*, 117 Ky. 1013, 80 S. W. 478; *Goodman v. Sussex County*, 66 N. J. L. 571, 49 Atl. 919; *State ex rel. Fooshe v. Burley* (S. C.), 61 S. E. 255; *Lewis County Pub. Co. v. Lewis County Court*, 75 W. Va. 305, 83 S. E. 993.

16. *Bayer v. Hoboken*, 40 N. J. L. 152.

17. *Holliday v. Henderson*, 67 Ind. 103; *People ex rel. Opdyke v. Brennan*, 39 Barb. (N. Y.) 651; *People ex rel. Hall v. Greene County*, 13 Abb. N. C. (N. Y.) 421; *Matter of Hall*, 66 How. Pr. (N. Y.) 330.

18. *Ga.*—*Tillman v. Thrasher*, 61 Ga. 15. *Ind.*—*Holliday v. Henderson*, 67 Ind. 103. *N. Y.*—*People ex rel. Francis v. Troy*, 78 N. Y. 33; *People ex rel. Elmira A. Assn. v. Gorman*, 169 App. Div. 891, 155 N. Y. Supp. 727; *People ex rel. Utica Sunday Tribune Co. v. Hugo*, 93 Misc. 618, 158 N. Y. Supp. 490; *People ex rel. Rathburn v. Tabor*, 140 N. Y. Supp. 803. *Pa.*—*Com. ex rel.*

discretion, and not purely ministerial,¹⁹ cannot in anywise be controlled.

III. ACTIONS TO RECOVER COMPENSATION FOR PUBLICATION OF OFFICIAL ADVERTISEMENTS.—The declaration in an action to recover compensation for the publication of an official notice or advertisement, as in other civil actions, should contain a concise statement of the essential elements of the cause of action,²⁰ alleging the order or request for publication by the defendant,²¹ and stating that such publication was to be made in the paper indicated.²²

Bressler v. Clinton County Comrs., 34 Pa. Co. Ct. 321.

As to when mandamus will lie generally, see the title "Mandamus."

[a] **When Action Will Lie.**—When a board of supervisors have selected and designated a certain newspaper to be the official newspaper, they have discharged the functions conferred upon them by law, and until that action has been nullified by some judicial action they cannot be compelled to act again. *People ex rel. Elmira A. Assn. v. Gorman*, 169 App. Div. 891, 155 N. Y. Supp. 727.

19. *Dollar v. Wind* (Ga.), 70 S. E.

335; *Braddy v. Whiteley*, 113 Ga. 746, 39 S. E. 317; *Coffee v. Ragsdale*, 112 Ga. 705, 37 S. E. 968; *In re Troy Press Co.*, 94 App. Div. 514, 88 N. Y. Supp. 115 (*affirmed*, 179 N. Y. 529, 71 N. E. 1141); *Fulton County Pub. Co. v. Council of Johnstown*, 157 N. Y. Supp. 1058; *People ex rel. Rathburn v. Tabor*, 140 N. Y. Supp. 803.

20. See generally the titles "Declaration and Complaint;" "Pleading."

21. *Becker v. Yellowstone*, 11 Mont. 490, 28 Pac. 1116.

22. *Becker v. Yellowstone*, 11 Mont. 490, 28 Pac. 1116.

NEW TRIAL

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CROSS-REFERENCES:

Appeals;	Juries and Jurors;
Bills of Exceptions;	Justices of the Peace;
Instructions;	Statement and Abstract of Case;
Judgments;	Venire De Novo.

New trial in particular cases, see appropriate titles.

For further references and cross-references, see the index to this work and the cross-references throughout this title.

I. NATURE AND OFFICE OF NEW TRIAL. — A. DEFINITION.

A new trial is sometimes very briefly, although incompletely, defined as "a re-examination of an issue in fact."¹ It is frequently defined

1. *Zaleski v. Clark*, 45 Conn. 397, 401.
 [a] This Definition Is Based Upon Blackstone's Definition of Trial. "Trial is the examination of the matter of fact in issue." Com. 3, 330.
 [b] Blackstone, however, defines new trial as "a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before." Com. 3, 391. To the same effect, *Star Bottling Co. v. Louisiana Purchase Exposition Co.*, 240 Mo. 634, 144 S. W. 776; *Gunn v. Union R. Co.*, 23 R. I. 289, 49 Atl. 999.

by statute, a typical illustration of statutory definition being "A re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees."² A more complete and satisfactory definition is the following: A new trial may be defined to be a re-investigation of the facts and legal rights of the parties upon disputed facts, either upon the same, or different, or additional evidence before a new jury before either the same or another judge, and which, in general, is in the power and discretion of the trial court to grant or refuse, according to the exigency of each particular case, and generally upon principles of substantial justice and equity.³

In a criminal prosecution it has been defined as the re-examination of the facts under the same plea of not guilty, on the same information or indictment.⁴

B. SCOPE OF REMEDY.—1. Corrective Remedies at Law.—As stated elsewhere in this work,⁵ at common law, remedies for errors committed during judicial proceedings may be invoked either by certain motions made after verdict and before judgment, or by certain proceedings taken after judgment; and the former class consists of motions for a new trial, motions in arrest of judgment,⁶ and motions for judgment non obstante veredicto.⁷

2. History of New Trial.—The remedy of new trial is an evolution, an outgrowth of the English common law system of trial by jury, and has been a great factor in maintaining the integrity of that institution, and preserving public confidence in it.⁸ The custom of granting new trials grew up in the English common law courts of King's Bench

[c] It is a rehearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon the presentation of proper grounds or cause. Bouvier Law Dict., 1914, title "New Trial."

2. See the statutes, and the following: **Alaska.**—Comp. Laws, 1913, §1057. **Ark.**—Texas & P. Ry. Co. v. Smith, 91 Ark. 362, 121 S. W. 282. **Cal.**—Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Clark v. Torchiana, 19 Cal. App. 786, 127 Pac. 831. **Colo.**—Anno. Code, 1910, §235. **Ga.**—Buchanan v. James, 134 Ga. 475, 68 S. E. 72. **Idaho.**—Caldwell v. Wells, 16 Idaho 459, 101 Pac. 812. **Ia.**—Bottineau Land & L. Co. v. Hintze, 150 Iowa 646, 125 N. W. 842. **Kan.**—Darling v. Atehison, T. & S. F. R. Co., 76 Kan. 893, 93 Pac. 612, 94 Pac. 202. **Ky.**—Civ. Code, §340. **Mo.**—Star Bottling Co. v. Louisiana P. Exposition Co., 240 Mo. 634, 144 S. W. 776. **Mont.**—State ex rel. Carleton v. District Court, 33 Mont. 138, 82 Pac. 789; Hamilton v. Murray, 29 Mont. 80, 74 Pac. 75.

Nev.—Rev. Laws, 1912, §5319. **N. D.**—Comp. Laws, 1913, §7660. **Ohio.**—Page & Adams Anno. Gen. Code, §11,575. **Okla.**—Rev. Sts., 1903, §4493. **Ore.**—State v. Eddy, 46 Ore. 625, 81 Pac. 941, 82 Pac. 707. **S. D.**—State v. Finstad, 16 S. D. 422, 93 N. W. 640. **Utah.**—Rev. Sts., 1898, §3291. **Wash.**—Anno. Codes & Sts., 1897, §5070. **Wyo.**—Todd v. Peterson, 13 Wyo. 513, 81 Pac. 878.

3. Chitty's Gen. Pr., Phil., 1839, vol. 4, p. 30.

4. State v. Keerl, 33 Mont. 501, 85 Pac. 862. See Cal. Pen. Code, §1179; State v. Landry, 29 Mont. 218, 74 Pac. 419.

5. See 2 STANDARD PROC. 128.

6. See the title "Arrest of Judgment."

7. See 14 STANDARD PROC. 958.

8. See 3 Bl. Com. 390; Levi v. Milne, 4 Bing. 196, 198, 12 Moore 418, 13 E. C. L. 464, 5 L. J. C. P. (O. S.) 153, 130 Eng. Reprint 743; Hodgson v. Richardson, 1 Wm. Bl. 463, 96 Eng. Reprint 268.

and Common Pleas.⁹ At what time new trials were first recognized in connection with erroneous verdicts does not clearly appear.¹⁰ The first reported case in which a new trial was granted on this ground, is the case of *Wood v. Gunston*, decided about 1655.¹¹ For a long time, however, new trials were granted with an intolerable degree of strictness.¹² But it has not been the spirit of the common law of England to regard the verdict of a jury in civil causes as final in the first instance. Some mode of revision has long existed. Anciently, the practice was by attain of the jury for perjury, that is, for being false to their oath to render a true finding.¹³

3. Object or Purpose.—There are two objects or purposes of a new trial. The first is the attainment of justice;¹⁴ the second, is

9. *Tidd's Pr.* 904; *Bright v. Eynon*, 1 Burr. 390, 394 (1757), 97 Eng. Reprint 365; *Argent v. Darrell*, 2 Salk. 648, 91 Eng. Reprint 551; *Martyn v. Jackson*, 3 Keb. 398 (1674), 84 Eng. Reprint 787; *Wood v. Gunston*, Style 462, 466, 82 Eng. Reprint 863, 867; *Slade's Case*, Style 138, 82 Eng. Reprint 592.

[a] During the early part of the 17th century, the court of common pleas was accustomed to grant new trials upon the certificate of the judge that the verdict was contrary to his opinion. The court of King's Bench required some matter appearing on the record to justify such a grant. *Holdsworth Hist. Eng. Law*, I, 90; 3 Bl. Com. 388; *Martyn v. Jackson*, 3 Keb. 398, 84 Eng. Reprint 787.

10. It seems that the first reported case in which a new trial was moved for on the ground of an erroneous verdict is *Slade's Case* (decided in 1648), Style 138, 82 Eng. Reprint 592. Compare *Smith v. Parkhurst*, Andrews 315 (1738), 95 Eng. Reprint 414.

[a] Power to grant new trials, in the Connecticut colony, was given as early as 1644. Judge Baldwin, in *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226.

11. *Wood v. Gunston*, Style 462, 466, 82 Eng. Reprint 864, 867.

[a] The reason why the matter cannot be traced further back is "that the old report books do not give any account of determinations made by the court upon motions." *Bright v. Eynon*, 1 Burr. 390, 97 Eng. Reprint 365.

[b] Earlier New Trials.—In the case of *Dorner v. Fortescue*, 21 Viner's Ab. v. Trial, M. G. pl. 2. N., it is said that new trials began before 1655, and in *Argent v. Darrell*, 2 Salk. 648, 91 Eng. Reprint 551, Chief Justice Holt

says that there were new trials more anciently than the case of *Wood v. Gunston*, Style 462, 466, 82 Eng. Reprint 864, 867, because it was long before this case a good cause of challenge to a juror that he before had been a juror in the same cause. However, in *Rex v. Bell*, 2 Str. 995, 93 Eng. Reprint 991, it is said that this statement by Holt is not conclusive since one might have been a juror in the same cause where a venire de novo had been awarded.

12. *Bright v. Eynon*, 1 Burr. 390, 395, 97 Eng. Reprint 365. See *Bartling v. Jamison*, 44 Mo. 141, per Biiss, J.

13. See Pollock & M. Hist. of Eng. Law, vol. 2, p. 665; 3 Bl. Com. 387; Bul. N. P. 327; *Bright v. Eynon*, 1 Burr. 390, 397, 97 Eng. Reprint 365.

14. *Hinton v. McNeil*, 5 Ohio 509, 24 Am. Dec. 315; *Bright v. Eynon*, 1 Burr. 390, 393, 97 Eng. Reprint 365; *The Queen v. The Corporation of Helston*, 10 Mod. Rep. 202, 88 Eng. Reprint 693. See also *Goodtitle v. Clayton*, 4 Burr. 2224, 98 Eng. Reprint 159; *Goodwin v. Gibbons*, 4 Burr. 2108, 98 Eng. Reprint 100.

[a] "Looking at the principle upon which a motion for a new trial is founded, having taken the place of attain, and in some measure of writs of error and bills of exception, it is founded upon the broadest and most liberal principles of justice. It is for the interest of the community that this power should be as unrestrained as possible, because it affords one of the most simple, direct, prompt and convenient modes of considering, deciding and applying the rules of law to the circumstances of every case which can arise." *Bicknell v. Dorion*, 16 Pick. (Mass.) 478, 484.

to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal.¹⁵ In fact, a motion for a new trial is an appeal to the trial court for the correction of its errors, and a formal notice of what the appellate court may be asked to review if relief is not granted in the trial court.¹⁶ The office of a motion for a new trial is not alone to secure a new hearing, but to present the errors complained of for correction, if possible, without another hearing.¹⁷

4. Distinguished From Other Remedies.—There are other corrective remedies more or less akin to the remedy of new trial, and it is important at times to differentiate them.

a. *Venire De Novo*.—A motion for a venire facias de novo should not be confused with a motion for a new trial, although the effect of the motions is the same, and the former is frequently classed with the latter.¹⁸ Motions for new trials have a wider scope, however, and in modern practice they have largely superseded motions for a venire de novo.¹⁹

[b] **Justice to the Court.**—In *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35, it is said that the power of courts of general jurisdiction, in the correction of errors committed by them, "is exercised not alone on account of their solicitude for the rights of litigants, but also in justice to themselves as instruments provided for the impartial administration of the law." And such is the view generally entertained by the courts in this country. **Ia.**—*Allen v. Wheeler*, 54 Iowa 628, 7 N. W. 111. **La.**—*State ex rel. Henderson v. McCrea*, 40 La. Ann. 20, 3 So. 380. **Mass.** *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800. **Minn.**—*Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868. **Mo.**—*Standard Milling Co. v. White Line Central Transit Co.*, 122 Mo. 258, 26 S. W. 704; *State ex rel. Brainerd v. Adams*, 84 Mo. 310. **Pa.**—*Com. v. Gabor*, 209 Pa. 201, 58 Atl. 278.

15. *Hensley v. Davidson Bros. Co.*, 135 Iowa 106, 112 N. W. 227; *Chadron Loan & Bldg. Assn. v. Scott*, 4 Neb. (Unof.) 694, 96 N. W. 220; *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35.

16. See *infra*, I, B, 9.

[a] **The cardinal object of a new trial**, however, was not to correct the errors of the court, but of the jury. *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

17. *Railroad Co. v. Johnson*, 114 Tenn. 632, 88 S. W. 169. See also *Barnes v. Noel*, 131 Tenn. 126, 174 S. W. 276.

18. *Stephen on Pl.* 100; *United States v. Hawkins*, 10 Pet. (U. S.) 125, 9 L. ed. 369; *Hite's Heirs v. Wilson*, 2 Hen. & M. (12 Va.) 268. See the title "*Venire de Novo*."

[a] "**A venire facias de novo and a motion for a new trial are very different things**; they agree indeed in some things, but differ in many; they agree in this, that a venire facias de novo must be awarded in both, and that the court may or may not grant either of them; but they differ first in this, that a venire facias de novo is the ancient proceeding of the common law, a new trial is only a new invention; the first is as ancient as the law, when attainments were in use . . . and therefore to avoid that severity it was thought better to proceed in a milder way, and so motions for new trial were introduced. . . . The most material difference between them is this, that a venire facias de novo must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it." *Witham v. Lewis*, 1 Wils. K. B. 48, 95 Eng. Reprint 485.

See also *Kinney v. Beverley*, 2 Hen. & M. (12 Va.) 318, where Judge Tucker uses the same language.

19. **The grounds for a new trial, at common law, include not only those causes in which a venire de novo would at all times have been granted, but also include other causes.** See *infra*, II.

b. *Directing a Verdict.*—The considerations and legal principles that guide the courts in directing a verdict and in granting a new trial on the evidence are not the same.²⁰ In directing a verdict the court is governed by practically the same rules that are applicable in demurrers to evidence.²¹ Where there is some substantial evidence to support a verdict for one party a verdict for the other should not be directed because a preponderance of evidence is favorable to the movant.²² But under proper circumstances a new trial may be granted under such circumstances.²³

c. *Arrest of Judgment.*—Arrest of judgment is based upon some defect apparent upon the record. It stays the entry of judgment. It is in the nature of a demurrer to the facts of the case as presented by the record.²⁴ Motions in arrest of judgment for causes not apparent of record are, practically, only applications for new trials.²⁵

d. *Motion for Judgment Non Obstante.*—A motion for new trial differs materially from a motion for judgment non obstante veredicto.²⁶

e. *Mistrial.*—A new trial recognizes a completed trial which for sufficient reason has been set aside so that the issues may be litigated de novo. A mistrial is a nugatory trial. A new trial results from the exercise of judicial discretion, while a mistrial is a positive matter of law.²⁷

f. *Trial De Novo.*—A trial de novo, that is anew or a second time, is not in any sense a new trial, but means a trial in a higher or appellate court, as if no action had been brought in the lower court. It is not a proceeding to correct errors, but a consideration of the case anew either upon the same or additional evidence.²⁸

g. *Rehearing.*—Although a new trial has been said to mean the rehearing of a cause from the beginning,²⁹ yet a "rehearing" proper is a term, used in connection with appellate proceedings at law, signifying a new hearing in a matter once decided; a further consideration of a case upon a re-argument.³⁰ The term is also used in connection with equity practice, meaning a second hearing before the original jurisdiction, in distinction from appeal.³¹

h. *Re-reference.*—When a matter has been referred to a master or to a referee by order of a court, especially in courts of equity, and the character of the report shows that there is a necessity for

20. *Florida East Coast Ry. Co. v. Hayes*, 66 Fla. 589, 64 So. 274.

21. *Hammond v. Jacksonville Electric Co.*, 66 Fla. 145, 63 So. 709.

22. *Florida East Coast Ry. Co. v. Hayes*, 66 Fla. 589, 64 So. 274; *Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878.

See the title "**Verdict.**"

23. See *infra*, II, G.

24. See the title "**Arrest of Judgment.**"

25. *Quinebaug Bank v. Leavens*, 20 Conn. 87, 50 Am. Dec. 272.

26. See 14 STANDARD PROC. 958.

27. *Stern v. Wabash R. Co.*, 52 Misc. 12, 101 N. Y. Supp. 181, 182.

28. *Del.*—*Kareher v. Green*, 8 Houst. 163, 32 Atl. 225. **N. M.**—*Lewis v. Baca*, 5 N. M. 289, 21 Pac. 343. **Tex.**—*Harrold v. Barwise*, 10 Tex. Civ. App. 138, 30 S. W. 498.

29. *Dayton & U. R. Co. v. Dayton & M. Traction Co.*, 72 Ohio St. 429, 74 N. E. 195, 196.

30. 3 Bl. Com. 453.

See the title "**Rehearing.**"

31. See the title "**Rehearing.**"

correction or for further investigation, the report may usually be sent back or "referred back," or "recommitted" to the master or referee. Such a proceeding is in no sense, of course, a new trial.³²

5. Power To Grant.—*a. Courts of Common Law.*—(I.) **General Jurisdiction.**—(A.) **POWER INHERENT.**—New trials are peculiar to courts of common law where jury trials prevail,³³ and, with reference to courts of general jurisdiction, the power to try a case also implies the power to hear and decide a motion for a new trial.³⁴ While, in many jurisdictions, the power to grant new trials is conferred upon the courts by express statutory authority, yet courts of general common-law jurisdiction have inherent power to grant, or to refuse, such motions,³⁵ because courts of general jurisdiction, in civil actions,³⁶ have by the principles of the ancient common law the power to correct errors in their own proceedings, and therefore a right to set aside verdicts and to grant new trials.³⁷ This inherent power will not be deemed to have been abrogated by statute unless the intent so to do is clear.³⁸

(B.) **POWER DISCRETIONARY.**—The power of trial courts of general

32. See the title "References."

33. *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; *Arellano v. Chacon*, 1 N. M. 269.

See this section, and *infra*, I, B, 5, b.

34. *Cheesman v. Hart*, 42 Fed. 98, 105.

[a] **Power Is Incidental.**—*Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226.

35. *Ala.*—*Woodward Iron Co. v. Brown*, 167 Ala. 316, 320, 52 So. 829. *Ark.*—*Taylor v. Grant Lumber Co.*, 94 Ark. 566, 127 S. W. 962. *Conn.*—*Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. *Ia.*—*Bottineau Land & L. Co. v. Hintze*, 150 Iowa 646, 649, 125 N. W. 842. *Mass.*—See *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912 D, 588. *Minn.*—*McNamara v. Minnesota Cent. Ry. Co.*, 12 Minn. 388. *Mo.*—*Ewart v. Peniston*, 233 Mo. 695, 711, 136 S. W. 422. *N. Y.*—*Ellis v. Hearn*, 132 App. Div. 207, 116 N. Y. Supp. 977. *Okla.*—*Todd v. Orr*, 44 Okla. 459, 145 Pac. 393. *P. I.*—*De Fiesta v. Llorente & Manila R. Co.*, 25 Phil. Isl. 554. *Wash.*—*Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88; *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175. *Eng.*—*Bright v. Eynon*, 1 Burr. 390, 97 Eng. Reprint 365.

See also *infra*, II, A, 1.

36. As to criminal actions, see *infra*, I, B, 6, a, (II).

37. *Conn.*—*Bartholomew v. Clark*, 1

Conn. 472. *Minn.*—*McNamara v. Minnesota Cent. Ry. Co.*, 12 Minn. 388. *N. J.*—*Van Waggoner v. Coe*, 25 N. J. L. 197; *Squier v. Gale*, 6 N. J. L. 157. *Okla.*—*Todd v. Orr*, 44 Okla. 459, 145 Pac. 393. *P. I.*—*De Fiesta v. Llorente & Manila R. Co.*, 25 Phil. Isl. 554.

And see other cases cited in preceding notes.

[a] **Rhode Island.**—In the colony and state of Rhode Island, under the charter and under the constitution, the jurisdiction of the courts as to new trials has always depended entirely upon statute. Under authority given by the charter, the General Assembly, in 1677, passed a law entitled "A rehearing after judgment granted," providing that "either the plaintiff or defendant shall each of them have liberty of one rehearing if either of them desires it, and no more." Pub. Laws, R. I., 1636-1705, p. 26; *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 80 Atl. 406. Ann. Cas. 1913 B, 356.

[b] "Trials by jury in civil causes could not subsist without this power." *Bright v. Eynon*, 1 Burr. 390, 397, 97 Eng. Reprint 365.

38. *Conn.*—*Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. *Ia.*—*Bottineau Land & L. Co. v. Hintze*, 150 Iowa 646, 649, 125 N. W. 842. *Ore.*—*De Vall v. De Vall*, 60 Ore. 493, 118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914 A, 409, 40 L. R. A. (N. S.) 291. *R. I.*—See *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913 B, 356.

jurisdiction to grant new trials is not arbitrary, however, but is based upon judicial discretion,³⁹ that is, a legal discretion, to be exercised according to principles ascertained by adjudged cases,⁴⁰ because the ground for granting a new trial must be a legal one.⁴¹ The statutes however, may give an absolute right to a new trial in certain cases.⁴²

(II.) **Inferior Jurisdiction.**—The inherent power to grant new trials is limited to courts of general jurisdiction,⁴³ and in the absence of authority by statute, courts of inferior and limited jurisdiction have no power to set aside the verdict of juries found in their courts and grant new trials.⁴⁴ The jurisdiction of inferior courts, as, for example,

39. *Wolfe v. Ridley*, 17 Idaho 173, 104 Pac. 1014; *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912 D, 588. See *infra*, III, G, 2.

[a] In the first reported case on account of error in the verdict (*Wood v. Gunston*, Style 466, 82 Eng. Reprint 867) Lord Chief Justice Glenn says that it is in the discretion of the court to grant a new trial, "but this must be a judicial and not an arbitrary discretion."

[b] Such a discretion does not mean a mere whim or caprice, but it means an honest attempt, in the exercise by the judge of his duty and power to see that justice is done, to establish a legal right. *Johnson v. Gragson*, 230 Mo. 380, 130 S. W. 673.

40. *Vickers v. Philip Carey Co.*, 49 Okla. 231, 151 Pac. 1023, L. R. A. 1916 C, 1155.

[a] "In criminal cases, where the life or liberty of the citizen is involved, a judge may properly exercise a liberal discretion in allowing a person convicted to have another opportunity of explanation and defense, when there is reasonable doubt as to guilt, or fairness in the first trial. But in civil cases, when the rights of the parties have once been determined after full investigation, by an impartial jury, the discretion of the judge should be a legal discretion, controlled by the principles and usages of law." *Chandler v. Tompson*, 30 Fed. 38, 44.

41. *Braithwaite v. Aikin*, 2 N. D. 57, 49 N. W. 419.

As to grounds, see *infra*, II.

42. See *infra*, I, B, 8.

43. See *Bartling v. Jamison*, 44 Mo. 141, and cases in note following.

44. *Ga.*—*Daniel v. State*, 55 Ga. 222; *Tate v. State*, 48 Ga. 37; *Booth v. Stamper*, 6 Ga. 172; *Ex parte Simpson*, R. M. Charl. 111. *Ia.*—*Duponte*

v. Downing, 6 Iowa 172. *Mo.*—*Bartling v. Jamison*, 44 Mo. 141, 144. *Neb.* *Cox v. Tyler*, 6 Neb. 297. *N. Y.* *Wilke v. People*, 53 N. Y. 525; *Zimmerman v. Bloch*, 12 Misc. 158, 32 N. Y. Supp. 1073, 66 N. Y. St. 358; *Son v. People*, 12 Wend. 344; *People v. Stone*, 5 Wend. 39; *People v. Sessions of Chenango*, 2 Caines 319. *Pa.* *Howser v. Com.*, 51 Pa. 332. *Eng.* *Rex v. Peters*, 1 Burr. 568, 571, 97 Eng. Reprint 452; *Brooke v. Ewers*, 1 Str. 113, 93 Eng. Reprint 418; *Jewell v. Hill*, 1 Str. 499, 93 Eng. Reprint 659. *Can.*—*Yearke v. Bingleman*, 28 U. C. Q. B. 551.

As to new trial in justices' courts, see 18 STANDARD PROC. 77.

[a] **The Rule Has Come Down From the Early English Decisions.**—It was held that new trials could not be granted in inferior courts, because trials in such courts were not like trials at nisi prius, since the nisi prius trials are subordinate upon writs issuing out of King's Bench, over which the latter court had authority and inspection. *Mayor v. Alderman of Bristol*, 2 Salk. 650, 91 Eng. Reprint 553.

[b] In criminal cases, under the former English practice, a new trial could not be granted by an inferior court, but only by the court of King's Bench. In order that a motion for a new trial could be heard at all in a criminal case (and they were grantable only in misdemeanors), the proceedings must have originated in the King's Bench, or have been removed into that court by a writ of certiorari. *Skinner v. Northallerton County Court*, App. Cas. (1899) 439; *Reg. v. Dudley*, 14 Q. B. Div. 273, 560; *Reg. v. Parke*, 2 K. B. (1903) 432.

[c] **Prohibition** is the proper remedy where a court is about to exceed its powers and grant a new trial.

county courts, probate courts, justices of the peace, and municipal courts to grant new trials is derived wholly from statutory provisions.⁴⁵

b. *Courts of Equity*.—The chancery and ecclesiastical courts proceeded according to the method of the civil law, having no jury trials as a matter of right,⁴⁶ but their decrees or decisions might be made the subject of a rehearing by any aggrieved party.⁴⁷

c. *Courts of Admiralty*.—A rehearing or a new trial may under proper circumstances be granted in admiralty.⁴⁸

d. *Federal Courts*.—The federal statutes expressly provide that the district courts may, after trial by jury, grant new trials,⁴⁹ and the language of the seventh amendment to the Constitution of the United States, "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," has been construed to give to federal courts the power, in their discretion, to set aside verdicts and grant new trials.⁵⁰ A

People *ex rel. Jerome v. Court of General Sessions*, 185 N. Y. 504, 78 N. E. 149.

45. *Mo.*—*Bartling v. Jamison*, 44 Mo. 141. *Neb.*—*Cox v. Tyler*, 6 Neb. 297. *N. Y.*—People *ex rel. Jerome v. Court of General Sessions*, 185 N. Y. 504, 78 N. E. 149; *Lanergan v. People*, 39 N. Y. 39, 5 Abb. Pr. (N. S.) 113, 6, Park Cr. 209; *Nicholson v. Moriarty*, 13 Misc. 244, 34 N. Y. Supp. 57, 68 N. Y. St. 12. *Can.*—*Bland v. Rivers*, 19 Ont. 407.

See 18 STANDARD PROC. 78.

[a] **The municipal court** may grant a new trial. *New York City Municipal Court Code*, 1915, §6.

[b] **New Jersey**.—The statute conferring power upon the judges of certain inferior courts, namely, district and county courts, to grant new trials provides "the judge may if he sees fit order a new trial to be had upon such terms as he shall think reasonable." This act, it is held, confers on judges of district courts as full and ample power to grant new trials as obtain in courts of common law jurisdiction. *Dunning v. Reid*, 76 N. J. L. 384, 69 Atl. 1013.

[c] **Habeas Corpus—County Court**. There is no provision of law for the filing of a motion for a new trial in a habeas corpus proceeding in a county court. *State v. Shrader*, 73 Neb. 618, 103 N. W. 276, 119 Am. St. Rep. 913.

46. 3 Bl. Com. 100.

47. 2 Dan. Ch. Pr. 1543; *Hunter v. Marlboro*, 2 Woodb. & M. 168, 12 Fed. Cas. No. 6,908; *Cargill v. Spence*, 2

Hag. Ecc. Sup. (Eng.) 146. See in general, the title "Rehearing."

[a] **Rehearing**.—In equity, a rehearing is analogous to a new trial and rehearings are granted, except when the judge acts of his own motion, only upon such grounds as would authorize a new trial in an action at law. In equity, however, the application for a rehearing is not an ex parte proceeding. *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. 197, 201, 6 Sawy. 527; *Bentley v. Phelps*, 3 Woodb. & M. 403, 3 Fed. Cas. No. 1,332.

48. See Admiralty Rule 40; The Annex No. Three, 38 Fed. 620; and 1 STANDARD PROC. 550.

49. U. S. Rev. Sts., §726; U. S. Comp. Sts., §1246; The Judicial Code, §269, Act March 3, 1911; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873; *Newcomb v. Wood*, 97 U. S. 581, 583, 24 L. ed. 1085; *Parsons v. Bedford*, 3 Pet. (U. S.) 433, 488, 7 L. ed. 732; *Hughey v. Sullivan*, 80 Fed. 72.

50. See *infra*, this note.

[a] **The control of the court over the verdict after it is given** is as much a part of the trial by jury as the giving of the verdict itself, and the right to have the issues tried by a second jury, or even a third jury when the verdict of the first jury is affected by some infirmity for which the common law required the trial court to set that verdict aside, is as much a right of "trial by jury" preserved by the first constitution as the first trial. *Hughey v. Sullivan*, 80 Fed. 72, 76.

state statute cannot enlarge or restrict the power of a federal court to grant a new trial, because in regard to motions for a new trial federal courts are independent of any statute or practice prevailing in the courts of the state,⁵¹ and the power of the federal courts to grant new trials is not controlled by the federal statute which provides that procedure in civil cases shall be as near as may be to the practice of the state in which the court is held.⁵² It has been held, however, that a state statute limiting the number of new trials will be followed by the courts of the United States.⁵³

e. *Appellate Courts*.—Appellate courts, such as supreme courts, courts of errors, and other courts of review, may, in the exercise of their appellate jurisdiction for the correction of errors in the trial courts, order new trials in the courts below,⁵⁴ and, in some jurisdictions, the statutes or rules of court, provide that the supreme court may grant a new trial, on original application, either on some particular ground, or because the time for granting a new trial in the lower court has expired.⁵⁵ However, to review original proceedings in the appellate courts, or obtain the reconsideration of a decision on appeal,

51. *Troxell v. Delaware*, L. & W. R. Co., 219 U. S. 584, 31 Sup. Ct. 469, 55 L. ed. 346; *Missouri Pac. Ry. Co. v. Chicago & A. R. Co.*, 132 U. S. 191, 10 Sup. Ct. 65, 33 L. ed. 309; *Indianapolis & St. L. Ry. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Johnson v. Cadillac Motor Car Co.*, 197 Fed. 485; *United States v. Gibson*, 188 Fed. 396; *Hughey v. Sullivan*, 80 Fed. 72.

52. See U. S. Rev. Sts., §914. See also *Knight v. Illinois Cent. R. Co.*, 180 Fed. 368, 103 C. C. A. 514; *Murhard Estate Co. v. Portland & Seattle R. Co.*, 163 Fed. 194, 90 C. C. A. 64 (reviewing cases); *Tullis v. Lake Erie & W. R. Co.*, 105 Fed. 554, 44 C. C. A. 597; *United States v. Davis*, 103 Fed. 457; *Hughey v. Sullivan*, 80 Fed. 72; *United States v. Train*, 12 Fed. 852.

53. *Equator, etc. Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. ed. 114; *Campbell v. Iron-Silver Min. Co.* 83 Fed. 643, 27 C. C. A. 646.

54. Conn.—*Cowles v. Coe*, 21 Conn. 220. Ind.—*Haughton v. Aetna Life Ins. Co.*, 42 Ind. App. 527, 85 N. E. 125, 1050. Md.—*Archer v. State*, 74 Md. 410, 22 Atl. 6, 737. N. C.—*Higgs & Co. v. Sperry & Hutchinson Co.*, 139 N. C. 299, 51 S. E. 1020. W. Va.—*Maupin v. Scottish Union & Nat. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

See the title "Mandate and Proceedings Thereafter."

[a] Technically, it is a *venire de novo* that the appellate court directs, as

distinguished from the order of a new trial which, properly, proceeds from the trial court. "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings." *Parsons v. Bedford*, 3 Pet. (U. S.) 433, 448, 7 L. ed. 732. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. ed. 979; *New York, etc. R. Co. v. Fraloff*, 100 U. S. 24, 31, 25 L. ed. 531.

55. Conn.—*Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. N. J.—*La Valle v. Electric Cutlery Co.*, 56 N. J. L. 59, 27 Atl. 1066; *Schuyler v. Mills*, 28 N. J. L. 137. N. C.—*Daniels v. Fowler*, 123 N. C. 35, 31 S. E. 598; *Henry v. Smith*, 78 N. C. 27. N. D.—*McKenzie v. Bismarck Water Co.*, 6 N. D. 361, 71 N. W. 608. R. I.—*Haggelund v. Oakdale Mfg. Co.*, 26 R. I. 520, 60 Atl. 106; *Thurston v. Schroeder*, 6 R. I. 272. Vt.—*Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57; *Nelson v. Marshall*, 77 Vt. 44, 58 Atl. 793.

[a] Under the North Dakota statute, "errors in law" occurring at the trial are not ground for a new trial in the district court, and for such ground an original application must be made in the supreme court. *McKenzie v.*

a motion for a rehearing, rather than new trial, is the proper practice.⁵⁶

6. Granted in What Causes.—a. *At Law.*—(I.) *Civil Actions.*

(A.) *IN GENERAL.*—The particular causes in which new trials may be granted upon issues of fact, in civil actions, in courts of law of general jurisdiction, are practically as numerous as the causes themselves, whether in the nature of contract, of tort, or of special proceedings; and the right given to the trial judge to grant new trials in civil cases is not limited to any particular classes of action.⁵⁷ In illustration of the general right in civil cases to grant new trials, it has been held that such motions may be entertained in such special proceedings as quo warranto,⁵⁸ in a proceeding to remove one from elective office,⁵⁹ in an action for the usurpation of a franchise,⁶⁰ mandamus,⁶¹ in condemnation proceedings,⁶² in distress proceedings,⁶³ in proceedings to compel the listing of omitted property for taxation,⁶⁴ and the determination of a contested petition for distribution of a decedent's estate.⁶⁵ A new trial may also be granted in involuntary liquidation proceedings against a bank, under a bank commissioner act.⁶⁶ Moreover, in general, the power to grant a new trial should be exercised in any cause, whenever a trial judge is convinced⁶⁷ that

Bismarck Water Co., 6 N. D. 361, 71 N. W. 608.

56. *In re Philbrook*, 108 Cal. 14, 40 Pac. 1061. See the title "**Rehearing.**"

57. See *People v. City of Oakland*, 123 Cal. 145, 55 Pac. 772; *People v. Glasgow*, 30 App. Div. 94, 52 N. Y. Supp. 24; and the statutes of the several states.

[a] "The right to move for a new trial is present in every case whether legal or equitable." *Law v. Smith*, 34 Utah 394, 98 Pac. 300.

[b] **Class of Actions Not Limited.** "It is insisted that distress proceedings are entirely regulated by statute, and as the statute provides for appeals and is silent as to motions for new trials, such procedure is forbidden by implication. There may be authority for this position in some code states, but we see no occasion for adopting such construction here. Our statute provides merely the manner and time within which such motions are to be made and does not prescribe or limit the class of actions where permitted. It is a wholesome and ancient method of correcting promptly and inexpensively errors that may creep into the rulings of the court or findings of the jury, and the silence of the statute does not inhibit its use." *Owens v. Wilson*, 58 Fla. 335, 50 So. 674, 138 Am. St. Rep. 117.

58. Mich.—*People v. Sackett*, 14

Mich. 320. But see *Attorney General v. Joy*, 181 Mich. 266, 148 N. W. 250. Neb.—*State v. Atchison, etc. R. Co.*, 38 Neb. 437, 57 N. W. 20. Eng.—*Rex v. Francis*, 2 T. R. 484, 100 Eng. Reprint 261.

59. *Law v. Smith*, 34 Utah 394, 98 Pac. 300.

60. *People v. Oakland*, 123 Cal. 145, 55 Pac. 772. See also, *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; *People v. Sutter St. Ry. Co.*, 117 Cal. 604, 49 Pac. 736.

61. Mass.—*Com. ex rel. Springfield v. Hampden County Comrs.*, 6 Pick. 501. N. Y.—*People ex rel. Wieland v. Knox*, 78 App. Div. 344, 79 N. Y. Supp. 989. Wis.—*State v. Hoeflinger*, 33 Wis. 594.

62. *Metropolitan R. Co. v. Mac Farland*, 195 U. S. 322, 25 Sup. Ct. 28, 49 L. ed. 219; *Murhard Estate Co. v. Portland & Seattle Ry. Co.*, 163 Fed. 194, 90 C. C. A. 64.

63. *Owens v. Wilson*, 58 Fla. 335, 50 So. 674, 138 Am. St. Rep. 117.

64. *Stearns Coal & Lumber Co. v. Com.*, 163 Ky. 837, 174 S. W. 771.

65. *In re Sutro's Estate*, 152 Cal. 249, 92 Pac. 486, 1027.

66. *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481.

67. *Schlag v. Chicago, M. & St. P. R. Co.*, 152 Wis. 165, 139 N. W. 756.

to enter judgment on a verdict would result in a miscarriage of justice.

(1.) *Issues of Fact.* — A new trial being a re-examination of an issue of fact, there can be no new trial unless in a previous hearing there has been a trial of such an issue,⁶⁸ and the term "issue of fact" refers to an issue arising on formal pleadings,⁶⁹ in which evidence in some form or other is taken.⁷⁰ Where a cause is submitted on pleadings without a trial upon any issue of fact, no new trial can be had,⁷¹ and when a cause is submitted to the court upon an agreed statement of facts, no new trial will lie after the decision.⁷² Moreover,

68. **Cal.**—Maxson *v.* Superior Court, 124 Cal. 468, 57 Pac. 379; Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411; Harper *v.* Hildreth, 99 Cal. 265, 33 Pac. 1103. **Idaho.**—Smith *v.* Clyne, 15 Idaho 254, 97 Pac. 40, 42. **Ind.**—Harris *v.* Tomlinson, 130 Ind. 426, 30 N. E. 214. **Kan.**—McDermott *v.* Halleck, 65 Kan. 403, 69 Pac. 335. **Mont.**—State *ex rel.* Heinze *v.* Second Judicial District Court, 28 Mont. 227, 72 Pac. 613; Beach *v.* Spokane Ranch & Water Co., 21 Mont. 7, 52 Pac. 560.

[a] **Does Not Apply to Every Order.** A new trial applies to issues of fact, and in those cases in which issues of fact are framed. It does not apply to every order which may be made *ex parte*, or by the court of its own motion, simply because the court has permitted written objections to be filed. Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235.

[b] **The allowance of alimony** is an incident to an action of divorce, and, although a determination as to its allowance may involve a controversy as to facts, such determination is not the trial of an issue in the case. It may be before or after the trial. Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411.

[c] **Proceedings to set apart a homestead, or to exempt personal property from execution, or for a family allowance,** under the provisions of the California statute, do not involve any trial of issues of fact, and, consequently, a motion for a new trial does lie in such proceedings. *In re Heywood's Estate*, 154 Cal. 312, 97 Pac. 825; Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235. In this latter case, the court speaking of the application of jury trials, and, consequently, new trials, in probate matters said: "In *In re*

Moore, 72 Cal. 340, 13 Pac. 880, it was suggested that the operation of these sections should be confined 'to those cases in which the code has expressly authorized issues of fact to be framed.' " It is not necessary, however, in this case to lay down a rule of universal application; and all we decide is that, in the matter before us proceedings for a new trial were not authorized. It is better perhaps to follow the suggestion of Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 616, as to ascertain the intent and proper application of the provisions bearing upon the subject "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."

69. *State ex rel.* Culbertson Ferry Co. *v.* District Court, 49 Mont. 595, 144 Pac. 159; *In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1033.

[a] **Does Not Apply to Mere Motions.**—A motion which does not ask for a decision on an issue of fact that arises upon the pleadings is not subject of a new trial, and it needs little reflection to see that if every motion which is made in the courts on a trial, or with reference to an action, could be followed by a motion for a new trial of such motion, the case itself would be inextricably involved in the determination of these motions, and the final judgment in the action indefinitely postponed. Harper *v.* Hildreth, 99 Cal. 265, 33 Pac. 1103.

70. Ray *v.* Arnett, 32 Ky. L. Rep. 562, 106 S. W. 828.

71. *Abbey Land & Imp. Co. v. San Mateo County*, 167 Cal. 434, 139 Pac. 1068, Ann. Cas. 1915C, 804, 52 L. R. A. (N. S.) 408.

72. Quist *v.* Sandman, 154 Cal. 748, 99 Pac. 204; Gregory *v.* Gregory, 102

there cannot be, at common law, a "new trial" in cases of default, since there has never been a trial.⁷³ A judgment by default may be set aside by proper motion, but such a remedy is quite different from a new trial which is a re-examination of an issue of fact.⁷⁴ By force of statute, however, in some states, a retrial may be obtained, under certain circumstances, in default cases.⁷⁵

Likewise in criminal cases, a new trial can be granted only after a trial, that is, after a verdict of conviction,⁷⁶ and, consequently, a motion for a new trial will not lie after a plea of guilty.⁷⁷

(2.) *Issue of Law.*—There can be no new trial upon an issue of law, since such issues can be investigated upon appeal without previous examination by the trial court.⁷⁸ Consequently, no new trial can be granted for rulings upon demurrers,⁷⁹ and if the facts have been agreed to or have been eliminated so that the controversy depends upon a question of law, there is nothing upon which to base a new trial.⁸⁰

Cal. 50, 36 Pac. 364; *Sheets v. Henderson*, 77 Kan. 761, 93 Pac. 577; *Noble v. Harter*, 6 Kan. App. 823, 49 Pac. 794. *Compare* *Shallenberger v. Brady*, 37 Okla. 440, 131 Pac. 1096.

73. Cal.—*In re Dean's Estate*, 149 Cal. 487, 87 Pac. 13; *Savings & Loan Soc. v. Meeks*, 66 Cal. 371, 5 Pac. 624; *Younger v. Moore*, 8 Cal. App. 237, 96 Pac. 1093. Ind.—*Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351; *Bell v. Corbin*, 136 Ind. 269, 36 N. E. 23; *Brenner v. Heiler*, 46 Ind. App. 335, 91 N. E. 744. Ky.—*Riglesberger v. Baily*, 102 Ky. 608, 44 S. W. 118. Minn.—*Myrick v. Pierce*, 5 Minn. 65. Mo.—*Crossland v. Admire*, 118 Mo. 87, 24 S. W. 154. N. J.—*See Rosner v. Cohn*, 81 N. J. L. 343, 79 Atl. 1056. Vt.—*Adams v. Howard*, 14 Vt. 158. Wash.—*Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381.

[a] **Oklahoma; Failure To Attend Trial.**—Where, however, defendant was adjudged in default for failure to appear and prosecute the action (and not for failure to reply), and evidence was introduced by the plaintiff and judgment rendered in his favor, a motion for a new trial may be filed by the defendant. *Lovejoy v. Stutsman*, 46 Okla. 122, 148 Pac. 175.

74. *Price v. Ratcliffe*, 47 Okla. 370, 148 Pac. 153; *J. F. Hart Lumber Co. v. Rucker*, 17 Wash. 600, 50 Pac. 484; *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381.

[a] **Default Judgment Distinguished From Surprise.**—Where the defendant, in response to a summons, appeared and demurred to the complaint, which being overruled, interposed an

answer, and then arranged for a day for the trial; and where upon the day for the trial, defendant did not appear, but the case was regularly called, evidence submitted to the jury, and a verdict returned, and judgment entered, such a judgment was not a judgment by default to be set aside upon motion, but defendant could move for a new trial on the ground of irregularity, or accident or surprise. *Luke v. Coffee*, 31 Nev. 165, 101 Pac. 555.

75. *See Berryhill v. Jacobs*, 20 Iowa 246.

76. *Ledgerwood v. State*, 134 Ind. 81, 33 N. E. 631.

77. *Jackson v. State*, 161 Ind. 36, 67 N. E. 690; *Ledgerwood v. State*, 134 Ind. 81, 33 N. E. 631.

78. Cal.—*Quist v. Sandman*, 154 Cal. 748, 99 Pac. 204. Conn.—*Zaleski v. Clark*, 45 Conn. 397. Kan.—*Sheets v. Henderson*, 77 Kan. 761, 93 Pac. 577; *Wagner v. Atchison, T. and S. F. Ry. Co.*, 73 Kan. 283, 85 Pac. 299.

79. Ga.—*Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719; *Gibson v. Carreker*, 82 Ga. 46, 9 S. E. 124; *Nicholls v. Popwell*, 80 Ga. 604, 6 S. E. 21; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451. Ind.—*Irwin v. Smith*, 72 Ind. 482; *Glendy v. Lanning*, 68 Ind. 142; *Davis v. Pool*, 67 Ind. 425; *Leiter v. Jackson*, 8 Ind. App. 98, 35 N. E. 289. Kan.—*Barber Asphalt Paving Co. v. Topeka*, 6 Kan. App. 133, 50 Pac. 904. Minn.—*Dodge v. Bell*, 37 Minn. 382, 34 N. W. 739. Wyo.—*Perkins v. McDowell*, 3 Wyo. 328, 23 Pac. 71.

80. *Gregory v. Gregory*, 102 Cal. 50,

Moreover, although some of the grounds for which a new trial may be granted may involve only a question of law, yet there can be no new trial upon such grounds until there has been an original trial, that is, such a trial as results in a verdict, a report of a referee, or a decision by the court which involves and determines the facts in issue.⁸¹

(3.) *Case Tried by Court*.—In some states, new trials are grantable only in cases tried by jury,⁸² and in the federal courts, new trials apply only to jury cases.⁸³ In many states, however, there may be a new trial of an issue of fact whether the case be tried by a jury or by the court, and this practice is expressly authorized by many of the statutes.⁸⁴

(4.) *Decision by Referee*.—In some states,⁸⁵ the report or decision of a referee may be set aside, and a new trial granted, in like manner as

36 Pac. 364; *Wagner v. Atchison*, T. & S. F. Ry. Co., 73 Kan. 283, 85 Pac. 299.

81. *Darling v. Atchison*, T. & S. F. Ry. Co., 76 Kan. 893, 93 Pac. 612, 613, 94 Pac. 202.

[a] **No Issue of Fact Raised by Evidence**.—There may be new trials where as far as the grounds are concerned, only questions of law are involved, and when no issue of fact is raised by the evidence. For example, a "new trial" on the ground of "unavoidable casualty" may be granted after the previous dismissal of a suit. *Ray v. Arnett*, 32 Ky. L. Rep. 562, 106 S. W. 828.

82. **Me.**—*Espeargnette v. Merrill*, 107 Me. 304, 78 Atl. 290. **N. Y.** *City Trust, S. D. & Sur. Co. v. Wilson Mfg. Co.*, 58 App. Div. 271, 68 N. Y. Supp. 1004; *Simpson v. Hefter*, 43 Misc. 608, 88 N. Y. Supp. 282. **N. D.** *Park River Bank v. Norton*, 12 N. D. 497, 97 N. W. 860. **R. I.**—*Bristow v. Nichols*, 19 R. I. 719, 37 Atl. 1033. **Eng.**—*Pannell v. Nunn*, 28 Wkly. Rep. 940.

[a] **Mississippi**.—(1) Under the code of 1871, a motion for a new trial was permissible where the case was tried by the judge without a jury. *Nicholson v. Karpe*, 58 Miss. 34. (2) Under the Code of 1880, a motion for a new trial was not contemplated, but a bill of exceptions is taken directly to the judgment of the court. *Quin v. Myles*, 59 Miss. 375.

83. Rev. Sts., §726; U. S. Comp. Sts., 1916, §1246. And see *Chandler v. Tompson*, 30 Fed. 38, where it is said: "The statute conferring jurisdiction upon the federal courts to grant new

trials . . . should be exercised 'for reasons for which new trials have been usually granted in courts of law.' This provision applies only to jury trials, and is directory to the courts, to be governed by the rules and principles of the common law."

84. See the statutes and the following. **Cal.**—*Harper v. Hildreth*, 99 Cal. 265, 270, 33 Pac. 1103. **Ga.** *Phillips, etc. Co. v. Jones*, 139 Ga. 160, 76 S. E. 1019; *Castellaw v. Blanchard*, 106 Ga. 97, 100, 31 S. E. 801. **Ia.** *Hooker v. Chittenden*, 106 Iowa 321, 323, 76 N. W. 706. **Kan.**—*Mc Dermott v. Halleck*, 65 Kan. 403, 408, 69 Pac. 335. **Ky.**—*Riglesberger v. Bailey*, 102 Ky. 608, 44 S. W. 118. **Mo.** *Crossland v. Admire*, 118 Mo. 87, 91, 24 S. W. 154. **Mont.**—*Froman v. Patterson*, 10 Mont. 107, 111, 24 Pac. 692. **Neb.**—*Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632, 154 N. W. 217. **Utah.**—*Law v. Smith*, 34 Utah 394, 98 Pac. 300. **Wyo.**—*United States v. Trabing*, 3 Wyo. 144, 148, 6 Pac. 721.

85. **Cal.**—*Cappe v. Brizzolara*, 19 Cal. 607. **Minn.**—*Thayer v. Barney*, 12 Minn. 502. **Neb.**—*Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450. **N. Y.**—*Smith v. Schanck*, 18 Barb. 344; *Foster v. Coleman*, 1 E. D. Smith 85.

See generally the title "References."

[a] Where the statute is general in its terms relating to the granting of new trials, the court is vested with the same power in cases tried by a referee, as in cases tried by the court itself, or by a jury. Every case is placed upon the same footing, and the grounds

in cases of a decision of the court, or a verdict of the jury, and the statutes sometimes expressly so provide.⁸⁶

(B.) ACTIONS FOR PENALTIES. — It was at one time held that in an action for a penalty, a verdict for the defendant would not be set aside and a new trial granted on the sole ground that the verdict was against the evidence,⁸⁷ and this rule was extended to actions for libel and slander, and to other actions vindictive in their nature.⁸⁸ The rule was settled in analogy to criminal proceedings,⁸⁹ but the modern rule is that a new trial may be granted in such instances,⁹⁰ because the action for a penalty is not a criminal but a civil action.⁹¹

(II.) Criminal Proceedings. — At common law, motions for new trials were permitted in cases of misdemeanor tried before the King's Bench, either originally or removed from inferior courts into that court by certiorari, or sent by that court to be tried at nisi prius.⁹² New trials were not grantable, however, in cases of felony or treason.⁹³ The authority and jurisdiction of criminal courts, in this country, to grant new trials are usually derived from the statutes,⁹⁴ though it has been

upon which a new trial may be granted are the same in all cases irrespective of the manner in which the case was originally tried. *Cappe v. Brizzolara*, 19 Cal. 607.

86. See the statutes.

[a] **Jury Cases Only.**—In jurisdictions where new trials apply only to cases tried by juries, the decision of a referee is not subject to such motions. Thus a motion for a new trial cannot be granted by the court, where an action at law is referred to a referee to hear and determine. *Alder v. Edenborn*, 198 Fed. 928. See *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. ed. 334.

87. *Lawyer v. Smith*, 1 Denio (N. Y.) 207; *Overseers of Poor v. Lunt*, 15 Wend. (N. Y.) 565; *Wheeler v. Calkins*, 17 How. Pr. (N. Y.) 451; *Comfort v. Thompson*, 10 Johns. (N. Y.) 101; *Mattison v. Allanson*, 2 Str. 1238, 93 Eng. Reprint 1154; *Seymour v. Day*, 2 Str. 899, 93 Eng. Reprint 926.

88. *Crafts v. Plumb*, 11 Wend. (N. Y.) 143; *Jarvis v. Hatheway*, 3 Johns. (N. Y.) 180, 3 Am. Dec. 473.

89. *Overseers of the Poor v. Lunt*, 15 Wend. (N. Y.) 565, where the chief justice further said that the rule seemed to have no foundation in reason or good sense.

90. *People v. Bean*, 88 Hun 520, 34 N. Y. Supp. 973, 9 N. Y. Crim. 536, 69 N. Y. St. 36; *People v. McMasters*, 74 Hun 226, 26 N. Y. Supp. 221.

91. *Buffalo v. Schliefer*, 25 Hun (N.

Y.) 275. See the title "Penalties, Forfeitures and Fines."

92. *Stephen's Com. Laws of Eng.*, vol. IV, 374. See *Reg. v. Dudley*, 14 Q. B. Div. 273, 560; *Skinner v. Northalerton County Court Judge*, App. Cas. (1899) 439; *Reg. v. Parke*, 2 K. B. (1903) 432.

93. *Mass.*—*Com. v. Green*, 17 Mass. 515. *Mich.*—*People v. Marble*, 38 Mich. 309. *Neb.*—*Dodge v. People*, 4 Neb. 220. *N. Y.*—*People v. Seidenschner*, 152 N. Y. Supp. 595; *People v. Comstock*, 8 Wend. 549. *Eng.*—*Rex v. Fowler*, 4 B. & Ald. 273, 6 E. C. L. 481, 106 Eng. Reprint 937; *Reg. v. Oxford*, 13 East 411, 415 (note b), 104 Eng. Reprint 429; *Reg. v. Mawbey*, 6 T. R. 619, 638, 101 Eng. Reprint 736; *Reg. v. Read*, 1 Lev. 9 (1662), 83 Eng. Reprint 271; *Reg. v. Murphy*, L. R. 2 P. C. (1869) 535; *Reg. v. Bertrand*, L. R. 1 P. C. (1867) 520.

94. See the statutes and the following: *Cal.*—*People v. Amer*, 151 Cal. 303, 90 Pac. 698; *People v. Kirby*, 15 Cal. App. 264, 114 Pac. 794. *Colo.* *Klink v. People*, 16 Colo. 467, 27 Pac. 1062. *Neb.*—*Hubbard v. State*, 72 Neb. 62, 100 N. W. 153, 9 Am. & Eng. Anno. Cas. 1034; *Dodge v. People*, 4 Neb. 220. *N. Y.*—*People v. Dalton*, 15 Wend. 581. *R. I.*—*State v. Papa*, 32 R. I. 453, 80 Atl. 12. *S. D.*—*State v. Coleman*, 17 S. D. 594, 98 N. W. 175. *Wash.* *Thompson v. Washington Ter.*, 1 Wash. Ter. 547.

held that such a court has the inherent power to grant a new trial,⁹⁵ and generally throughout the United States, new trials are granted in all criminal cases, whether for misdemeanors or felonies, for practically the same causes, and under like circumstances, as in civil cases,⁹⁶ and, as in civil cases, motions for a new trial in criminal cases are addressed to the discretion of the trial judge.⁹⁷ Under the English common law, a new trial in misdemeanor cases was not granted, as a rule, in favor of the prosecution upon the acquittal of the accused,⁹⁸ even though the verdict of acquittal was against the evidence, or was founded upon a misdirection of the judge.⁹⁹ In this country, after a verdict of acquittal, it is the almost universal rule that no new trial can be granted to the prosecution in any criminal case whatsoever.¹

95. *Com. v. Endrukut*, 231 Pa. 529, 80 Atl. 1049, 35 L. R. A. (N. S.) 470.

[a] **Constitutional Right.**—In New York, however, it is held that the constitution guarantees to a defendant a fair trial, and no statute can deprive him of it, and that independent of a statute, the trial court has inherent power to grant a new trial if the defendant has been in any way deprived of that right. *People v. Mullen*, 49 Misc. 389, 99 N. Y. Supp. 227, 19 N. Y. Crim. 589.

96. **U. S.**—*United States v. Harding*, 1 Wall. Jr. 127, 26 Fed. Cas. No. 15,301; *United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. **Idaho.** See *State v. Cotterel*, 12 Idaho 572, 86 Pac. 527. **Ind.**—*Jackson v. State*, 161 Ind. 36, 67 N. E. 690; *Weinzorpfen v. State*, 7 Blackf. 186. **Kan.**—*Campbell v. Downer*, 94 Kan. 674, 146 Pac. 1039; *State v. Appleton*, 73 Kan. 160, 84 Pac. 753; *State v. Bogue*, 52 Kan. 79, 84, 34 Pac. 410. **La.**—*State v. Hornsby*, 8 Rob. 583, 41 Am. Dec. 314. **Mass.** *Com. v. Green*, 17 Wend. 515. **Minn.** *State v. Miller*, 10 Minn. 313. **Tex.** *Perez v. State*, 48 Tex. Crim. 225, 87 S. W. 350.

[a] **Treason.**—In the case of the *United States v. Fries*, 3 Dall. 515, 1 L. ed. 701, a new trial was granted on an indictment for treason. See also *State v. Hopkins*, 1 Bay (S. C.) 372.

[b] **In England**, new trials in criminal cases apparently are no longer granted. *Appeal Act*, 1907, 7 Edw. VII, ch. 23, §20 (1).

[c] **Only after a trial**, see *supra*, note 77.

As to grounds for new trial, see *infra*, II.

97. See *infra*, III, G, 2.

98. *Reg. v. Mann*, 4 Maule & S. 337,

105 Eng. Reprint 858; *Rex v. Bear*, 2 Salk. 646, 91 Eng. Reprint 547; *Reg. v. Duncan*, 7 Q. B. D. 198; Bl. Com. IV, 336.

99. *Reg. v. Mann*, 4 Maule & S. 337, 105 Eng. Reprint 858; *Reg. v. Reynell*, 6 East 315, 102 Eng. Reprint 1307; *Smith v. Frampton*, 1 Ld. Raym. 62, 91 Eng. Reprint 938; *Reg. v. Jackson*, 1 Lev. 124, 83 Eng. Reprint 330.

[a] **Verdict Obtained by Fraud.** Where, however, the verdict was obtained by the fraud or unfair practice, of the accused, or in consequence of irregularity in his proceedings, a new trial could be granted, even though the defendant had been acquitted. *Rex v. Furser*, Sayer 90, 96 Eng. Reprint 813; *Rex v. Bear*, 2 Salk. 646, 91 Eng. Reprint 547; *Rex v. Davis*, 1 Show. 336, 89 Eng. Reprint 609; 1 Chit. Cr. L. 655. See, however, *Reg. v. Fenwick*, 1 Sid. 153, 82 Eng. Reprint 1027, where the court said that the defendant could be punished for the perjury he committed, but that the court cannot grant a new trial. And see *Reg. v. Read*, 1 Lev. 9, 83 Eng. Reprint 271.

[b] **Nonfeasance.**—A new trial could be granted, whatever the original verdict was, in a case of misdemeanor consisting of mere nonfeasance, or which involved only a mere civil liability. *Reg. v. Johnson*, 2 E. & E. 613, 105 E. C. L. 612, 29 L. J. M. C. 133, 6 Jur. N. S. 553, 8 W. R. 236, 121 Eng. Reprint 230; *Reg. v. Russell*, 3 E. & E. 942, 77 E. C. L. 942, 118 Eng. Reprint 1394.

1. **Cal.**—*People v. Bangeneaur*, 40 Cal. 613. **Conn.**—*State v. Brown*, 16 Conn. 54. See, however, *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498. **Ind.**—*Danen-*

b. *In Equity*.—As elsewhere shown,² rehearings, which are analogous to new trials, are allowed in causes in equity in the discretion of the court,³ and an application for a rehearing in equity is controlled by the general rules governing a motion for a new trial at law.⁴ Moreover, in any issue tried by a jury, when ordered by the court, the discretion of the court in ordering new trials in such jury cases, and the grounds for which new trials may be granted, are practically the same as at common law.⁵ In former times, when courts

offer *v. State*, 79 Ind. 75. **Md.**—Cochran *v. State*, 119 Md. 539, 87 Atl. 400. **N. J.**—State *v. Kanouse*, 20 N. J. L. 115. **N. C.**—State *v. Phillips*, 66 N. C. 646; State *v. Freeman*, 66 N. C. 647; State *v. Credle*, 63 N. C. 506; State *v. Jones*, 5 N. C. 257. **Okla.**—Turner *v. Territory*, 15 Okla. 557, 82 Pac. 650. **Ore.**—See State *v. Reed*, 52 Ore. 377, 97 Pac. 627. **Pa.**—Com. *v. Pflueger*, 10 Pa. Dist. 717. **S. C.**—State *v. Wright*, 2 Treadw. 517, 3 Brev. 421. **Tex.**—State *v. Burris*, 3 Tex. 118. **Can.** Reg. *v. Port Perry & P. W. R. Co.*, 38 U. C. Q. B. 431.

[a] Under the Federal Constitution, (1) "no fact once tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," therefore there can be no trial in capital cases, after a regular trial once had upon a sufficient indictment. United States *v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. (2) Mr. Justice Gray, in Sparf *v. United States*, 156 U. S. 51, 175, 15 Sup. Ct. 273, 321, 39 L. ed. 343, says: "Although Mr. Justice Story, in United States *v. Gibert* (1834), 2 Sumn. 19, thought that a new trial could not be granted to a man convicted of murder by a jury, because to do so would be to put him twice in jeopardy of his life, yet the circuit courts of the United States may doubtless grant new trials after conviction, though not after acquittal, in criminal cases tried before them." Citing United States *v. Fries*, 3 Dall. 515, 1 L. ed. 701; United States *v. Wilson*, Baldw. 78, 108, 28 Fed. Cas. No. 16,730; United States *v. Williams*, 1 Cliff. 5, 28 Fed. Cas. No. 16,707; United States *v. Smith*, 3 Blatchf. 255, 27 Fed. Cas. No. 16,320; United States *v. Maccomb*, 5 McLean 286, 26 Fed. Cas. No. 15,702; United States *v. Keen*, 1 McLean 429, 26 Fed. Cas. No. 15,510; United States *v. Harding*, 1 Wall. Jr. 127, 26 Fed. Cas. No. 15,301.

[b] Appeal in Nature of Motion for New Trial.—In the case of State *v. Lee* (65 Conn. 265, 279, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498), under a statute providing that "appeals from the rulings and decisions of the superior court upon all questions of law arising on the trial of criminal causes may be taken by the state . . . in the same manner and to the same effect as if made by the accused," it is held that even after a verdict of acquittal of a felony (murder in second degree), the state may take an appeal in the nature of a motion for a new trial, and that a person accused of crime is not put in jeopardy until both the facts and the law applicable to the facts are finally determined. See generally the title "Review."

2. See *supra*, I, B, 4, g, and the title "Rehearing."

3. **Ill.**—Ennor *v. Galena & S. W. R. Co.*, 14 Ill. App. 327. **Mass.**—Winchester *v. Winchester*, 121 Mass. 127. **R. I.**—Shepard *v. Taylor*, 16 R. I. 166, 13 Atl. 105.

4. **Mass.**—Gibson *v. Crehore*, 5 Pick. 146. **N. J.**—Burrows *v. Wene* (N. J. Eq.), 26 Atl. 890. **N. Y.**—Dinsmore *v. Adams*, 48 How. Pr. 274. **Tenn.**—Smith *v. Sneed*, Cooke 190.

5. **Ill.**—Waddams *v. Humphrey*, 22 Ill. 661. **Ky.**—Harrison *v. Harrison*, 1 Litt. 137, 140. **N. H.**—Clark *v. First Congregational Society*, 45 N. H. 331. **N. J.**—Trenton Banking Co. *v. Rossell*, 2 N. J. Eq. 511. **N. Y.**—Clark *v. Brooks*, 2 Abb. Pr. (N. S.) 385, 2 Daly 159; Lansing *v. Russell*, 13 Barb. 510. **N. C.**—Feagram *v. King*, 9 N. C. 605. **Va.**—Grigsby *v. Weaver*, 5 Leigh (32 Va.) 197. **W. Va.**—Barnes' Code, 1916, ch. 105, §18, p. 1055. **Eng.**—Metropolitan Ry. Co. *v. Wright*, 11 App. Cas. 152, 55 L. J. Q. B. 401, 54 L. T. N. S. 658, 34 Wkly. Rep. 746; Kemp *v. Mackrell*, 2 Ves. Sr. 579, 28 Eng. Reprint 370; Cleeve *v. Gascoigne*, Amb. 323, 27 Eng. Reprint 217.

of law refused to grant new trials, courts of equity sometimes arrested the enforcement of a judgment at law for the purpose of deciding whether a new trial should be had in order to prevent serious wrong. Although this procedure has become practically obsolete,⁶ yet, in some jurisdictions, after the judgment, or after the time for a motion for a new trial at law has expired, a bill in equity may be filed to vacate the judgment and to obtain a new trial.⁷ In jurisdictions, however, where the distinctions between pleadings in law and in equity have been abolished, the former chancery practice of proceeding by petition for rehearing, or a bill of review, is no longer necessary since the court may grant a new trial on motion.⁸

c. *Whether for Part of the Cause of Action.*—It was the old rule that a new trial was not to be granted for merely a part of the cause of action, but for the whole,⁹ but it is well established, at the present time, that, in proper cases, a new trial may be had of less than all the issues,¹⁰ and this practice is sometimes expressly authorized by statute¹¹ or rule of court.¹² A party cannot, however, as a matter

6. *Hayes v. United States Phonograph Co.*, 65 N. J. Eq. 5, 55 Atl. 84; *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 Atl. 1045; *Hannon v. Maxwell*, 31 N. J. Eq. 318.

7. See *infra*, III, A, 6 and 15 STANDARD PROC. 257.

[a] **Criminal Case.**—A court of equity will not interfere for the purpose of granting a new trial in a criminal case. *Hubbard v. State*, 72 Neb. 62, 100 N. W. 153, 9 Am. & Eng. Ann. Cas. 1034.

8. **Ind.**—*Jones v. Jones*, 91 Ind. 72. **Neb.**—*Williams v. Miles*, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769. **N. D.**—*State ex rel. Berndt v. Templeton*, 21 N. D. 470, 130 N. W. 1009. **S. C.**—*Covington v. Covington*, 47 S. C. 263, 25 S. E. 193. **Utah.**—See *Law v. Smith*, 34 Utah 394, 98 Pac. 300; *Fisher v. Emerson*, 15 Utah 517, 50 Pac. 619.

9. **Ala.**—*Dale v. Mosely*, 4 Stew. & P. 371. **Tex.**—*Hume v. Schintz*, 16 Tex. Civ. App. 512, 40 S. W. 1067. **Va.**—*Gardner's Admr. v. Vidal*, 6 Rand. (27 Va.) 106. **Eng.**—*Tidd's Pr.*, 911; *Edie v. East India Co.*, 1 W. Bl. 295, Bull. 328, 2 Burr. 1216, 96 Eng. Reprint 166; *Parker v. Godin*, 2 Str. 813, 93 Eng. Reprint 866, was trover for plate. The question was "what meddling with the effects of a bankrupt is a conversion." The verdict was for the defendant, and a new trial was granted. At the end of the report the case is as follows: "N. B. A difficulty arose upon this motion for

a new trial, which was this: There were other things besides plate in the declaration, and as to them the verdict pro defendant was right; and yet a new trial must be granted upon the whole."

10. **Cal.**—*In re Everts' Estate*, 163 Cal. 449, 125 Pac. 1058. **Ia.**—*Case Threshing Mach. Co. v. Fisher*, 144 Iowa 45, 122 N. W. 575. **Kan.**—*Corley v. Atchison, T. & S. F. R. Co.*, 95 Kan. 124, 130, 147 Pac. 842, Ann. Cas. 1916B, 163. **Mass.**—*Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. **Minn.**—*Smith v. Great Northern R. Co.*, 133 Minn. 192, 158 N. W. 46. **Nev.**—*Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74. **N. H.** *Lisbon v. Lyman*, 49 N. H. 553. **N. Y.** *Amory v. Amory*, 3 Abb. Pr. (N. S.) 16, 6 Robt. 514, 33 How. Pr. 490. **N. C.**—*Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444. **R. I.**—*Clark v. New York, N. H. & H. R. Co.*, 35 R. I. 479, 87 Atl. 206; *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356, giving an excellent review of the early English cases. **S. D.**—*Spawm v. South Dakota Cent. R. Co.*, 26 S. D. 1, 3, 127 N. W. 648, Ann. Cas. 1912D, 979. **Eng.**—See *Hutchinson v. Piper*, 4 Taunt. 555, 128 Eng. Reprint 447. **Can.**—*Baker v. Read*, 7 Nova Scotia 199.

11. **Conn. Gen. Sts.**, 1902, §803; **Kan. Laws**, 1909, ch. 182, §307.

12. **R. S. C.** 1883 (Eng.) Ord. xxxix, r.

of right move for a new trial only as to one of two or more issues, regardless of their dependence,¹³ since a new trial should be granted on all of the issues if it appears that injustice would otherwise be done.¹⁴ Where, however, there are separable issues, a new trial may in the discretion of the court be granted as to one, and refused as to the others,¹⁵ and where special findings are separable, the judge may grant a new trial on a separable issue.¹⁶ A new trial may be ordered on the question of damages alone,¹⁷ and in connection with reports

13. D. C.—*Browne v. Dyson*, 38 App. Cas. 5. **Minn.**—See *Fink v. United American F. Ins. Co.*, 109 Minn. 422, 124 N. W. 7. **N. Y.**—*Colwell Lead Co. v. Construction Material & Coal Co.*, 156 App. Div. 824, 142 N. Y. Supp. 112; *Lavelle v. Corrignio*, 86 Hun 135, 33 N. Y. Supp. 376, 67 N. Y. St. 122. **N. C.**—*Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070; *Burnett v. Roanoke Mills Co.*, 152 N. C. 35, 67 S. E. 30. **W. Va.**—*Moss v. Campbell's C. R. Co.*, 75 W. Va. 62, 83 S. E. 721.

14. *Doody v. Boston & M. R. R.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846.

15. *In re Everts' Estate*, 163 Cal. 449, 125 Pac. 1058; *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356.

[a] **Single Question.**—(1) In *Secomb v. Provincial Ins. Co.*, 4 Allen (Mass.) 152, 153, a new trial was granted on a single question "whether Smyrna, in a commercial sense and by commercial usage, was a port in Europe." (2) In *Amherst Bank v. Root*, 2 Mete. (Mass.) 522, 542, the court said: "As the only exception, which is sustained relates to the proof of the execution of the bond, the court are of opinion that this is one of those cases where the new trial should be confined to the point, whether the bond was duly executed, and that the issue to the jury on the new trial should be on that fact only."

[b] **Single Plea.**—*Stroud v. Stroud, Executor*, 7 M. & G. 417, 49 E. C. L. 416, 135 Eng. Reprint 174, was an action for debt. The defendant pleaded, first, that the testatrix was never indebted; secondly, payment; thirdly, plene administravit. The plaintiff had a verdict. A new trial was granted on the last issue, because the verdict was against the evidence; but the verdict on the first and second issue was not disturbed. *Tindal*, Ch. J., said.

"With respect to the first part of the case I entertain no doubt but that it ought to rest where it is on the finding of the jury. . . . With regard to the question arising on the plea of plene administravit, which I think has not been properly sifted, it seems to me that the case ought to go down to a new trial." *Creswell*, C. J.: "The proper course will be to enter a verdict for the plaintiff on the first issue with 11 pounds, 2s damages, and for the plaintiff on the second issue; and that, on payment of cost, there be a new trial on the last issue, the plaintiff admitting that the 20 pounds were paid in a due course of administration." Rule absolute accordingly.

16. Ia.—*Dawson v. Wisner*, 11 Iowa 6. **Kan.**—*Ord Nat. Bank v. Massey*, 7 Kan. App. 680, 51 Pac. 570. **Mass.**—*Edwards v. Willey*, 218 Mass. 363, 105 N. E. 986. **Mont.**—*Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146. **Nev.**—*Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74. **S. D.**—*Spawn v. South Dakota Cent. R. Co.*, 26 S. D. 1, 3, 127 N. W. 648, Ann. Cas. 1912D, 979.

17. Ind.—*Radcliff v. Radford*, 96 Ind. 482. **Me.**—*McKay v. New England Dredging Co.*, 93 Me. 201, 44 Atl. 614. **Mass.**—*Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588; *Stynes v. Boston Elev. R. Co.*, 206 Mass. 75, 91 N. E. 998, 30 L. R. A. (N. S.) 737. **N. H.**—*Doody v. Boston & M. R. R.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846; *Lisbon v. Lyman*, 49 N. H. 553. **N. C.**—*Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *Strother v. Aberdeen, etc. R. Co.*, 123 N. C. 197, 31 S. E. 386. **R. I.**—*Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356; *Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521, 78 Am. St. Rep. 881. **S. C.**—*Laney v. Bradford*, 4 Rich. L. 1.

[a] **Damages Only.**—(1) In *Boyd v. Brown*, 17 Pick. (Mass.) 453, 461, the

of referees, there may be a new trial on matters collateral to the main issue.¹⁸ Although it is held that a new trial should not be granted upon issues raised by a cross-complaint without also granting a new trial as to the issues raised by the original complaint,¹⁹ yet where the issues on the cross-complaint are distinct from those on the complaint, a new trial may, in some jurisdictions, be granted on the cross-complaint.²⁰ Also, where distinct counts and causes of action and cross-complaints and counterclaims are all tried in the same case, a new trial may be granted as to part only, and denied as to others.²¹

court found that the damages were excessive and said: "But this we do not consider a sufficient reason for setting aside the verdict and granting a new trial so as to open the whole merits of the case to future litigation, which have been once fairly tried, especially as the verdict may be set aside in part, and a new trial granted with respect to the assessment of damages only, as was done in the case of *Winn v. Columbian Ins. Co.*, 12 Pick. 288; and thus the only error existing may be corrected without the expense of a new trial on the merits." (2) In *Ryder v. Hathaway*, 21 Pick. (Mass.) 298, 306, the court said: "The verdict must therefore be set aside, and a new trial granted. But as the question of title has been fully and fairly tried and settled, there can be no reason for retrying that, and the new trial must be confined entirely to the question of damages."

[b] In an action to recover the value of a quantity of wool, a new trial was granted by the superior court on the issue of the value of the wool alone. *Pratt v. Boston Heel & Leather Co.*, 134 Mass. 300, 302. See also *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356.

[c] **Contrary View.**—The damages in an action for negligence are entire and indivisible, and cannot be split up as to form a basis for several trials. Indeed, the splitting of entire demands so that a man may institute several actions where one would suffice is forbidden, whether these demands arise on contract or grow out of tort. This is too elementary to require citation of authority to support it. It may well be doubted whether, even if authorized by statute, it would be due process of law to permit the plaintiff in an action for unliquidated

damages to retain the advantage gained by the verdict, and at the same time have one or more trials for the purpose of increasing or adding to the damages first awarded. This might deprive the defendant in such new trial of the benefit of many items of evidence proper to be considered by the jury in mitigation of unliquidated damages. It would also impair or destroy the finality of verdicts and of judgments founded thereon. *Banaszek v. F. Mayer Boot & Shoe Co.*, 161 Wis. 404, 154 N. W. 637.

18. See *infra*, this note.

[a] "The term 'new trial' had always been regarded by the profession as meaning a complete re-trial of a cause, except in certain instances. . . . These instances are where the trial of fact in which the error intervened has been a trial not involving the main issue of fact in the case; as where a remonstrance to the acceptance of a report of a committee or auditors sets up certain facts, and the court on the trial of an issue on those facts makes erroneous rulings, that render the trial of the issue a mis-trial. There a new trial of only that part of the case involved in that issue is asked for in the motion, and of course only the new trial asked for is granted. The new trial is here, as everywhere, a new trial of the facts, and is in no sense a new trial of the law." *Zaleski v. Clark*, 45 Conn. 397, 403.

19. *Kable v. Crown Oil Co.*, 180 Ind. 131, 100 N. E. 681.

20. *Cal.*—*Jacob v. Carter*, 102 Cal. xviii, 36 Pac. 381. *Ind.*—*Kessans v. Kessans* (Ind. App.), 108 N. E. 380; *Topp v. Standard Metal Co.*, 47 Ind. App. 483, 94 N. E. 891. *Ia.*—*McAfferty v. Hale*, 24 Iowa 355. *N. C.* *Hall v. Hall*, 131 N. C. 185, 42 S. E. 562.

21. *Spawn v. South Dakota Cent. R.*

If, however, several causes of action are merged, and there is a general verdict on them all, the court cannot separate them for the purpose of granting a new trial,²² although the contrary would be true if special verdicts were returned.²³

When a new trial is granted as to only one of several issues, it opens for examination only that issue.²⁴

d. *Whether for Part of the Parties.* — (I.) **Civil Cases.** — It was formerly the rule in civil cases that a new trial could not be granted at the instance of one of several defendants.²⁵ If granted, the new trial had to be brought against all of them.²⁶ This rule has been greatly relaxed, however, in modern times, particularly in cases of tort.²⁷ Thus, in an action for personal injuries against two defendants, the court may give judgment against one and grant a new trial to the other.²⁸ Moreover, in contract, when, in distinction from a joint judgment, a plaintiff may obtain separate judgments against two or more

Co., 26 S. D. 1, 127 N. W. 648, Ann. Cas. 1912D, 979.

22. *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326.

23. *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326.

24. *In re Everts' Estate*, 163 Cal. 449, 125 Pac. 1058.

25. *Ga.*—*McCalla v. Shaw*, 72 Ga. 458. *Ill.*—*Cochran v. Ammon*, 16 Ill. 316; *Maxwell v. Habel*, 92 Ill. App. 510. *Mass.*—See *Bicknell v. Dorion*, 16 Pick. 478. In this case, the question is elaborately discussed by Chief Justice Shaw, referring to all the English cases, up to that time, in both civil and criminal trials. It was held, however, that a new trial might be granted to one of two defendants, without disturbing the verdict in favor of the other defendant. *Eng.*—*Parker v. Godin*, 2 Str. 813, 93 Eng. Reprint 866; *Berrington's Case*, 3 Salk. 362, 91 Eng. Reprint 874; *Collier v. Morris*, Bull. N. P. 326. And see *Tidd's Pr.* 911.

26. See cases in preceding note, and *Bond v. Spark*, 12 Mod. 275, 88 Eng. Reprint 1318.

27. *U. S.*—*Strand v. Griffith*, 109 Fed. 597; *Albright v. McTighe*, 49 Fed. 817. *Cal.*—*Fearon v. Fodera*, 169 Cal. 370, 148 Pac. 200; *Clark v. Torchiana*, 19 Cal. App. 786, 127 Pac. 831. *Conn.*—*Sparrow v. Bromage*, 83 Conn. 27, 74 Atl. 1070, 27 L. R. A. (N. S.) 209. *Mich.*—*Moreland v. Durocher*, 121 Mich. 398, 80 N. W. 284. *Ill.*—*Pecararo v. Halberg*, 246 Ill. 95, 92 N. E. 600. *Neb.*—*Gross v. Scheel*, 67 Neb. 223, 93 N. W. 418. *N. J.*—*Hagy v. Hafner*,

86 N. J. L. 502, 94 Atl. 48. *N. Y.*—*Seely v. Chittenden*, 4 How. Pr. 265. *S. C.*—*Webber v. Jonesville*, 94 S. C. 189, 77 S. E. 857. *Tex.*—See *Texas & P. R. Co. v. Moore* (Tex. Civ. App.), 119 S. W. 697. *W. Va.*—*Pence v. Bryant*, 73 W. Va. 126, 80 S. E. 137. *Eng.*—*Price v. Harris*, 10 Bing. 331, 25 E. C. L. 159, 131 Eng. Reprint 932.

[a] **Equitable Rule Applied.**—“The rule that judgments at law are entireties in the sense that they are void or reversible as a whole and as to all the defendants, if they are void or reversible as to one or more defendants, has been disavowed by the supreme court in a number of recent decisions. *State ex rel. Ozark County v. Tate*, 109 Mo. 265; *Breman Bank v. Umrath*, 55 Mo. App. 43. The rule as now established is that a judgment against several defendants, invalid as to one or more, may be annulled as to the improper parties, and affirmed as to the others, it being the purpose of our code of procedure to apply the rules applicable to decrees in equity in this respect, as far as they are applicable to judgments at law.” *Holborn v. Naughton*, 60 Mo. App. 100.

[b] “Inasmuch as separate actions could have been maintained against each of the defendants, neither of them had the right to insist that the other be retained in the case until final trial and judgment.” *Pence v. Bryant*, 73 W. Va. 126, 80 S. E. 137, 139.

28. *Pecararo v. Halberg*, 246 Ill. 95, 92 N. E. 600. See, also, cases in preceding note.

parties defendant,²⁹ or when separate verdicts are returned against coparties,³⁰ or the property rights of co-defendants are distinct,³¹ a trial court may grant a new trial to one, and refuse it to another. When, however, the liability of one of several defendants cannot exist without that of the others, it is error, after a verdict in favor of all, to grant a motion for a new trial against one alone.³²

(II.) **Criminal Cases.**—In case of joint trials of parties accused of crime, where some are acquitted and some convicted, it was at one time doubted whether the verdict could be set aside and a new trial granted as to a convicted defendant without, also, setting aside the same verdict of acquittal as to the acquitted defendant.³³ It is, however, established that in such cases a new trial may be granted to a convicted party without affecting the verdict of acquittal as to another party.³⁴ No new trial can, however, be granted against a defendant who has been acquitted.³⁵ In case two or more co-defendants are all convicted, it is, moreover, within the discretion of the court to grant a new trial to one and to refuse it to another.³⁶

7. Stage of the Proceedings.—a. *After the Verdict.*—A trial properly ends with the verdict, and application for new trials are properly classed among proceedings made after the verdict and before the judgment. At what stage of such proceedings, however, steps for

29. Ga.—*Adams v. Bank of Stewart County*, 94 Ga. 718, 20 S. E. 356. **Ind.**—*First Nat. Bank of Huntington v. Williams*, 126 Ind. 423, 26 N. E. 75. **Mass.**—*Way v. Butterworth*, 106 Mass. 75. **Mo.**—*Bremen Bank v. Umrath*, 55 Mo. App. 43. **Tenn.**—*The Union Bank v. McClung*, 9 Humph. 98.

As to joint and several judgments, see 15 STANDARD PROC. 81, et seq. *Compare* 14 STANDARD PROC. 1015.

[a] **Effect of Statute.**—The “principle of the common law has been greatly interfered with in our state by statutory provisions, and to such an extent as to render it difficult of application, even in cases of joint actions against defendants chargeable in the same right and to the same extent, for, by statute, the principle of the common law, that a failure against one joint defendant is a failure as to all, is repealed, and a plaintiff may now have judgment in such cases against such of the defendants as he can charge by a verdict, notwithstanding others may be discharged by the same verdict.” *The Union Bank v. McClung*, 9 Humph. (Tenn.) 98, 101.

30. Stubbings v. Village of Evanston, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839.

31. Ga.—*Equitable Mortgage Co. v. McWaters*, 119 Ga. 337, 46 S. E. 437. **Ind.**—*Clay v. Redifer*, 32 Ind. App. 93, 69 N. E. 305. **Ia.**—*McBride v. McClintock*, 108 Iowa 326, 79 N. W. 83. **32. Holborn v. Naughton, 60 Mo. App. 100.**

33. King v. Mawbey, 6 T. R. 619 (1796), 101 Eng. Reprint 736. See *Kemp v. Com.*, 18 Gratt. (59 Va.) 969, 977.

34. United States v. Campbell, 4 Cranch C. C. 658, 25 Fed. Cas. No. 14,714; *Sims v. State*, 87 Ga. 569, 13 S. E. 551; *Seborn v. State*, 51 Ga. 164; *Tidd's Pr.* 912.

35. Reg. v. Inhabitants of Wandsworth, 1 Barn. & Ald. 63, 106 Eng. Reprint 23 (*approved in Reg. v. Southampton*, 19 Q. B. Div. 590); *Reg. v. Mann*, 4 Maule & S. 337, 105 Eng. Reprint 858; *Reg. v. Reynell*, 6 East 315, 102 Eng. Reprint 1307. See *supra*, I, B, 6, a, (II).

36. Browne v. United States, 145 Fed. 1, 76 C. C. A. 31; *Kemp v. Com.*, 18 Gratt. (59 Va.) 969. But see *contra*, *Queen v. Gompertz*, 9 Q. B. 824, 58 E. C. L. 823, 115 Eng. Reprint 1491; *Fern's Case*, from Buller, N. P. 326, cited in the case of *R. v. Mawbey*, 6 T. R. 619, 101 Eng. Reprint 736.

a new trial can be taken, depends upon the local practice.³⁷

b. *Order of Motions.*—(I.) *Arrest of Judgment.*—By the general rule, a party cannot move for a new trial after he has moved in arrest of judgment,³⁸ and it is sometimes so provided by statute.³⁹ The rule, however, extends only to cases where the party has knowledge of the facts at the time of moving in arrest of judgment.⁴⁰ Some cases hold, nevertheless, that a motion to arrest judgment does not bar a motion for a new trial.⁴¹

(II.) *Judgment Non Obstante Veredicto.*—A motion for a new trial logically precedes a motion for judgment non obstante veredicto, but a number of cases hold that a motion for a new trial may follow such a motion,⁴² and by the practice in some jurisdictions a motion for a judgment non obstante veredicto may be joined with a motion for a new trial.⁴³

(III.) *Venire Facias De Novo.*—It is also held that a motion for a new trial may follow a motion for a venire facias de novo.⁴⁴

c. *Entry of Judgment.*—Although, at common law, a motion for a new trial is regularly made before entry of judgment,⁴⁵ and although such is still the practice in some jurisdictions,⁴⁶ yet in many

37. See *infra*, III, D.

[a] **At common law** (1) in the King's Bench, after a general verdict, the prevailing party entered a rule for judgment nisi causa. At the expiration of four days exclusive after entering such rule, if no sufficient cause was shown to the contrary, judgment could be signed. Tidd's Pr. 903; Heiskell v. Rollins, 81 Md. 397, 32 Atl. 249. (2) During this period of four days opportunity was given the unsuccessful party to avoid the effect of the verdict (Andrew's Stephen's Pl., §95), (3) and within the time limited by the rule he could move the court to set aside the verdict, or to grant a new trial, or to arrest the judgment, or to render judgment non obstante veredicto, or to award a venire facias de novo. Tidd's Pr. 904.

38. **Ill.**—Hall v. Nees, 27 Ill. 411. **Ind.**—Kelley v. Bell, 172 Ind. 590, 88 N. E. 58; Eckert v. Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Rogers v. Maxwell, 4 Ind. 243. **Mo.**—McComas v. State, 11 Mo. 116; McKee v. Jones Dry Goods Co., 152 Mo. App. 241, 132 S. W. 1191. **Tenn.**—Pelican Assur. Co. v. American Feed, etc. Co., 122 Tenn. 652, 126 S. W. 1085. **Texas.** Hipp v. Ingram, 3 Tex. 17. **Eng.**—Philpot v. Page, 4 Barn. & C. 160, 10 E. C. L. 525, 107 Eng. Reprint 1019; Rex v. White, 1 Burr. 333, 97 Eng.

Reprint 338; Turbervil v. Stamp, 2 Salk. 647, 91 Eng. Reprint 548.

39. N. J. Comp. Sts., 1910, §163; Hipp v. Ingram, 3 Tex. 17.

40. Eckert v. Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; McKinney v. Springer, 6 Ind. 453.

41. **U. S.**—Turner v. Foxall, 2 Cranch C. C. 324, 24 Fed. Cas. No. 14,255. **Ark.**—Pope v. Latham, 1 Ark. 66. **Ga.**—Candler v. Hammond, 23 Ga. 493. **Ky.**—Jewell v. Blandford, 7 Dana 472.

42. **Ill.**—Chicago & N. W. R. Co. v. Dimick, 96 Ill. 42, 48. **Ia.**—Stone v. Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870. **Kan.**—See Linker v. Union Pac. R. Co., 87 Kan. 186, 123 Pac. 745. **Minn.**—Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623. **Neb.** Kafka v. Union Stock Yards Co., 87 Neb. 331, 127 N. W. 129.

43. See Pennsylvania Pr. Act, April 22, 1895 (P. L. 286); Fries-Breslin Co. v. Bergen, 168 Fed. 360, 176 Fed. 76, 99 C. C. A. 384; Troxell v. Delaware, L. & W. R. Co., 180 Fed. 871.

44. 2 Tidd's Pr. 854; Jenkins v. Parkhill, 25 Ind. 473.

45. Spanagel v. Dellinger, 34 Cal 476, 482; Heiskell v. Rollins, 81 Md. 397, 32 Atl. 249.

46. **Mo.**—See Romine v. Haag, 178 S. W. 147. **N. Y.**—Sheldon v. Stryker, 42 Barb. 284, 27 How. Pr. 387; Ander-

jurisdictions such motion may be filed even after judgment has been entered,⁴⁷ this procedure being authorized in some states by the terms or express provisions of the statutes.⁴⁸

d. *Effect of Appeal.*—The remedy of appeal lies, as a general rule, only after a final decision, or a judgment,⁴⁹ and it is, therefore, logical to hold that after a judgment and the bringing of appellate proceedings, a lower court has no power to entertain a motion for a new trial.⁵⁰ At common law, the taking of a bill of exceptions, pendente lite, will preclude a motion for a new trial unless the bill of exceptions is waived,⁵¹ and the taking of an appeal before the motion for a new trial is acted upon has likewise been held to be a waiver of the motion.⁵² The practice, however, in this regard is so purely local that the particular jurisdiction must be consulted, for some states, either by force of statute, or on the theory that the power to grant a new trial within the legal time is absolute, permit new trials regardless of the pendency of appellate proceedings.⁵³ It has, moreover, been

son *v.* Dickie, 26 How. Pr. 199, 17 Abb. Pr. 83, 1 Robt. 700; Peck *v.* Hiler, 30 Barb. 655. **Pa.**—Syracuse Pit Hole Co. *v.* Carothers, 63 Pa. 379. **S. C.** Lawrence *v.* Isear, 27 S. C. 244, 3 S. E. 222. **Wis.**—Cooper *v.* Chicago & N. W. R. Co., 155 Wis. 614, 145 N. W. 203. **Can.**—Rooney *v.* Rooney, 29 U. C. C. P. 247, 4 Ont. App. 255.

47. **Ala.**—Woodward Iron Co. *v.* Brown, 167 Ala. 316, 52 So. 829. **Cal.** Spanagel *v.* Dellinger, 34 Cal. 476; Pendegast *v.* Knox, 32 Cal. 73; Ketchum *v.* Crippen, 31 Cal. 365. **Conn.** Etchells *v.* Wainwright, 76 Conn. 534, 57 Atl. 121. **Ill.**—Mobile Fruit & L. Co. *v.* Judy, 91 Ill. App. 82. **Ind.** Cox *v.* Baker, 113 Ind. 62, 14 N. E. 740. **Kan.**—See Spottsville & Western States P. Cement Co., 94 Kan. 258, 146 Pac. 356. **Minn.**—Noonan *v.* Spear, 125 Minn. 475, 147 N. W. 654. **N. Y.**—Tracey *v.* Altmeyer, 46 N. Y. 598. See Cerrato *v.* Santugge, 119 N. Y. Supp. 615. **P. I.**—De Fiesta *v.* Llorente & Manila R. Co., 25 Phil. Isl. 554. **Wash.** Carkonen *v.* Columbia & P. S. R. Co., 86 Wash. 473, 150 Pac. 1162.

48. **Ill.**—Board of Education *v.* Hoag, 21 Ill. App. 588. **Ind.**—Cox *v.* Baker, 113 Ind. 62, 14 N. E. 740. **Minn.** Eaton *v.* Caldwell, 3 Minn. 134. **N. Y.** See Tracey *v.* Altmeyer, 46 N. Y. 598; Smith *v.* Lidgerwood Mfg. Co., 60 App. Div. 467, 69 N. Y. Supp. 975. **Ore.** Jennings *v.* Frazier, 46 Ore. 470, 80 Pac. 1011.

Time for motion or petition, see infra, III. D.

[a] *During Term.*—A statutory pro-

vision that the application for a new trial may be made at the "term" the verdict or decision is rendered, allows a party, although judgment has been entered, to move for a new trial at any time during the term. Cox *v.* Baker, 113 Ind. 62; 14 N. E. 740; Hinkle *v.* Margerum, 50 Ind. 240; Beals *v.* Beals, 20 Ind. 163.

49. See 2 STANDARD PROC. 161.

50. **Ala.**—Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693. **Ill.** Elgin Lumber Co. *v.* Langman, 23 Ill. App. 250. **Minn.**—McArdle *v.* McArdle, 12 Minn. 122.

51. **U. S.**—Cunningham *v.* Bell, 5 Mason 161, 6 Fed. Cas. No. 3,479. **Ala.** West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300. **Ark.**—Danley *v.* Robbins' Heirs, 3 Ark. 144. **Ky.**—Reed *v.* Miller, 1 Bibb 142. **Mass.**—Sylvester *v.* Mayo, 1 Cush. 308; Byrnes *v.* Piper, 5 Mass. 363. **N. J.**—Meeker *v.* Boylan, 27 N. J. L. 262. **N. Y.**—Corlies *v.* Cummings, 5 Cow. 415. **Eng.**—Fabrigas *v.* Mostyn, 2 Wm. Bl. 929, 96 Eng. Reprint 549.

52. **Colo.**—McClellan *v.* Hurd, 11 Colo. 126, 17 Pac. 288. **Mich.**—Hackley *v.* Muskegon Circ. Judge, 58 Mich. 454, 25 N. W. 462. **Minn.**—Bray *v.* Doheny, 39 Minn. 355, 40 N. W. 262. **Nev.**—Corbett *v.* Swift, 6 Nev. 194. **Wis.**—Ladd *v.* Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

53. **U. S.**—Belknap *v.* United States, 150 U. S. 588, 14 Sup. Ct. 183, 37 L. ed. 1191, 29 Ct. Cl. 557; United States *v.* Young, 94 U. S. 258, 24 L. ed. 153; *Ex parte* United States, 16 Wall. 699,

held that where an appeal is a matter of judicial allowance, an appeal so allowed may be set aside and a new trial granted instead.⁵⁴

8. Statutory Second Trial as of Right.—a. *In General.*—In some states, it is provided by statute that in certain actions, particularly actions of ejectment or those involving the recovery of the possession of real property, the party against whom the judgment is rendered may, as a matter of right, and regardless of any cause, demand another trial.⁵⁵ Such provisions have really no connection with

703, 21 L. ed. 507. Cal.—*Rayner v. Jones*, 90 Cal. 78, 81, 27 Pac. 24; *Nagle v. Spencer*, 60 Cal. 10; *Chase v. Evoy*, 58 Cal. 348; *Carpentier v. Williamson*, 25 Cal. 154, 167. Ind.—*Hines v. Driver*, 89 Ind. 339. Ia.—*Chambliss v. Hass*, 125 Iowa 484, 101 N. W. 153, 68 L. R. A. 126; *Cook v. Smith*, 58 Iowa 607, 12 N. W. 617. Kan.—*Duffitt v. Crozier*, 30 Kan. 150, 1 Pac. 69. Mass. Com. v. Scott, 123 Mass. 418; Com. v. McElhaney, 111 Mass. 439, 441. Neb. *Hellman v. David Adler & Sons Clothing Co.*, 60 Neb. 580, 83 N. W. 846. Wis.—*State v. Circuit Court*, 71 Wis. 595, 38 N. W. 192.

[a] **Case Pending in United States Supreme Court.**—Under a statute authorizing the trial court to grant a new trial upon grounds discovered after the expiration of the term, the right to apply for such a new trial is a matter of right and may be exercised although the case is pending on appeal, in the supreme court of the United States. *Fuller v. United States*, 182 U. S. 562, 21 Sup. Ct. 871, 45 L. ed. 1230.

54. See *infra*, this note.

[a] This on the principle that the court may revise its judgment at any time during the term. *Kingman v. Abington*, 56 Mo. 46. And see *Henrichsen v. Smith*, 29 Ore. 475, 42 Pac. 486, 44 Pac. 496.

55. See the following: U. S.—*Equator, etc. Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. ed. 114, applying Colorado statute. Ill.—*Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915; *Emons v. Bishop*, 14 Ill. 152. See also *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. ed. 90. Ind.—*Studabaker v. Alexander*, 179 Ind. 189, 100 N. E. 10; *Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104. Minn.—*Tew v. Webster*, 106 Minn. 185, 118 N. W. 554. S. C.—*Carr v. Mouzon*, 93 S. C. 161, 76 S. E. 201, Ann. Cas. 1914C, 731; *Columbia*

Water Power Co. v. Columbia Land, etc. Co., 42 S. C. 488, 20 S. E. 378; *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479, 9 S. E. 521. Tex.—See *Dangerfield v. Paschal*, 20 Tex. 536, former statute. Wis.—*Walker v. Rockman*, 156 Wis. 190, 145 N. W. 766.

[a] **Judgment by Default.**—(1) Where, however, judgment in the first trial was rendered against defendant by default, and no issue raised as to right of plaintiff's possession of the land, such judgment was held conclusive, and no second trial allowed. *Hall v. Sanders*, 25 Kan. 558; *Province v. Lovi*, 4 Okla. 672, 47 Pac. 476. (2) The Illinois statute, however, provides that the second trial may be allowed after a default. See *Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915.

[b] **Statutes Repealed.**—In recent years, several states have repealed their statutes that gave a second trial as a matter of right in actions of ejectment. Kansas repealed its statute in 1905 (Laws of 1905, ch. 333); Oklahoma, in 1909 (Laws of 1909, ch. 29); New York, in 1911 (Laws of 1911, ch. 509). See also *Nesbit v. English*, 58 Ind. App. 10, 107 N. E. 552, as to part repeal of the Indiana statute. Under the previous Michigan statute (C. L., 1897, §10,981), the trial judge had the authority to grant a new trial in ejectment, and it would seem from *Clairview Park Imp. Co. v. Wayne Circ. Judge*, 172 Mich. 172, 137 N. W. 531, Ann. Cas. 1914C, 734, that the new trial, upon payment of costs, was a matter of right, apparently overruling *Stahl v. Dayton*, 126 Mich. 70, 85 N. W. 249. The present Michigan statute (Comp. Laws, 1915, §13,197) provides that new trials may be granted in ejectment cases for the same reasons, and in the same manner as in personal actions; but no trial shall be granted as a matter of course.

[c] **In Rhode Island** there was a right to a second trial in all cases,

the doctrines of new trials proper. They are anomalous, and are not found in common law practice.⁵⁶ They arose, however, as a substitute for the successive actions that might, at common law, be brought by the same party in an ejectment suit,⁵⁷ and are based upon the theory of greater probability in the attainment of justice, and in the greater security of title.⁵⁸ When the second trial is demanded in a proper case, the statute, as a rule, is mandatory, and the court has no discretion but must grant it.⁵⁹

Such statutes are not retrospective,⁶⁰ and do not apply to pending actions.⁶¹ The repeal of such a statute before the demand for the second trial is made, takes away the right.⁶²

b. *Actions for Which Second Trial Given.*—As a rule, the actions specified by statute for which second trials as of right are granted are "actions for the recovery of real property."⁶³ Such statutes generally apply both to the action of ejectment,⁶⁴ or its statutory sub-

which remained in force for more than two hundred years, being finally abolished by Pub. Laws, p. 103, ch. 674, April 12, 1878, and Pub. Laws, 1879, p. 113, ch. 743, March 10, 1879. *Gunn v. Union R. Co.*, 23 R. I. 289, 62 Atl. 118.

[d] *In Federal Courts.*—The statutory provision of a second trial as a matter of right, is binding on the courts of the United States sitting in a state where the statute obtains. *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. ed. 90; *Equator, etc. Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. ed. 114.

56. *Studebaker v. Alexander*, 179 Ind. 189, 100 N. E. 10, 11.

57. *Equator M. & S. Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. ed. 114.

[a] By the common law the action of ejectment was purely one of possession, and as it proceeded on a fictitious demise between fictitious parties, its determination decided nothing beyond the right of the plaintiff at the date of the alleged demise. A new action upon the allegation of a different demise might immediately be instituted. It was only after repeated verdicts in such cases in favor of the plaintiff that the real claimant could apply to a court of equity to quiet the possession and put an end to the fruitless litigation respecting the property. A judgment in ejectment in one action was consequently not a bar to a second action for the same premises. *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. ed. 90.

58. *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. ed. 90.

59. *Ind.*—*Studebaker v. Alexander*, 93 N. E. 23; *Anderson v. Anderson*, 128 Ind. 254, 27 N. E. 724; *Warburton v. Crouch*, 108 Ind. 83, 8 N. E. 634. *Kan.*—*McManamy v. Ewing*, *McCahon* 171, 1 Kan. 580, former statute. *Mich.*—*Keyser v. Sutherland*, 59 Mich. 455, 26 N. W. 865; *Van den Brooks v. Correon*, 48 Mich. 283, 12 N. W. 206, construing former statute. *N. Y.* *Rogers v. Wing*, 5 How. Pr. 50. *Okla.* *Keller v. Hawk*, 13 Okla. 261, 74 Pac. 106, under former statute. *Wis.*—*Hewitt v. Wisconsin River Land Co.*, 81 Wis. 546, 51 N. W. 1016.

[a] The right is absolute, not to be denied except upon a clear showing of waiver. *Guaranteed Inv. Co. v. Van Metre*, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554.

60. *Jackson ex dem. Palmer v. Coe*, 5 Wend. (N. Y.) 101. See also *Bay v. Gage*, 36 Barb. (N. Y.) 447; *Singer v. Belt's Heirs*, 8 Ohio St. 291.

61. *Singer v. Belt's Heirs*, 8 Ohio St. 291.

62. *Johnson v. Craig*, 37 Okla. 378, 130 Pac. 581.

63. See the statutes.

64. *U. S.*—*Shreve v. Cheesman*, 69 Fed. 785, 16 C. C. A. 413, Colorado statute. *Ala.*—*Ex parte Shear*, 92 Ala. 596, 8 So. 792, 11 L. R. A. 620. *Ill.* *Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915; *Emmons v. Bishop*, 14 Ill. 152. *Mich.*—*Van Den Brooks v. Correon*, 48 Mich. 283, 12 N. W. 206. *Minn.*—*Buffalo Land & Exploration Co. v. Strong*, 101 Minn. 27, 111 N. W. 728. *N. Y.*

stitutes,⁶⁵ and to proceedings in the nature of ejectment, whether under the form of forcible entry and detainer,⁶⁶ or trespass to try title.⁶⁷ They do not, however, embrace actions for the mere determining of title to real property,⁶⁸ especially where the title is merely incidentally involved.⁶⁹ The statutes are usually confined to possessory actions, that is, to actions where one of the parties is in possession of the property, and dispossession is sought by the other party.⁷⁰ Moreover,

Shumway v. Shumway, 42 N. Y. 143, under the former statute. See also *Purdy v. Bennett*, 68 Hun 227, 22 N. Y. Supp. 817, 51 N. Y. St. 876. *Wis. Newland v. Morris*, 115 Wis. 207, 91 N. W. 664; *Haseltine v. Metcalf*, 66 Wis. 209, 28 N. W. 337.

[a] The Wisconsin statute was originally taken from the New York statutes (2 N. Y. Rev. St. 309), and applies only to actions of ejectment. *Maurer v. Stiner*, 82 Wis. 99, 51 N. W. 1101. See *Shumway v. Shumway*, 42 N. Y. 143.

65. *Carr v. Mouzon*, 93 S. C. 161, 76 S. E. 201, Ann. Cas. 1914C, 731.

66. *Ferguson v. Kumler*, 25 Minn. 183.

67. *Atchison v. Owen*, 58 Tex. 610; *Dangerfield v. Paschal*, 20 Tex. 536; *Fisk v. Miller*, 20 Tex. 572.

68. *Upton v. Merriman*, 122 Minn. 158, 142 N. W. 150. And see *infra*, this section.

69. *Kahle v. Crown Oil Co.*, 180 Ind. 131, 100 N. E. 681; *Studabaker v. Alexander*, 179 Ind. 189, 100 N. E. 10; *Nesbit v. English*, 58 Ind. App. 10, 107 N. E. 552.

[a] **Scope of Statute.**—The act in question is a remedial statute and should be liberally construed. To come within it the action must be in the nature of an action of ejectment for the recovery of real property. It does not include all actions in which the title to real estate may come in question and be determined. As stated by Chief Justice Gilfillan in *Godfrey v. Valentine*, 50 Minn. 284, 52 N. W. 643, had the statute intended to give the right to a second trial in all actions where the title to real estate is involved and determined, it would have used different language. To determine the right to a new trial in a given action the court will look to the substance of the action, and not to the mere form thereof. Pleadings will be taken together, without special reference to their formal averments, and

if it appears therefrom, in connection with the findings and decision of the court, that the result was to determine the ownership and right to possession of real property, the right to a second trial must be conceded. Where the ownership and right of possession concur, it has been the purpose of this court to disregard the mere technical effect of the pleading in substantial rights of the parties. *Phillips v. Mo*, 96 Minn. 42, 104 N. W. 681, citing the Minnesota cases.

[b] **Does Not Include All Title Actions.**—There are other forms of action by which the title of real property may be brought in issue and determined, as for instance, an action for damages for trespass in the nature of the common law action of trespass *quare clausum fregit*, an action for rents and profits, and actions for foreclosure of mortgage or partition in which the defendant sets up an independent legal title in himself, but none of these are actions for the recovery of real property, and therefore they do not fall within the provisions of the statute. *Foster v. Foster*, 81 S. C. 307, 62 S. E. 320; *Elmore v. Davis*, 49 S. C. 1, 26 S. E. 898; *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479, 9 S. E. 521.

70. *Buffalo Land & Exploration Co. v. Strong*, 101 Minn. 27, 111 N. W. 728; *Phillips v. Mo*, 96 Minn. 42, 104 N. W. 681. See *Nesbit v. English*, 58 Ind. App. 10, 107 N. E. 552.

[a] **Only Possessory Actions.**—(1) In *Tierney v. Gondreau*, 99 Minn. 421, 109 N. W. 821, the statute was held not to apply to an action to determine a boundary line between adjoining property, although the right of possession was indirectly involved. (2) Of course the ultimate right of possession is involved in all actions involving the title of real property, but the statute granting a second trial must under the decisions be limited to actions where judgment of ouster is sought against the party in possession. *Buffalo Land*

in determining the right to a second trial, the court will look to the substance of the cause of action determined, and not merely to the form or manner in which it is presented.⁷¹

c. *Limited to Specified Actions.*—The statutory right to a second trial is limited to the causes or action specified by the act and is not to be extended to other actions not included therein,⁷² and under a statute authorizing a second trial in actions to quiet title, it has been held that when the title is only incidentally involved in an action, the right will not be extended to the other issues.⁷³ Moreover, a statute giving a second trial in actions to recover realty and quiet title, does not apply to actions to enforce or cancel⁷⁴ a lien, incumbrance, or con-

& Exploration Co. v. Strong, 101 Minn. 27, 111 N. W. 728.

71. Phillips v. Mo, 96 Minn. 42, 104 N. W. 681; Gray Cloud Land Co. v. Security Trust Co., 93 Minn. 369, 101 N. W. 605; Finnegan v. Brown, 81 Minn. 508, 84 N. W. 343; Gahre v. Berry, 79 Minn. 20, 81 N. W. 537; Eastman v. Linn, 20 Minn. 433.

72. Studabaker v. Alexander, 179 Ind. 189, 100 N. E. 10; Nesbit v. English, 58 Ind. App. 10, 107 N. E. 552.

[a] **Tax Lien.**—Does not apply to an action foreclosing a tax lien. Butler University v. Conard, 94 Ind. 353.

[b] **Quia Timet.**—Does not apply to an action quia timet. Mollie v. Peters, 28 Neb. 670, 44 N. W. 872.

[c] **Leave To Sell Real Estate.**—The Indiana statute does not apply to a proceeding by an administrator to obtain leave to sell real estate for the payment of debts. Fralich v. Moore, 123 Ind. 75, 24 N. E. 232.

[d] **Action To Quiet Title.**—A statute authorizing a second trial for the recovery of land does not apply to an action to quiet title against an adverse claimant by one in possession. **Ia.**—Russell v. Nelson, 32 Iowa 215. **Kan.**—Moorehead v. Robinson, 68 Kan. 634, 75 Pac. 503. **Neb.**—Mollie v. Peters, 28 Neb. 670, 44 N. W. 872. **N. Y.**—Malin v. Rose, 12 Wend. 258.

[e] **Partition Suits.**—(1) A statute giving a second trial as of right to actions for the recovery of possession of land, does not apply to partition suits where no judgment of possession is sought and where no issue of title is involved. Hawkins v. Heinzman, 126 Ind. 551, 25 N. E. 708; Gullett v. Miller, 106 Ind. 75, 5 N. E. 741; Pipes v. Hobbs, 83 Ind. 43; Swartzel v. Rogers, 3 Kan. 374. (2) It is otherwise, how-

ever, where title is contested, and the possession of land is sought in connection with such suits. Powers v. Nesbitt, 127 Ind. 497, 27 N. E. 501; Kreitline v. Franz, 106 Ind. 359, 6 N. E. 912.

[f] **Obstruction of Easement.**—(1) The right does not extend to an action for interruption of the use and enjoyment of an easement, although in such action the title or right to the possession of real estate may be finally determined. Maurer v. Stiner, 82 Wis. 99, 51 N. W. 1101. See also Midland Ry. Co. v. Galey, 141 Ind. 483, 39 N. E. 940, 40 N. E. 801; Davis v. Cleveland, C., C. & St. L. Ry. Co., 140 Ind. 468, 39 N. E. 495; Hall v. Hedrick, 125 Ind. 326, 25 N. E. 350. (2) Where, however, the gist of the action is the recovery of real property, any incidental relief asked in connection with the obstruction of an easement will not defeat the right to a second trial. Kremer v. Chicago, M. & St. P. Ry. Co., 54 Minn. 157, 55 N. W. 928; St. Paul v. Chicago, M. & St. P. Ry. Co., 49 Minn. 88, 51 N. W. 662.

[g] **Specific Performance.**—Such second trial cannot be demanded in an action for the specific performance of a contract regarding real estate. Truitt v. Truitt, 37 Ind. 514; McFerran v. McFerran, 69 Ind. 29.

73. Kahle v. Crown Oil Co., 180 Ind. 131, 100 N. E. 681; Studabaker v. Alexander, 179 Ind. 189, 100 N. E. 10; Richwine v. Presbyterian Church, 135 Ind. 80, 34 N. E. 737.

74. Studabaker v. Alexander, 179 Ind. 189, 100 N. E. 10; Board of Comrs. v. Plotner, 149 Ind. 116, 48 N. E. 635; Roeder v. Keller, 135 Ind. 692, 697, 35 N. E. 1014; Williams v. Thames Loan & Tr. Co., 105 Ind. 420, 5 N. E. 17; Frankel v. Voss, 59 Ind. App. 175,

tract; or to mortgage foreclosure suits;⁷⁵ or to enforce trusts in land;⁷⁶ or to actions to set aside fraudulent conveyances;⁷⁷ or to actions of trespass to land;⁷⁸ or to an action seeking the abatement, as a nuisance, of obstructions to a highway;⁷⁹ or to an action by a landlord to recover leased premises for nonpayment of rent;⁸⁰ or to actions seeking the recovery of vacant land.⁸¹

d. *Joinder of Actions*.—Under some statutes it is held that where the complaint states two substantive causes of action, in one of which a second trial is demandable as of right, and the other in which it is not, a second trial as of right will be refused.⁸² But under other statutes, if the title and right to the possession of land be involved in the action, either party is entitled to a second trial, even though other

109 N. E. 55; *Henry v. Frazier*, 53 Ind. App. 605, 100 N. E. 770.

75. *Rariden v. Rariden*, 129 Ind. 288, 28 N. E. 701; *Sterne v. Vert*, 111 Ind. 408, 12 N. E. 719; *Butler University v. Conrad*, 94 Ind. 353; *Shular v. Shular*, 56 Ind. 30. And see *Gilliland v. Milligan*, 144 Ind. 154, 42 N. E. 1010.

[a] *Actions for redemption, subrogation, and foreclosure* are substantive causes of action. A second trial as of right is not allowable in such a case. *Bennett v. Closson*, 138 Ind. 542, 551, 38 N. E. 46.

76. *Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531; *Voss v. Eller*, 109 Ind. 260, 10 N. E. 74; *McConnell v. McCullough*, 47 Hun 405, 14 N. Y. St. 621.

77. *Searles v. Little*, 153 Ind. 432, 55 N. E. 93. But see *Tomlinson v. Tomlinson*, 162 Ind. 530, 70 N. E. 881.

[a] *Cancellation of Deed*.—(1) A mere suit to cancel or to set aside a conveyance does not, under the statutes, include a right to a second trial without cause. *Liggett v. Hinkley*, 120 Ind. 387, 22 N. E. 256; *Warburton v. Crouch*, 108 Ind. 83, 8 N. E. 634; *Truitt v. Truitt*, 37 Ind. 514; *Somerville v. Donaldson*, 26 Minn. 75, 1 N. W. 808. (2) If, however, the action contemplates the reinvestment of the title, or the recovery of the possession of the land, the statutory second trial is a matter of right. *McKittrick v. Glenn*, 116 Ind. 27, 18 N. E. 388; *Warburton v. Crouch*, 108 Ind. 83, 8 N. E. 634.

78. *Hofferbert v. Williams*, 32 Ind. App. 593, 70 N. E. 405; *Atkinson v. Williams*, 151 Ind. 431, 51 N. E. 721.

[a] *Trespass Quare Clausum*.—The statute does not apply to an action in tort for trespass in removing a

building from land. *Jonsson v. Lindstrom*, 114 Ind. 152, 16 N. E. 400. See also *Shumway v. Shumway*, 42 N. Y. 143; *Maurer v. Stiner*, 82 Wis. 99, 51 N. W. 1101.

[b] *Though intermingled in one paragraph with a cause of action for ejectment*. *Hofferbert v. Williams*, 32 Ind. App. 593, 70 N. E. 405.

79. *Seisler v. Smith*, 150 Ind. 88, 46 N. E. 993.

80. *Whitaker v. McClung*, 14 Minn. 170.

[a] *But it is held, in Indiana, that a leasehold is a "valid and subsisting interest in real property," and that the right of a second trial applies to the recovery of the same*. *Campbell v. Hunt*, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879.

81. *Buffalo Land & Exploration Co. v. Strong*, 101 Minn. 27, 111 N. W. 728.

82. *Cambridge Lodge v. Routh*, 163 Ind. 1, 71 N. E. 148; *Nutter v. Hendricks*, 150 Ind. 605, 50 N. E. 748; *Frankel v. Voss*, 59 Ind. App. 175, 109 N. E. 55. But compare *Voss v. Eller*, 109 Ind. 260, 10 N. E. 74 (right of redemption pleaded with right of cancellation of a mortgage; second trial refused); *Norris v. Kendall*, 48 Ind. App. 304, 93 N. E. 1087; *Aetna Life Ins. Co. v. Stryker*, 42 Ind. App. 57, 59, 83 N. E. 647, right to redeem and to quiet title combined; second trial refused.

[a] *Suit in equity* (1) cannot be combined with ejectment. *Frankel v. Voss*, 59 Ind. App. 175, 109 N. E. 55. (2) But one may set up an equitable defense under the code. *Newland v. Morris*, 115 Wis. 207, 91 N. W. 664.

issues are presented by the pleadings upon which both are concluded by the first trial.⁸³

e. *Resort to Statute Permitting New Trial for Cause, and Waiver.* In addition to the statutory right of a second trial, a new trial may be obtained, as in any other case, for sufficient grounds shown.⁸⁴ It has been held that one who has requested a second trial as of right, waives his right by the filing of a motion for a new trial for cause before the court has ruled upon his prior request.⁸⁵ But the mere fact that a motion for a new trial for cause has been previously filed but denied, does not waive the right to the statutory second trial.⁸⁶ And a party will not be deprived of his right by moving in arrest of judgment,⁸⁷ or, by taking an appeal,⁸⁸ nor by accepting the benefit of a judgment giving him only part of the relief sought.⁸⁹ The right to the second trial can be waived, however, by express agreement,⁹⁰

83. *Gray Cloud Land Co. v. Security Trust Co.*, 93 Minn. 369, 101 N. W. 605. See also *Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913.

[a] "It is not important that issues other than the title and right to the possession of the land are involved in the action, for upon all issues not affecting such title or right to possession the former judgment is final and conclusive. In the case of *Schmitt v. Schmitt*, 32 Minn. 130, 19 N. W. 649, which was an action for divorce, the court held that, as the title and right to the possession of certain land was also involved in the litigation, a second trial of the action was proper upon those questions, notwithstanding the fact that the action was in form one for divorce." *Gray Cloud Land Co. v. Security Trust Co.*, 93 Minn. 369, 101 N. W. 605.

84. *Emmons v. Bishop*, 14 Ill. 152.

[a] *Procedure.*—In case of a new trial for cause, the motion is governed by the same rules that govern motions for new trials in all other actions. Therefore, while the application for the second trial as of right may, under the statute, be made orally, yet a motion for a new trial for cause must be in writing if the statute regulating new trials in general so provides. See *Clayton v. School District*, 20 Kan. 256.

85. *Johnson v. Ballard*, 148 Ind. 181, 46 N. E. 674. Compare *Indiana, B. & W. Ry. Co. v. McBroom*, 103 Ind. 310, 2 N. E. 760.

86. *Cheney v. Crandell*, 28 Colo. 383, 65 Pac. 56; *Scranton v. Stewart*, 52 Ind. 68.

87. *Anderson v. Anderson*, 128 Ind. 254, 27 N. E. 724.

88. *U. S.*—*Jordan v. Hardin*, 58 Fed. 140, 7 C. C. A. 111. *Ill.*—*Gibson v. Manly*, 15 Ill. 140. *Ind.*—*Indiana B. & W. Ry. Co. v. McBroom*, 103 Ind. 310, 2 N. E. 760. *Ia.*—*Butterfield v. Walsh*, 25 Iowa 263. *N. Y.*—*New York Cent. & H. R. R. Co. v. Brennan*, 163 N. Y. 584, 57 N. E. 1119.

89. *Clairview Park Imp. Co. v. Wayne Circ. Judge*, 172 Mich. 172, 137 N. W. 531, Ann. Cas. 1914C, 734 (construing former statute); *Rupiper v. Calloway*, 105 Wis. 4, 80 N. W. 916.

[a] *Accepting Quit-Claim Deed.* The defendant's right is not waived by accepting from the plaintiff a quit-claim deed of the portion of the land in dispute adjudged to the defendant. *Guaranteed Inv. Co. v. Van Metre*, 153 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554.

90. *Roberts v. Baumgarten*, 126 N. Y. 336, 27 N. E. 470; *Ladd v. Hildebrandt*, 27 Wis. 135, 9 Am. Rep. 445.

[a] *Waiver by Stipulation.*—An unsuccessful party has been held, however, to have waived his right to the second trial by having stipulated, in order to perfect and maintain an appeal (which he had lost by lapse of time), that, in case the judgment of the appellate court should be against him on the whole controversy, judgment absolute should be entered against him. *Roberts v. Baumgarten*, 126 N. Y. 336, 27 N. E. 470.

[b] *Stipulation by Attorney.*—The attorney of a party may by a stipulation made in the case waive a second

but it is not to be construed as waived by a mere stipulation of the facts in the case, even though it be in writing.⁹¹

f. *Procedure To Obtain.*—(I.) *Parties.*—Some of the statutes provide that "the party against whom the judgment is rendered," that is, either the plaintiff or the defendant in the first trial, may demand the second trial,⁹² and this right extends to the heirs, personal representatives, and assignees of the unsuccessful party,⁹³ including purchasers,⁹⁴ or mortgagees of the land.⁹⁵ Under some of the statutes, devisees are also included.⁹⁶

(II.) *Necessity of Demand.*—It is not mandatory upon the court to order the second trial, or "new trial," without request, as a matter of course,⁹⁷ but only when demanded by the party entitled.⁹⁸

(III.) *Form of Application.*—The application must be made in the form and manner directed by the statute. It may be oral unless otherwise required by rule or statute.⁹⁹

(IV.) *Time of Demand.*—The second trial must be demanded within the time permitted by the statute.¹

trial. *Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262.

91. *Hewitt v. Wisconsin River Land Co.*, 81 Wis. 546, 51 N. W. 1016. And see *Guaranteed Inv. Co. v. Van Metre*, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554.

92. *Ind.*—*Shucraft v. Davidson*, 19 Ind. 98. *Mich.*—Under the former statute, *Clairview Park Imp. Co. v. Wayne Circ. Judge*, 172 Mich. 172, 137 N. W. 531, Ann. Cas. 1914C, 734; *Keyser v. Sutherland*, 59 Mich. 455, 465, 26 N. W. 865; *Van Den Brooks v. Correon*, 48 Mich. 283, 12 N. W. 206. *Minn.* *Davidson v. Lamprey*, 16 Minn. 445. *Wis.*—Rev. Sts., 1915, §3092; *Rupiper v. Calloway*, 105 Wis. 4, 80 N. W. 916.

[a] *The plaintiff only.* S. C. Code Civ. Proc., 1902, §98, subd. 2. See also *Lewis v. San Antonio*, 26 Tex. 316; *Fisk v. Miller*, 20 Tex. 572.

[b] *The Defendant.*—*Purdy v. Bennett*, 22 N. Y. Supp. 817.

93. *Ind.*—*Forsyth v. Van Winkle*, 9 Fed. 247, construing Indiana statute. *N. Y.*—See *Higgins v. New York*, 63 Hun 633, 18 N. Y. Supp. 553, 45 N. Y. St. 696, affirmed in 136 N. Y. 214, 32 N. E. 772, under the former New York statute. See also *Purdy v. Bennett*, 22 N. Y. Supp. 817. *Wis.*—Sts., 1915, §3092. See also *Rupiper v. Calloway*, 105 Wis. 4, 80 N. W. 916.

94. *Ind.*—*Brown v. Cody*, 115 Ind. 484, 18 N. E. 9. *N. Y.*—*Howell v. Leavitt*, 90 N. Y. 238, 2 Civ. Proc. 447,

under former statute. *Tex.*—*Williams v. Bennett*, 1 Tex. Civ. App. 498, 20 S. W. 856.

95. *Purdy v. Bennett*, 68 Hun 227, 22 N. Y. Supp. 817, 51 N. Y. St. 876, holding, under the former statute, that the mortgagee who held a sheriff's deed was an assignee of the occupant of the premises.

96. *Rupiper v. Calloway*, 105 Wis. 4, 80 N. W. 916; *Wis. Sts.*, 1915, §3092. See also *Purdy v. Bennett*, 68 Hun 227, 22 N. Y. Supp. 817, 51 N. Y. St. 876.

97. *Johnson v. Craig*, 37 Okla. 378, 130 Pac. 581, under former statute.

98. *Colo.*—*Snider v. Rinehart*, 20 Colo. 448, 39 Pac. 408. *Kan.*—*West v. Cameron*, 39 Kan. 736, 18 Pac. 894, under former statute. *Okla.*—*Johnson v. Craig*, 37 Okla. 378, 130 Pac. 581, construing former statute.

99. *Studebaker v. Alexander (Ind.)*, 93 N. E. 23; *Physio-medical College v. Wilkinson*, 89 Ind. 23; *Doster v. Sterling*, 33 Kan. 381, 6 Pac. 556.

1. *U. S.*—*Iron Silver Min. Co. v. Mike & Starr G. & S. Min. Co.*, 56 Fed. 956, 6 C. C. A. 180. *Colo.*—*Snider v. Rinehart*, 20 Colo. 448, 30 Pac. 408. *Ill.*—*Pugh v. Reat*, 107 Ill. 440. *Ind.* *Kreitline v. Franz*, 106 Ind. 359, 6 N. E. 912. *Minn.*—*Voight v. Woll*, 110 Minn. 6, 124 N. W. 446. *N. Y.*—*Lewis v. Townsend*, 79 Misc. 61, 140 N. Y. Supp. 500. *S. C.*—*Columbia Water Power Co. v. Columbia Land, etc. Co.*, 42 S. C. 488, 20 S. E. 378, 540. *Can.* *Grundy v. Macdonald*, 11 Manitoba 1,

(V.) **Notice to Opposite Party.** — Notice of the demand for the second trial must be given to the opposite party according to the procedure pointed out by the statute.² In some states, however, no notice may be required.³

(VI.) **Conditions Imposed.** — The statutes generally require the payment of costs, as a prerequisite to the second trial,⁴ and also the damages awarded in the first trial.⁵ A bond, or undertaking, with sufficient sureties may, also, be required to the effect that the party demanding the second trial will pay all costs and damages which may finally be awarded the other party.⁶ The court, however, may extend the time for the filing of the undertaking and payment of the costs.⁷ When the unsuccessful party in the first trial obtains judgment in the second, the statute sometimes provides for the restitution of the costs and damages.⁸

(VII.) **Order Granting Second Trial.** — (A.) **GENERALLY.** — The order granting the second trial should vacate the former judgment,⁹ although

[a] **The proper mode of computing the time** is to exclude the day named and include the day on which the act is to be done. Consequently, where a judgment was rendered on April 12, 1882, the filing of the motion for the second trial on April 13, 1883, was too late. The year began to run April 13, 1882, and ended on April 12, 1883. *Pugh v. Reat*, 107 Ill. 440, 443.

2. **Kan.**—*McManamy v. Ewing*, McCahon, 171, 1 Kan. 580, former statute. **Minn.**—*Davidson v. Lamprey*, 16 Minn. 445, written notice of demand of second trial essential. **Ohio.**—*Markward v. Doriatt*, 21 Ohio St. 637.

[a] **Oral demand under the former Kansas statute**, in open court. *Doster v. Sterling*, 33 Kan. 381, 6 Pac. 556.

3. *Studebaker v. Alexander* (Ind.), 93 N. E. 23; *Steeple v. Downing*, 60 Ind. 478; *Walker v. Rockman*, 156 Wis. 190, 145 N. W. 766.

4. See the statutes and the following: **U. S.**—*Shreve v. Cheesman*, 69 Fed. 785, 16 C. C. A. 413. **Ill.**—*Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915; *Pugh v. Reat*, 107 Ill. 440. **Ind.**—*Golden v. Snellen*, 54 Ind. 282. **Minn.**—*Sammons v. Pike*, 105 Minn. 106, 117 N. W. 244. **Wis.**—*Walker v. Rockman*, 156 Wis. 190, 145 N. W. 766.

[a] **If no costs are recovered** the condition as to the payment of costs does not apply. *Runiper v. Calloway*, 105 Wis. 4, 80 N. W. 916.

[b] **Time of Payment.**—If the costs are not paid, or offered to be paid, within the time required by statute, the order granting the new trial is

properly vacated and the judgment affirmed. **Ill.**—*Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915; *Aholtz v. Durfee*, 21 Ill. App. 144. **Ind.**—*Schrodt v. Bradley*, 29 Ind. 352. **Minn.**—*Dawson v. Shillock*, 29 Minn. 189, 12 N. W. 526.

5. **Ill.**—*Myers v. Phillips*, 68 Ill. 269. **Mich.**—*People v. Circ. Judge*, 37 Mich. 281, under former statute. **Minn.**—*Davidson v. Lamprey*, 16 Minn. 445. **N. Y.**—*Risley v. Rice*, 11 Civ. Proc. 367, 3 N. Y. St. 168.

6. **Ind.**—*Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Stanley v. Dailey*, 112 Ind. 489, 14 N. E. 375. **Ohio.**—*Negley v. Jeffers*, 28 Ohio St. 90. **Wis.**—*Walker v. Rockman*, 156 Wis. 190, 145 N. W. 766; *Dickinson v. Smith*, 139 Wis. 1, 120 N. W. 406; *Newland v. Morris*, 113 Wis. 394, 89 N. W. 179.

7. **Guaranteed Inv. Co. v. Van Metre**, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554; *Dickinson v. Smith*, 139 Wis. 1, 120 N. W. 406.

[a] **The court may in its discretion relieve a defendant** in case of his default to file a bond and to pay the costs within the statutory time. *Guaranteed Inv. Co. v. Van Metre*, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554.

8. *Sammons v. Pike*, 105 Minn. 106, 117 N. W. 244.

9. **Ill.**—*Cook v. Calumet*, etc. Dock Co., 131 Ill. 505, 23 N. E. 629; *Oetgen v. Ross*, 36 Ill. 335. **Ind.**—*Golden v. Snellen*, 54 Ind. 282. **Wis.**—*Runiper v. Calloway*, 105 Wis. 4, 80 N. W. 916; *Haseltine v. Metcalf*, 66 Wis. 209, 28 N. W. 337.

a failure to do so has been held merely an irregularity which the parties waived by proceeding, without objection, with the second trial.¹⁰ It should provide for the payment to the successful party, of the costs awarded in the action, where that is a condition precedent.¹¹ Unless required by statute, notice of the order is unnecessary.¹²

(B.) VACATING ORDER. — Where the order is not in proper form,¹³ or was not warranted by the facts of the case,¹⁴ the order may be vacated. Motions to vacate the order should, however, be promptly presented, otherwise they will be deemed waived.¹⁵

g. *Status of Second Trial.* — On the second trial the action stands for trial as if it had never been tried,¹⁶ and, as far as the second trial is concerned, there has never been a previous trial or judgment. The case is fully open to be tried de novo.¹⁷ The former pleadings may be amended,¹⁸ if the cause of action be not so changed as to defeat the right to a second trial.¹⁹ The second trial extends to all issues presented by the pleadings which are pertinent to the title, right of possession, and damages for withholding the property.²⁰ The statutes usually provide that there shall be restitution when the party obtain-

[a] **It is better practice to follow the statute strictly** in entering an order for a new trial, that is, not only to require previous performance of the conditions mentioned in the statute, so far as they apply, but to frame the order that it will show the facts in that regard and will in terms vacate the judgment and grant a new trial. *Rupiper v. Calloway*, 105 Wis. 4, 80 N. W. 916.

[b] **Vacates the Judgment.**—The granting of the second trial under the statute vacates the former judgment without requiring any special order to set it aside. *Maxwell v. Campbell*, 45 Ind. 360. And see *Edwards v. Edwards*, 22 Ill. 121.

10. *Studabaker v. Alexander*, 179 Ind. 189, 100 N. E. 10.

11. *Guaranteed Inv. Co. v. Van Metre*, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554. But see *Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915.

12. *Walker v. Rockman*, 156 W. 190, 145 N. W. 766.

13. *Setzke v. Setzke*, 121 Ill. 30, 11 N. E. 915, interlocutory.

14. See *Hofferbert v. Williams*, 32 Ind. App. 593, 70 N. E. 405, where complaint is afterward amended to present a cause of action not within the statute.

15. *Barber v. Barber*, 156 Ind. 45, 59 N. E. 171.

16. *Slauson v. Goodrich Transporta-*

tion Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825; *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

17. Ill.—*Sheldon v. Van Vleck*, 106 Ill. 45. Mich.—*Donahue v. Klassner*, 22 Mich. 252. Wis.—*Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

[a] **The only difference** is that after the second trial and judgment, the plaintiff cannot as a matter of right demand another new trial under the statute. *Sheldon v. Van Vleck*, 106 Ill. 45.

[b] **The doctrine of res judicata** does not apply to second trials given by statutory right. *Weigel v. Green*, 221 Ill. 187, 77 N. E. 574; *Hammond v. Carter*, 161 Ill. 621, 44 N. E. 274; *Carr v. Mouzon*, 93 S. C. 161, 76 S. E. 201, Ann. Cas. 1914C, 731; *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479, 9 S. E. 521.

18. *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

As to amendments, see the titles "Amendments and Jeofails;" "New Cause of Action or Defense."

19. *Hofferbert v. Williams*, 32 Ind. App. 593, 70 N. E. 405.

20. *Sammons v. Pike*, 105 Minn. 106, 117 N. W. 244; *Kremer v. Chicago, M. & St. P. Ry. Co.*, 54 Minn. 157, 55 N. W. 928.

ing the second trial prevails on the final trial of the case.²¹

9. Motion for New Trial as Prerequisite to Appellate Review.

a. *In General.*—In most jurisdictions, subject to the limitations hereinafter set forth, alleged errors occurring at the trial will not be considered on appeal unless an opportunity to review them has been first presented to the trial court by means of a motion for a new trial.²² This requirement, however, results from local statutes, rules of court, or the established practice of the jurisdiction. It is not a common law requirement, and in some jurisdictions a motion for a new trial is not prerequi-

21. *Sammons v. Pike*, 105 Minn. 106, 117 N. W. 244.

22. *Ariz.*—*Walker v. Blake*, 13 *Ariz.* 1, 108 *Pac.* 221; *Newhall v. Porter*, 7 *Ariz.* 160, 62 *Pac.* 689; *Svea Ins. Co. v. McFarland*, 7 *Ariz.* 131, 60 *Pac.* 936. *Ark.*—*Nutt v. Fry*, 119 *Ark.* 450, 177 *S. W.* 1137; *Hastings Industrial Co. v. Copeland*, 114 *Ark.* 415, 169 *S. W.* 1185. *Cal.*—*Williams v. Savings & Loan Soc.*, 133 *Cal.* 360, 65 *Pac.* 822; *Yaeger v. Southern Calif. Ry. Co.*, 119 *Cal.* xvii, 51 *Pac.* 190. *Ill.*—*Spring Valley Coal Co. v. Chiaventone*, 214 *Ill.* 314, 73 *N. E.* 420; *Hartford Deposit Co. v. Pederson*, 168 *Ill.* 224, 48 *N. E.* 30; *Dallemand v. Saalfeldt*, 175 *Ill.* 310, 51 *N. E.* 645, 67 *Am. St. Rep.* 214, 48 *L. R. A.* 753; *Illinois Cent. R. Co. v. Johnson*, 191 *Ill.* 594, 61 *N. E.* 334; *Parnass v. Ryerson*, 128 *Ill.* App. 489. *Ind.*—*City of Indianapolis v. Stokes*, 182 *Ind.* 31, 105 *N. E.* 477; *Nesbitt v. Stevens*, 161 *Ind.* 519, 69 *N. E.* 256; *Standish v. Bridgewater*, 159 *Ind.* 386, 65 *N. E.* 189; *Shea v. City of Muncie*, 148 *Ind.* 14, 46 *N. E.* 138; *Fisher v. State*, 65 *Ind.* 51; *Rowe v. Templeton*, 15 *Ind.* 457. *Kan.*—*Cogshall v. Spurry*, 47 *Kan.* 448, 28 *Pac.* 154; *Struthers v. Fuller*, 45 *Kan.* 735, 26 *Pac.* 471; *Clark v. Schnur*, 40 *Kan.* 72, 19 *Pac.* 327; *Decker v. House*, 30 *Kan.* 614, 1 *Pac.* 584. *Ky.*—*Nicholson v. Patrick*, 160 *Ky.* 674, 170 *S. W.* 20; *Orient Ins. Co. v. J. A. Meers*, 29 *Ky. L. Rep.* 206, 92 *S. W.* 584; *Louisville & N. R. Co. v. Henry*, 19 *Ky. L. Rep.* 1783, 44 *S. W.* 428. *Minn.*—*Helmer v. Shevlin-Mathieu Lumb. Co.*, 129 *Minn.* 25, 151 *N. W.* 421; *Northwestern Marble & Tile Co. v. Williams*, 128 *Minn.* 514, 151 *N. W.* 419, *L. R. A.* 1915D, 1077; *Nye v. Kahlow*, 98 *Minn.* 81, 107 *N. W.* 733. *Miss.*—*Wilkerson v. State*, 106 *Miss.* 633, 64 *So.* 420; *Armstrong v. Gaddis*, 81 *Miss.* 35, 32 *So.* 917. *Mo.*—*Jefferson v. Wells*, 263 *Mo.* 231, 172 *S. W.* 329; *Sturdivant Bank v. Wright*,

184 *Mo. App.* 164, 168 *S. W.* 355; *Baker v. Kansas City, St. J. & C. B. R. Co.*, 107 *Mo.* 230, 17 *S. W.* 816; *Taylor v. Brotherhood of Railroad Trainmen*, 106 *Mo. App.* 212, 80 *S. W.* 306. *Neb.*—*Fairbanks, Morse & Co. v. Austin*, 96 *Neb.* 137, 147 *N. W.* 126, 148 *N. W.* 332; *State v. Ellsworth*, 72 *Neb.* 277, 100 *N. W.* 314; *Walker v. Smith*, 54 *Neb.* 31, 74 *N. W.* 390. *N. J.*—*See Hartman v. McClintie-Marshall Const. Co.*, 82 *N. J. L.* 734, 82 *Atl.* 874. *N. M.*—*James v. Hood*, 19 *N. M.* 234, 142 *Pac.* 162; *Henry v. Lincoln Lucky & Lee Min. Co.*, 13 *N. M.* 384, 85 *Pac.* 1043. *N. Y.*—*Curnen v. Curnen*, 155 *App. Div.* 536, 140 *N. Y. Supp.* 805. *Okla.*—*Hale v. Independent Powder Co.*, 46 *Okla.* 135, 148 *Pac.* 715; *James v. Jackson*, 30 *Okla.* 190, 120 *Pac.* 288; *Glaser v. Glaser*, 13 *Okla.* 389, 74 *Pac.* 944. *P. I.*—*Tumaeder v. Nueva*, 16 *Phil. Isl.* 513. *S. C.*—*Pearlstine v. Westchester Fire Ins. Co.*, 70 *S. C.* 75, 49 *S. E.* 4. *Tenn.*—*Barnes v. Noel*, 131 *Tenn.* 126, 174 *S. W.* 276; *Wise v. Morgan*, 101 *Tenn.* 273, 48 *S. W.* 971, 44 *L. R. A.* 548. *Tex.*—*Craver v. Greer* (*Tex. Civ. App.*), 178 *S. W.* 699; *Watson v. Patrick* (*Tex. Civ. App.*), 174 *S. W.* 632; *Cohen v. Grimes*, 18 *Tex. Civ. App.* 327, 45 *S. W.* 210. *Utah.*—*Law v. Smith*, 34 *Utah* 394, 98 *Pac.* 300. *W. Va.*—*Kemble v. Herndon*, 28 *W. Va.* 524. *Wyo.*—*Fremont Lodge No. 11, I. O. O. F. v. Board of Comrs.*, 21 *Wyo.* 264, 131 *Pac.* 62. *Can.*—*McDermott v. Ireson*, 38 *U. C. Q. B.* 1; *Clarkson v. Snider*, 10 *Ont.* 561.

[a] **Rulings After Trial and Judgment.**—(1) In order to review a ruling on a motion to set aside a judicial sale, no motion for a new trial is necessary. *Dreese v. Myers*, 52 *Kan.* 126, 34 *Pac.* 349, 39 *Am. St. Rep.* 336. (2) Such a motion is made, in fact, after final judgment, and a rule requiring a motion for a new trial as a prerequisite to the review of rulings

site to a review of all such alleged errors.²³ Moreover, in connection with certain classes of errors there is some conflict of opinion as to the necessity of a motion for a new trial prior to appeal,²⁴ and even in the same jurisdiction, the decisions are not always harmonious, because of changes in the statutes and rules of court. It is important, therefore, in the several states, to consult the latest regulations of the local practice. Where a motion for a new trial is prerequisite to appellate review, any errors that would be ground for a new trial not included in such a motion will not be considered by the appellate court.²⁵

Errors on Face of Record.—For errors appearing on the face of the record no motion for a new trial is necessary.²⁶

made during the progress of the trial, does not apply to such a ruling. *City of St. Louis v. Brooks*, 107 Mo. 380, 18 S. W. 22. *Contra*, *Tunstall v. Jones*, 25 Ark. 272.

23. Ark.—*Phillips v. State*, 100 Ark. 615, 140 S. W. 734. **Cal.**—*Caldwell v. Parks*, 47 Cal. 640. **Fla.**—*Parrish v. Pensacola & A. Co.*, 28 Fla. 251, 9 So. 696. **Ia.**—*Stewart v. Equitable Mut. Life Assn.*, 110 Iowa 528, 81 N. W. 782. **La.**—*Levert v. Berthelot*, 127 La. 1004, 54 So. 329. **Nev.**—*Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705. **N. Y.**—*Zang v. Joline*, 159 App. Div. 885, 143 N. Y. Supp. 858. **N. D.**—*McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685. **Utah.**—*Law v. Smith*, 34 Utah 394, 98 Pac. 300. **Vt.** See *Woodsville Guar. Sav. Bank v. Rogers*, 86 Vt. 121, 83 Atl. 537. **Can.** See *Hughes v. Canada P. L., etc. Soc.*, 39 U. C. Q. B. 221.

24. See *infra*, this section.

25. Ark.—*Burris v. State*, 73 Ark. 453, 84 S. W. 723; *Gaines v. Summers*, 39 Ark. 482. **Ga.**—*Hill v. State*, 112 Ga. 32, 400, 37 S. E. 441; *Simpson v. State*, 12 Ga. App. 292, 77 S. E. 105. **Ind.**—*Standish v. Bridgewater*, 159 Ind. 386, 65 N. E. 189; *La Follette v. Higgins*, 109 Ind. 241, 9 N. E. 780; *Robinson v. State*, 66 Ind. 331; *Fisher v. State*, 65 Ind. 51. **Kan.**—*Atchison v. Byrnes*, 22 Kan. 65; *Nesbit v. Hines*, 17 Kan. 316. **Ky.**—*Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433. **Mo.**—*State v. Gamma*, 215 Mo. 100, 114 S. W. 619. **Neb.**—*Republican Val. Ry. Co. v. Hayes*, 13 Neb. 489, 14 N. W. 521; *Walker v. Smith*, 54 Neb. 31, 74 N. W. 390. **N. M.**—*State v. Ellison*, 19 N. M. 428, 144 Pac. 10. **N. D.**—*State v. Glass*, 29 N. D. 620, 151 N. W. 229. **S. D.**—*State v. Morse*, 35 S. D. 18, 150

N. W. 293. **Tex.**—See *Howard v. State* (Tex. Crim.), 174 S. W. 607. **Wyo.** *Wolcott v. Bachman*, 3 Wyo. 335, 23 Pac. 72, 673.

26. Ark.—*Industrial Mut. Indemnity Co. v. Armstrong*, 93 Ark. 84, 124 S. W. 236; *Norman v. Fife*, 61 Ark. 33, 31 S. W. 740. **Cal.**—*California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38. **Ga.**—*Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803. **Ia.**—*Brown v. Rose*, 55 Iowa 734, 7 N. W. 133. **Kan.**—*Crawford v. Shaft*, 46 Kan. 704, 27 Pac. 156; *Phelps & Bigelow W. Co. v. Buchanan*, 46 Kan. 314, 26 Pac. 708; *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 109. **Ky.**—*Humphreys v. Walton*, 2 Bush 580; *Forrester v. Howard*, 30 Ky. L. Rep. 375, 98 S. W. 984. **Mo.**—*State v. Thompson*, 149 Mo. 441, 51 S. W. 98; *Bagby v. Emberson*, 79 Mo. 139. **Neb.** *Horton v. State*, 60 Neb. 701, 84 N. W. 87; *Slobodisky v. Curtis*, 58 Neb. 211, 78 N. W. 522. **Okla.**—*Kellogg v. School Dist. No. 10*, 13 Okla. 285, 74 Pac. 110. **Tenn.**—*Bonding Co. v. McLemore*, 4 Tenn. Ch. App. 633; *Johnston v. Phillips*, 4 Tenn. Ch. App. 662. **Tex.** *Craver v. Greer* (Tex. Civ. App.), 178 S. W. 699; *Lane v. Miller & V. Lumber Co.* (Tex. Civ. App.), 176 S. W. 100; *United States & M. Trust Co. v. Austin* (Tex. Civ. App.), 176 S. W. 87.

[a] **Bill of Exceptions.**—Errors appearing of record by means of a bill of exceptions are, by the prevailing rule, treated the same as the record proper, and require no motion for a new trial in order to be brought up for appellate review. **Cal.**—*Carpentier v. Williamson*, 25 Cal. 154. **Fla.**—*Parrish v. Pensacola & A. Co.*, 28 Fla. 251, 9 So. 696. **Ill.**—*Mendota v. Fay*, 1 Ill. App. 418. **Tenn.**—*Wells v. Moselev*, 4 Coldw. 401. **Tex.**—*Harvey v. Hill*, 7 Tex. 591. *Contra*, *Anderson v. Ben-*

Issues and Conclusions of Law.—Since a new trial is a re-examination of an issue of fact, a motion for a new trial is not required to review decisions on issues of law.²⁷ This rule applies, also, to errors in conclusions of law.²⁸

b. *Trial by Court.*—In many jurisdictions in which the general rule obtains, a motion for a new trial is required to review the alleged errors when the cause is tried by the court, the same as when tried by a jury.²⁹ In other jurisdictions, however, while the rule applies

jamin, 27 Ark. 26; *Bodamer v. Hutton*, 40 Ind. 244.

[b] **Error Apparent From Pleadings and Judgment.**—Where the error is apparent from an examination of the pleadings and judgment a motion for a new trial is unnecessary. *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 109.

27. *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 39 Pac. 718.

28. **Ind.**—*Luirance v. Luirance*, 32 Ind. 198; *Rathburn v. Wheeler*, 29 Ind. 601. **Kan.**—*McLeod v. Palmer*, 96 Kan. 159, 150 Pac. 535. **Neb.**—*Bannard v. Duncan*, 65 Neb. 179, 90 N. W. 947. **Tex.**—*Walsh v. Methodist E. Church (Tex. Civ. App.)*, 173 S. W. 241. **Utah.**—*Law v. Smith*, 34 Utah 394, 98 Pac. 300.

29. **Ark.**—*Independence County v. Tomlinson*, 93 Ark. 382, 125 S. W. 422; *Smith v. Hollis*, 46 Ark. 17. **Fla.**—*Manatee County State Bank v. Wade*, 56 Fla. 492, 494, 47 So. 927. **Ind.**—*Bowman v. Ely*, 135 Ind. 494, 35 N. E. 123; *Topp v. Standard Metal Co.*, 47 Ind. App. 483, 94 N. E. 891. **Ky.**—*Louisville & N. R. Co. v. Elizabethtown Dist. Pub. School*, 105 Ky. 358, 49 S. W. 34; *Day v. Adams*, 20 Ky. L. Rep. 1827, 50 S. W. 2; *Simms v. Lanehart*, 19 Ky. L. Rep. 1439, 38 S. W. 490; *Armstrong v. Smith*, 9 Ky. Op. 370. **Mass.**—*Lambert v. Cheney*, 221 Mass. 378, 108 N. E. 1078. **Mo.**—*State ex rel. St. Louis v. Missouri Pac. R. Co.*, 262 Mo. 720, 174 S. W. 73. **Neb.**—*Shoff v. Ash*, 95 Neb. 255, 145 N. W. 271; *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35. **Nev.**—See *Potosi Zinc Co. v. Mahoney*, 36 Nev. 290, 135 Pac. 1078. **Okla.**—*Lewis v. Lynde-Bowman-Darby Co.*, 151 Pac. 1045. **P. I.**—*Bermejo v. Dorado*, 4 Phil. Isl. 555. **Tenn.**—*Matthews v. Crofford*, 129 Tenn. 541, 167 S. W. 695. *Compare Barr v. Southern R. Co.*, 105 Tenn. 544, 58 S. W. 849. **Wyo.**—*Todd v. Peterson*, 15 Wyo. 513, 31 Pac. 878.

[a] **Special Findings Supporting**

Judgment.—No such motion is necessary to enable the reviewing court to determine whether special findings by the court support the judgment. *Horn v. Newton City Bank*, 32 Kan. 518, 523, 4 Pac. 1022.

[b] **Texas.—Fundamental Errors.** By construction of a statute regulating the contents of the record on appeal, it is held that "one appealing from a judgment rendered by the court without a jury need not file a motion for new trial. . . . (*Frenzell v. Lexington, L. A. & I. Co.*, 126 S. W. 907; *Luther v. Western Union Telegraph Co.*, 25 Tex. Civ. App. 31, 60 S. W. 1029; *Griffin v. McKinney*, 25 Tex. Civ. App. 432, 62 S. W. 82; *Akes v. Sanford*, 39 S. W. 952; *G. & C. S. F. Ry. v. Gaedecke*, 39 S. W. 312; *Maverick v. Routh*, 7 Tex. Civ. App. 669, 26 S. W. 1011; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268); but, when no such motion is filed, the party appealing must except to the judgment and have the trial judge file findings of fact and conclusions of law (*Pollard v. Allen & Sims*, 171 S. W. 302, and authorities cited), or bring up a statement of facts in the record (*Cornelius v. Harris*, 163 S. W. 346; *Greer v. Featherston*, 95 Tex. 654, 69 S. W. 69). Failing in this, none but fundamental errors can be considered." *Commonwealth B. & C. Ins. Co. v. Cator (Tex. Civ. App.)*, 175 S. W. 1074; *Campbell Banking Co. v. Hamilton (Tex. Civ. App.)*, 173 S. W. 1012. See also *Craver v. Greer (Tex. Civ. App.)*, 178 S. W. 699.

[c] **A judgment rendered after the court's refusal to admit any evidence requires no motion for a new trial in order that the decision may be reviewed.** *Werley v. Huntington Waterworks Co.*, 138 Ind. 148, 37 N. E. 582, the court saying, "It is only when there has been a trial that a motion for a new trial is required as a condition precedent to a review of errors."

to jury trials, it is held not to apply when the case is heard by the court.³⁰

c. *Report of Referee*.—It is also the general rule that a report of a referee will not be reviewed without a motion for a new trial.³¹

d. *Criminal Cases*.—The general rule is the same in criminal cases as in civil cases. The appellate court cannot consider errors of law occurring at the trial unless they are assigned as error on a motion for a new trial.³²

e. *In Equity*.—As a general rule, no motion for a new trial is necessary for the foundation of an appeal in equity.³³

See also *Coots v. Morgan's Admr.*, 24 Mo. 522.

30. **Colo.**—*Phelps v. Spruance*, 1 Colo. 414. **Ga.**—*Crumbley v. Brook*, 135 Ga. 723, 70 S. E. 655; *Hyfield v. Sims*, 87 Ga. 280, 13 S. E. 554. **Ill.** *Climax Tag Co. v. American Tag Co.*, 234 Ill. 179, 84 N. E. 873; *Alton v. Foster*, 207 Ill. 150, 69 N. E. 783; *Niagara Fire Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830; *Gage v. Goudy*, 128 Ill. 566, 21 N. E. 565; *Stern v. Glattstein*, 80 Ill. App. 367. **Miss.** *Nicholson v. Karpe*, 58 Miss. 34. **N. D.** *Bessie v. Northern Pac. R. Co.*, 14 N. D. 614, 105 N. W. 936. **Tenn.**—*Barr v. Southern R. Co.*, 105 Tenn. 544, 58 S. W. 849. See, however, *Matthews v. Crofford*, 129 Tenn. 541, 167 S. W. 695. **W. Va.**—*Capital City Supply Co. v. Beury*, 69 W. Va. 612, 72 S. E. 657. **Can.**—See *Crockett v. Macfarlane*, 33 N. Bruns. 29.

31. **Cal.**—*Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393; *Peck v. Vandenberg*, 30 Cal. 11. **Kan.**—*Northrop Nat. Bank v. Webster Refining Co.*, 89 Kan. 738, 132 Pac. 832. **Minn.** *Griffin v. Jorgenson*, 22 Minn. 92. **Mo.** *State v. Hurlstone*, 92 Mo. 327, 5 S. W. 38; *Price v. Davis*, 187 Mo. App. 1, 173 S. W. 64; *Donahue v. Maloney*, 14 Mo. App. 578. **Mont.**—*Kleinschmidt v. Iler*, 6 Mont. 122, 9 Pac. 901. **Neb.** *Light v. Kennard*, 11 Neb. 129, 7 N. W. 539. **Okla.**—*Gill v. Haynes*, 28 Okla. 656, 115 Pac. 790.

32. **Ariz.**—*Shaffer v. Territory*, 14 Ariz. 329, 127 Pac. 746. **Ark.**—*State v. Smith*, 117 Ark. 384, 175 S. W. 392. **Cal.**—*People v. Torres*, 38 Cal. 141. **Ga.** *Burney v. State*, 142 Ga. 812, 83 S. E. 927; *Garrison v. State*, 17 Ga. App. 314, 86 S. E. 743. **Ill.**—*Herder v. People*, 209 Ill. 50, 70 N. E. 674; *Collins v. People*, 194 Ill. 506, 62 N. E. 902. **Ind.** *McCutecheon v. State*, 176 Ind. 13, 93

N. E. 545; *Crawford v. State*, 155 Ind. 692, 57 N. E. 931; *Allen v. State*, 74 Ind. 216. **Kan.**—*State v. Douglas*, 69 Kan. 676, 77 Pac. 697; *State v. Tuchman*, 47 Kan. 726, 28 Pac. 1004. **Ky.** *Com. v. Hurst*, 149 Ky. 435, 149 S. W. 866; *Howard v. Com.*, 24 Ky. L. Rep. 91, 67 S. W. 1003; *Baker v. Com.*, 20 Ky. L. Rep. 879, 47 S. W. 864. **La.** *State v. Robertson*, 50 La. Ann. 455, 23 So. 510. **Miss.**—See *Burrage v. State*, 101 Miss. 598, 58 So. 217. **Mo.**—*State v. Hammontree*, 177 S. W. 367; *State v. Patton*, 255 Mo. 245, 164 S. W. 223; *State v. Harlan*, 130 Mo. 381, 32 S. W. 997. **Mont.**—*State v. Whaley*, 16 Mont. 574, 41 Pac. 852. **Neb.**—*Forbes v. State*, 93 Neb. 574, 141 N. W. 197; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *Dillon v. State*, 39 Neb. 92, 57 N. W. 986. **N. J.**—*State v. Palerma*, 87 N. J. L. 717, 94 Atl. 581. **N. M.** *State v. Holloway*, 19 N. M. 528, 146 Pac. 1066, L. R. A. 1915F, 922; *Territory v. Archibeque*, 9 N. M. 403, 54 Pac. 758. **Okla.**—*Dew v. State*, 11 Okla. Crim. 581, 149 Pac. 917; *Stutsman v. Territory*, 7 Okla. 490, 54 Pac. 707. **P. R.**—*People v. Ramos*, 15 Porto Rico 239. **Tex.**—*Williams v. State*, 78 Tex. Crim. 237, 177 S. W. 965; *Ford v. State*, 41 Tex. Crim. 1, 51 S. W. 935, 53 S. W. 869. **Wis.**—*Norton v. State*, 129 Wis. 659, 109 N. W. 531, 116 Am. St. Rep. 979; *Yanke v. State*, 51 Wis. 464, 8 N. W. 276. **Wyo.**—*Hollywood v. State*, 19 Wyo. 493, 120 Pac. 471, 122 Pac. 588, Ann. Cas. 1913E, 218; *Ross v. State*, 8 Wyo. 351, 57 Pac. 924; *Cook v. Territory*, 3 Wyo. 110, 4 Pac. 387.

[a] Denial of a motion to correct the record so as to show that there was no arraignment or plea, cannot be urged if there was no motion for new trial. *Shoffner v. State*, 93 Ind. 519. See also *Tindall v. State*, 71 Ind. 314.

33. **Ark.**—*LeMay v. Johnson*, 35 Ark.

f. *Intermediate Appellate Courts.*—According to some authorities, upon appeal from an intermediate appellate court which has reviewed the proceedings of an inferior court, a motion for a new trial is necessary;³⁴ but there are other authorities to the contrary.³⁵

g. *Agreed Statement of Facts.*—When a case is submitted on an agreed statement of facts, no motion for a new trial is necessary as a prerequisite for appellate review;³⁶ otherwise, however, where the case is tried on an agreed statement together with evidence.³⁷

h. *Sufficiency of Pleadings.*—Demurrers based upon the sufficiency of pleadings,³⁸ or rulings on motions directed against their alleged insufficiency,³⁹ or judgments rendered upon pleadings, there being no

225. **Cal.**—Dewey v. Bowman, 8 Cal. 145. **Ia.**—Jordan v. Wimer, 45 Iowa 65. **Ky.**—Nickels v. Collins, 153 Ky. 219, 154 S. W. 1090. **Neb.**—Ogden v. Garrison, 82 Neb. 302, 117 N. W. 714, 17 L. R. A. (N. S.) 1135. **Okla.**—Harrison v. Murphy, 35 Okla. 135, 128 Pac. 501. **Wis.**—Sanford v. McCreedy, 28 Wis. 103.

Contra, Barnett v. Montgomery & E. R. Co., 51 Ala. 555.

[a] *Issues Referred to Jury.*—In some jurisdictions, where issues of fact are referred to a jury, or are tried by the court, a motion for a new trial is required to review the evidence, or the findings, on appeal. **Cal.**—Deputy v. Stapleford, 19 Cal. 302. **Colo.**—Hall v. Linn, 8 Colo. 264, 5 Pac. 641. **Ind.**—Griffin v. Lynch, 10 Ind. 217. **Mo.**—Woodson v. McClelland, 4 Mo. 495. **Neb.**—Dunham v. Courtney, 24 Neb. 627, 39 N. W. 784. **Nev.**—Burbank v. Rivers, 20 Nev. 81, 16 Pac. 430. **N. Y.**—Apthorp v. Comstock, 2 Paige 482; Chapin v. Thompson, 23 Hun 12; Ward v. Warren, 15 Hun 600. **Ohio.**—Spangler v. Brown, 26 Ohio St. 389; Ide v. Churchill, 14 Ohio St. 372.

34. **Mo.**—Frick Co. v. Marshall, 86 Mo. App. 463; Mockler v. Skellett, 36 Mo. App. 174. **N. Y.**—Simmons v. Sherman, 30 How. Pr. 4; Carter v. Werner, 27 How. Pr. 385; Tallman v. American Express Co., 6 Hun 377. **Tex.**—San Antonio v. Hoefling, 90 Tex. 511, 39 S. W. 918.

35. **Ind.**—Kelly v. Lawson, 39 Ind. App. 613, 80 N. E. 553. **Kan.**—Lyons v. Osborn, 45 Kan. 650, 26 Pac. 31; Shaffer v. Hoenschield, 2 Kan. App. 516, 43 Pac. 979. **Neb.**—Biarl v. Myers, 59 Neb. 711, 82 N. W. 7; Claffin v. American Nat. Bank, 46 Neb. 884, 65 N. W. 1056.

36. Atkins v. Nordyke-Marmon Co.,

60 Kan. 354, 56 Pac. 533; Noble v. Harter, 6 Kan. App. 823, 49 Pac. 794; Schnitzler v. Green, 5 Kan. App. 656, 47 Pac. 990; Murray v. Southerland, 125 N. C. 175, 34 S. E. 270; Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178; Chamblee v. Baker, 95 N. C. 98; Davenport v. Leary, 95 N. C. 203. *Contra*, Smith v. Hollis, 46 Ark. 17; King v. Little Rock, 26 Ark. 479; Gardner v. Miller, 21 Ark. 398; Walker v. Swigart, 21 Ark. 404. See James v. Jackson, 30 Okla. 190, 120 Pac. 288, rule in former Indian Territory under laws of Arkansas.

37. Thomas v. Arthurs, 8 Kan. App. 126, 54 Pac. 694.

38. **Ark.**—Clark v. Hare, 39 Ark. 258. **Ind.**—Gray v. Stiver, 24 Ind. 174; Rodgers v. Lacey, 23 Ind. 507. **Mo.**—Diener v. Star-Chronical Pub. Co., 230 Mo. 613, 132 S. W. 1143, 33 L. R. A. (N. S.) 216; Houtz v. Hellman, 228 Mo. 655, 128 S. W. 1001; Dysart v. Crow, 170 Mo. 275, 70 S. W. 689; Crow v. Reliable Jewelry Co., 116 Mo. App. 624, 92 S. W. 742. **Neb.**—Scarborough v. Myrick, 47 Neb. 794, 66 N. W. 867; O'Donohue v. Hendrix, 13 Neb. 255, 13 N. W. 215. **Tenn.**—Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548. **Tex.**—Davis v. Parks (Tex. Civ. App.), 157 S. W. 449. **Wyo.**—Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71.

[a] When the demurrer to a petition is sustained, and plaintiff elects to stand upon the sufficiency of his pleading, and judgment is rendered against him for costs, no motion for a new trial is necessary in order to have the question of the sufficiency of the petition reviewed. Earlywine v. Topeka S. & W. R. Co., 43 Kan. 746, 23 Pac. 940.

39. **Ark.**—Clark v. Hare, 39 Ark.

trial of any issue of facts,⁴⁰ can be reviewed without a motion for a new trial.

i. *Demurrers to Evidence*.—It is the general rule that rulings on demurrers to the evidence require no motion for a new trial as a necessary preliminary to appellate review.⁴¹ Under the practice in some states, however, a motion for a new trial may be indispensable.⁴²

j. *Orders Sustaining or Dissolving Attachments*.—It is held that orders sustaining or dissolving attachments require no motion for a new trial as a prerequisite to review.⁴³

k. *Motion for Judgment Non Obstante*.—It is also held that a ruling denying a motion for a judgment non obstante veredicto may be reviewed without a motion for a new trial.⁴⁴

l. *Nonsuit*.—Although it has been held that an order granting a nonsuit requires a motion for a new trial to present the error on

258. **Ind.**—*Craig v. Ensey*, 63 Ind. 140; *Gray v. Stiver*, 24 Ind. 174; *Rodgers v. Lacey*, 23 Ind. 507. **Kan.**—*Nute v. American Glucose Co.*, 55 Kan. 225, 40 Pac. 279; *Dodge City Water Supply Co. v. Dodge City*, 55 Kan. 60, 39 Pac. 219. **Ky.**—*Simms v. Lanehart*, 19 Ky. L. Rep. 1439, 38 S. W. 490; *Neff v. Burch*, 15 Ky. L. Rep. 812. **Mo.**—*Childs v. Kansas City, etc. R. Co.*, 117 Mo. 414, 23 S. W. 373. But see *German Sav. Inst. v. Jacoby*, 97 Mo. 617, 11 S. W. 256 (refusal to allow amendment); *Atkison v. Dixon*, 96 Mo. 582, 10 S. W. 163, refusal to allow filing of answer to a motion. **Neb.**—*Miller v. Munce*, 98 Neb. 713, 154 N. W. 242; *Farmers' State Bank v. Sutton Merc. Co.*, 77 Neb. 600, 110 N. W. 308. But see *Barker v. Davis*, 47 Neb. 78, 66 N. W. 11, ruling on motion to make more certain. **Okla.**—*Burdett v. Burdett*, 26 Okla. 416, 109 Pac. 922, 35 L. R. A. (N. S.) 964. See *Healy v. Davis*, 32 Okla. 296, 122 Pac. 157. **Tenn.**—*Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548. **Tex.**—*American N. Ins. Co. v. Rowell* (Tex. Civ. App.), 175 S. W. 170. See *Trotti v. Kinnear* (Tex. Civ. App.), 144 S. W. 326. **W. Va.**—*Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004; *Brown v. Brown*, 29 W. Va. 777, 2 S. E. 808.

[a] "It is not usual or necessary to file a motion for a new trial for the mere purpose of having the court to hear twice the same motion or demurrer." *O'Connor v. Koch*, 56 Mo. 262; *Butler v. Lawson*, 72 Mo. 244. See also *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, ruling on motion to strike out interplea.

40. **Ark.**—*Burgen v. Dwinal*, 11 Ark. 314. **Ind.**—*Peru, etc. R. Co. v. Dayton*, 18 Ind. 326; *Davis v. Engler*, 18 Ind. 312; *Henly v. Kern*, 15 Ind. 391. **Mo.**—*Atkison v. Dixon*, 96 Mo. 582, 10 S. W. 163. **Tex.**—*Brown v. McKee*, 80 Tex. 594, 16 S. W. 435.

41. **Ind.**—*Strough v. Gear*, 48 Ind. 100. **Kan.**—*Moore v. Life & Annuity Assn.*, 95 Kan. 591, 148 Pac. 981; *Moore v. Life & Annuity Assn.*, 93 Kan. 398, 148 Pac. 981. **N. C.**—*Murray v. Southerland*, 125 N. C. 175, 34 S. E. 270. **Va.**—*Fidelity, etc. Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432. **W. Va.**—*Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394.

42. *McWilliams v. Workers' Printing Co.*, 188 Mo. App. 504, 174 S. W. 464; *Tyler v. Tyler*, 44 Okla. 411, 144 Pac. 1023; *Hughes v. Meler*, 43 Okla. 166, 141 Pac. 770; *State v. Adams*, 42 Okla. 491, 141 Pac. 1119; *Stump v. Porter*, 31 Okla. 157, 120 Pac. 639.

[a] The ruling on a demurrer to the evidence is a decision occurring on the trial; and in order to enable the supreme court to review such ruling, it is necessary that a motion for a new trial be filed within the time prescribed by law. *State v. Poor*, 33 Okla. 376, 125 Pac. 726.

43. **Ky.**—*Crouch v. Meguiar-Harris Co.*, 19 Ky. L. Rep. 819, 42 S. W. 91. **Ohio.**—*Beitman & Co. v. McKenzie*, 9 Ohio Dec. (Reprint) 403, 12 Wkly. L. Bul. 321. **Wyo.**—*First Nat. Bank of Cheyenne v. Swan*, 3 Wyo. 356, 23 Pac. 743.

44. *Satterlee v. Modern Brotherhood of America*, 15 N. D. 92, 106 N. W. 561.

appeal,⁴⁵ yet the general rule is that such an order is a part of the record proper and may be reviewed without such a motion.⁴⁶

m. *Directing Verdict*.—For the review of alleged error in directing, or refusing to direct, a verdict a motion for a new trial is not essential in some jurisdictions,⁴⁷ but in other states a contrary view is held.⁴⁸

n. *Dismissal*.—Where a judgment dismissing an action appears on the record, no motion for a new trial is necessary for appellate review;⁴⁹ otherwise, it is held that such a motion is a prerequisite.⁵⁰

o. *Continuances and Change of Venue*.—Alleged errors of the trial court in refusing or granting motions for continuance will not, in many jurisdictions, be reviewed upon appeal in the absence of exception and a motion for a new trial,⁵¹ unless such ruling may appear as a matter of record.⁵² Rulings on applications for a change of venue

45. *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *William Mercantile Co. v. Fussy*, 13 Mont. 401, 34 Pac. 189; *Burns v. Commencement Bay Land & Imp. Co.*, 4 Wash. 558, 30 Pac. 668, 709.

46. *Toulouse v. Pare*, 103 Cal. 251, 37 Pac. 146; *McCreery v. Everding*, 44 Cal. 284; *Donahue v. Gallavan*, 43 Cal. 573; *Law v. Smith*, 34 Utah 394, 98 Pac. 300.

47. *Ga.*—*Webb v. Hicks*, 117 Ga. 235, 43 S. E. 738. *Ill.*—*Stanhous v. Paradise Coal, etc. Co.*, 169 Ill. App. 75. *Ky.*—*Collins v. Potts*, 9 Ky. L. Rep. 536. *N. Y.*—*Miller v. Barnett*, 158 App. Div. 862, 144 N. Y. Supp. 40. *S. C.*—*Newsom v. Poe Mfg. Co.*, 102 S. C. 77, 86 S. E. 195. *S. D.*—*Jones Lumb. & M. Co. v. Faris*, 6 S. D. 112, 60 N. W. 403, 55 Am. St. Rep. 814. *Utah.*—*Law v. Smith*, 34 Utah 394, 98 Pac. 300. *Wis.*—*Wheeler v. Seamans*, 123 Wis. 573, 102 N. W. 28; *Prichard v. Deering Harvester Co.*, 117 Wis. 97, 93 N. W. 827; *Zahn v. Milwaukee, etc. R. Co.*, 114 Wis. 38, 89 N. W. 889; *Plankinton v. Gorman*, 93 Wis. 560, 67 N. W. 1128.

48. *Ill.*—*Knights Templars' & Masons' Life Indemnity Co. v. Crayton*, 110 Ill. App. 648, *affirmed* in 209 Ill. 550, 70 N. E. 1066. *Ind.*—*United States Health & Acc. Ins. Co. v. Batt*, 49 Ind. App. 277, 97 N. E. 195; *Chicago & E. I. R. Co. v. Richards*, 28 Ind. App. 46, 61 N. E. 18. *Kan.*—*Heinz v. Consumers' Light, H. & P. Co.*, 81 Kan. 261, 105 Pac. 527. *Ky.*—*Witt v. Lexington & E. R. Co.*, 158 Ky. 401, 165 S. W. 399. *Mich.*—*Harrington v. Calhoun Probate Judge*, 153 Mich.

660, 117 N. W. 62. *Mo.*—*King v. Kaw-Mo W. Grocer Co.*, 188 Mo. App. 235, 175 S. W. 77; *State v. Turner*, 113 Mo. App. 53, 87 S. W. 464. *N. M.*—*Western College v. Turknett*, 17 N. M. 275, 125 Pac. 1085. *Okla.*—*Hughes v. Meler*, 43 Okla. 166, 141 Pac. 770; *Bd. of Comrs. of Beaver County v. Langston*, 41 Okla. 715, 139 Pac. 956. *Tenn.*—*Barnes v. Noel*, 131 Tenn. 126, 174 S. W. 276.

49. *Ga.*—*O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731. *Ind.*—*Metsker v. Whitsell*, 181 Ind. 704, 103 N. E. 1078; *Lines v. Benner*, 52 Ind. 195. *Mo.*—*Butler v. Lawson*, 72 Mo. 227; *McCoy v. Farmer*, 65 Mo. 244. *S. D.*—*Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 24.

50. *Severs v. Bull*, 1 Ind. Ter. 8, 35 S. W. 234; *Severs v. Northern Trust Co.*, 1 Ind. Ter. 1, 35 S. W. 232.

51. *Ark.*—*Watts v. Cohn*, 40 Ark. 114. *Cal.*—*Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161. *Ill.*—*Metro-politan L. Ins. Co. v. Moravec*, 116 Ill. App. 271; *Lichter v. Russell*, 89 Ill. App. 62. *Ind.*—*Continental L. Ins. Co. v. Kessler*, 84 Ind. 310; *Morgan v. Hyatt*, 62 Ind. 560; *Arbuckle v. McCoy*, 53 Ind. 63. *Ky.*—*French v. Sewell*, 13 Ky. L. Rep. 928. *Mo.*—*State v. McKee*, 212 Mo. 138, 110 S. W. 729; *Handy v. McClellan*, 156 Mo. App. 454, 137 S. W. 280. *Tex.*—*San Antonio v. Ashton (Tex. Civ. App.)*, 135 S. W. 757; *Lion Ins. Co. v. Wicker (Tex. Civ. App.)*, 54 S. W. 294.

52. *Cook v. Larson*, 47 Kan. 70, 27 Pac. 113 (ruling on record of appeal from justice court); *Beatty v. Sylves-*

will not be considered on appeal without a motion for a new trial.⁵³

p. *Jury Trial and Jurors*.—In some jurisdictions it is held that the refusal of the court to allow a jury trial will not be reviewed on appeal unless a motion for a new trial is made.⁵⁴ Elsewhere, it is held, however, that when such refusal appears as a matter of record no motion for a new trial is required.⁵⁵ The question of the incompetency of jurors requires a motion for a new trial in order to obtain appellate review,⁵⁶ and, the same is true of other alleged irregularities connected with the jury.⁵⁷

q. *Witnesses and Evidence*.—(I.) *Witnesses*.—In connection with witnesses, such alleged errors as rejecting a witness,⁵⁸ limiting the number of witnesses to be heard,⁵⁹ separating the witnesses at the trial,⁶⁰ and permitting the asking of leading questions,⁶¹ require motions for new trials in order to be considered on appeal.

(II.) *Admission and Exclusion of Evidence*.—Errors based on the admission or exclusion of evidence must in most jurisdictions be raised by a motion for a new trial before they will be heard on appeal.⁶²

ter, 3 Nev. 228, ruling appearing on bill of exceptions.

53. *Cleveland, C., C. & St. L. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164; *Scanlin v. Stewart*, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; *Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; *State v. Alred*, 115 Mo. 471, 22 S. W. 363; *Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161.

54. *Horlacher v. Brafford*, 141 Ind. 528, 40 N. E. 1078; *Huffmond v. Bence*, 128 Ind. 131, 27 N. E. 347; *Peden v. Mail*, 118 Ind. 556, 20 N. E. 493, *s. c.*, 118 Ind. 560, 20 N. E. 446; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Sone v. Williams*, 130 Mo. 530, 32 S. W. 1016; *Kansas City, etc. R. Co. v. Carlisle*, 94 Mo. 166, 7 S. W. 102.

[a] *Opening and Closing Argument*. Rulings upon the right of a party to have the opening or closing argument, or both, are matters which must be presented to the court below by a motion for a new trial before they can be heard on appeal. *Abshire v. State*, 52 Ind. 99; *White Water Val. R. Co. v. McClure*, 29 Ind. 536. And see *Sammons v. Hawvers*, 25 W. Va. 678.

55. *In re Robinson's Estate*, 106 Cal. 493, 39 Pac. 862.

56. *Pemiscot Land, etc. Co. v. Davis*, 147 Mo. App. 194, 126 S. W. 218; *Mengedocht v. Van Dorn*, 48 Neb. 880, 67 N. W. 858; *Hastings, etc. R. Co. v. Ingalls*, 15 Neb. 123, 16 N. W. 762.

57. *State v. Rabourn*, 14 Ind. 300; *Hall v. Haun's Heirs*, 5 Dana (Ky.) 55.

58. *Hill v. Alexander*, 77 Mo. 296; *Long v. Story*, 13 Mo. 4.

59. *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1088.

60. *Cobb v. Krutz*, 40 Ind. 323.

61. *Anderson v. Hervey*, 67 Ind. 420.

62. *Ala.*—*Western Union Tel. Co. v. Rowell*, 166 Ala. 651, 51 So. 880; *Mobile v. Murphree*, 96 Ala. 141, 11 So. 201. *Ariz.*—*Van Dyke v. Cordova Copper Co.*, 14 Ariz. 499, 132 Pac. 94; *Green v. Miller*, 3 Ariz. 205, 73 Pac. 399. *Ark.*—*Kilpatrick v. Rowan*, 119 Ark. 175, 177 S. W. 893; *Jackson v. State*, 108 Ark. 425, 158 S. W. 138; *Thomas v. Jackson*, 105 Ark. 353, 151 S. W. 521. *Cal.*—*Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

Ga.—*Louisville & N. R. Co. v. Hughes*, 143 Ga. 206, 84 S. E. 451; *Georgia & F. R. Co. v. Stapleton*, 143 Ga. 46, 84 S. E. 120; *Bowdoin v. State*, 113 Ga. 1150, 39 S. E. 478. *Idaho.*—*Burrow v. Idaho & W. N. R. R.*, 24 Idaho 652, 135 Pac. 838. *Ill.*—*Hartnett v. Boston Store*, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915C, 460; *St. Louis & S. F. R. R. Co. v. Puterbaugh*, 117 Ill. App. 569. *Ind.*—*Norton v. State*, 181 Ind. 123, 100 N. E. 449; *Ward v. State*, 179 Ind. 524, 101 N. E. 809; *Storer v. Markley*, 164 Ind. 535, 73 N. E. 1081; *Hartwell v. Peck & Co.*, 163 Ind. 357, 71 N. E. 958; *Hedrick v. Hall*, 155 Ind. 371, 58 N. E. 257; *Indiana Imp. Co. v. Wagner*, 138 Ind. 658, 38 N. E. 49; *Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909; *Balue v. Sear*, 131

(III.) **Sufficiency and Weight of Evidence.** — In trials by jury, whether the evidence was sufficient to sustain the verdict, or whether the verdict was contrary to the weight of the evidence, are questions which by the authority of numerous decisions will not be considered on appellate review in the absence of a motion for a new trial in the lower court.⁶³ In actions tried by the court, the same general rule, requir-

Ind. 301, 28 N. E. 707; *McGuffey v. McClain*, 130 Ind. 327, 30 N. E. 296; *Racer v. Baker*, 113 Ind. 177, 14 N. E. 241; *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129; *Moore v. Harland*, 107 Ind. 474, 8 N. E. 272; *Frybarger v. Andre*, 106 Ind. 337, 7 N. E. 5. **Kan.** *Hamilton v. Atchison, T. & S. F. R. Co.*, 95 Kan. 353, 148 Pac. 648; *O'Neal v. Bainbridge*, 94 Kan. 518, 146 Pac. 1165, Ann. Cas. 1917B, 293; *Kuhn v. Johnson*, 91 Kan. 188, 137 Pac. 990; *Work v. Work*, 90 Kan. 683, 136 Pac. 236. **Ky.**—*Louisville, etc. R. Co. v. Roemmele*, 157 Ky. 84, 162 S. W. 547; *Louisville, etc. R. Co. v. Com.*, 154 Ky. 293, 157 S. W. 369. **Minn.**—*Helmer v. Shevlin-Mathieu Lumb. Co.*, 129 Minn. 25, 151 N. W. 421. **Miss.**—*Borroum v. State*, 94 Miss. 881, 47 So. 480; *Day v. State*, 91 Miss. 239, 44 So. 813. **Mo.** *State v. Patton*, 255 Mo. 245, 164 S. W. 223; *Stringer v. Geiser Mfg. Co.*, 189 Mo. App. 337, 175 S. W. 239. **Mont.** *Foster v. Winstanley*, 39 Mont. 314, 102 Pac. 574. **Neb.**—*Farmers' Loan & Tr. Co. v. Joseph*, 86 Neb. 256, 125 N. W. 533. **N. M.**—*Rogers v. Richards*, 8 N. M. 658, 47 Pac. 719. **N. Y.**—*Allden v. Supreme Tent of K. of M.*, 178 N. Y. 535, 71 N. E. 104, reversing 78 App. Div. 18, 79 N. Y. Supp. 89. **Ohio.** *Dummick v. Howitt*, 8 Ohio Dec. (Reprint) 196, 6 Wkly. L. Bul. 247. **Okla.** *Bank of Cherokee v. Sneary*, 46 Okla. 186, 148 Pac. 157; *Baker v. Tate*, 41 Okla. 353, 138 Pac. 171. **P. I.**—*Remo v. Espinosa*, 10 Phil. Isl. 136. **S. C.** *Barrineau v. Charleston Consol. R., etc. Co.*, 81 S. C. 20, 61 S. E. 1063. **S. D.** *State v. Pierre*, 15 S. D. 559, 90 N. W. 1047. **Tenn.**—*McCommon v. State*, 130 Tenn. 1, 168 S. W. 581, 48 L. R. A. 130. **Tex.**—*Keye v. State*, 53 Tex. Crim. 320, 111 S. W. 400. **Utah.** *Touse v. Consolidated R., etc. Co.*, 29 Utah 95, 80 Pac. 506. **Vt.**—*Fraser v. Blanchard*, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797. **Va.**—*Bridgewater v. Allemon*, 93 Va. 542, 25 S. E. 595. **W. Va.** *Bias v. Chesapeake & O. Ry. Co.*, 46 W. Va. 349, 33 S. E. 240. **Wyo.**—*Dickersen v. State*, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448.

63. **Ala.**—*Main & Co. v. Galloway*, 39 So. 770. **Ariz.**—*Gibson v. McLane*, 17 Ariz. 61, 148 Pac. 288; *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879. **Ark.**—*Evins v. St. Louis, etc. R. Co.*, 104 Ark. 79, 147 S. W. 452; *Western U. Tel. Co. v. Sockwell*, 91 Ark. 475, 121 S. W. 1046; *State v. Jennings*, 10 Ark. 428. **Cal.**—*Forsythe v. Los Angeles R. Co.*, 149 Cal. 569, 87 Pac. 24; *Green v. Green*, 103 Cal. 108, 37 Pac. 188; *Allen v. Fennon*, 27 Cal. 68. **Colo.** *Perry v. People*, 38 Colo. 23, 87 Pac. 796; *Komrs v. People*, 31 Colo. 212, 73 Pac. 25; *Roop v. Delahaye*, 2 Colo. 307. **Fla.**—*Johnson v. State*, 53 Fla. 42, 43 So. 430; *Davis v. State*, 47 Fla. 26, 36 So. 170. **Ga.**—*Schroeder v. Schroeder*, 144 Ga. 119, 86 S. E. 224; *Marshman v. State*, 138 Ga. 864, 76 S. E. 572; *Bacon & Sons v. Jones*, 117 Ga. 497, 43 S. E. 689; *Sanders v. State*, 84 Ga. 217, 10 S. E. 629; *Crim v. Sellars*, 37 Ga. 324; *Fish v. Van Winkle*, 34 Ga. 339. **Ill.**—*Wehrheim v. Gilbert*, 158 Ill. 542, 42 N. E. 142; *Law v. Fletcher*, 84 Ill. 45; *Daniels v. Shields*, 38 Ill. 197; *Hunter v. The Empire State Surety Co.*, 191 Ill. App. 634; *Kelly v. Aurora E. & C. R. Co.*, 168 Ill. App. 386; *Drake Standard Mach. Wks. v. Brossman*, 135 Ill. App. 209. **Ind.**—*Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138; *Philapy v. Ankerman-Bright Lumb. Co.*, 56 Ind. App. 266, 105 N. E. 161; *Hirsch & Sons Iron & R. Co. v. Peru Steel Casting Co.*, 50 Ind. App. 59, 96 N. E. 807; *Adams v. Ulsh*, 26 Ind. App. 516, 60 N. E. 162. **Ia.**—*Person v. Ames*, 150 N. W. 450; *Schulte v. Chicago, etc. R. Co.*, 124 Iowa 191, 99 N. W. 714. **Kan.** *Northrup Nat. Bank v. Webster Refining Co.*, 89 Kan. 738, 132 Pac. 832; *Decker v. House*, 30 Kan. 614, 1 Pac. 534. **Ky.**—*Brown v. Bennett*, 102 Ky. 518, 44 S. W. 85; *Webb v. Com.*, 30 Ky. L. Rep. 841, 99 S. W. 909. **Md.**—*Jones v. State*, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362. **Mich.** *Northrup v. Pontiac*, 159 Mich. 250, 123

ing a motion for a new trial, applies to the findings of the court.⁶⁴

N. W. 1107. Minn.—Barringer *v. Stoltz*, 39 Minn. 63, 38 N. W. 808; Byrne *v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 200, 12 N. W. 698. **Miss.**—Gale *v. Lancaster*, 44 Miss. 413. **Mo.**—State *v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; Seudder *v. Payton*, 65 Mo. App. 314. **Mont.**—Porter *v. Clark*, 6 Mont. 246, 11 Pac. 638. **Neb.**—Waxham *v. Fink*, 86 Neb. 180, 125 N. W. 145, 28 L. R. A. (N. S.) 367; Kafka *v. Union Stock Yards Co.*, 78 Neb. 140, 110 N. W. 672; Cassidy *v. Collier*, 72 Neb. 376, 100 N. W. 802. **Nev.**—Colquhoun *v. Wells, Fargo & Co.*, 21 Nev. 459, 33 Pac. 977. **N. H.**—Rockingham Bank *v. Claggett*, 29 N. H. 292. **N. M.**—Rogers *v. Richards*, 8 N. M. 658, 47 Pac. 719. **N. Y.**—Pangburn *v. Buick Motor Co.*, 151 App. Div. 756, 137 N. Y. Supp. 37; Peil *v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843. **N. D.**—State *v. Glass*, 29 N. D. 620, 151 N. W. 229; State *v. Reilly*, 25 N. D. 339, 141 N. W. 720; Russell *v. Olson*, 22 N. D. 410, 133 N. W. 1030, Ann. Cas. 1914B, 1069, 37 L. R. A. (N. S.) 1217. **Ohio.**—Cincinnati, H. & D. R. Co. *v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; Everett, Weddell & Co. *v. Sumner*, 32 Ohio St. 562; Mercantile Trust Co. *v. Etna Iron Works*, 4 Ohio Cir. Ct. 579, 2 Ohio Cir. Dec. 718. **P. I.**—Sandeliz *v. Paz Reyes*, 12 Phil. Isl. 506. **S. D.**—State *v. Kirby*, 34 S. D. 281, 148 N. W. 533; Gade *v. Collins*, 8 S. D. 322, 66 N. W. 466. **Tenn.**—Wells *v. Moseley*, 4 Coldw. 401. **Tex.**—DeGENER *v. O'Leary*, 85 Tex. 171, 19 S. W. 1004; Cain *v. Mack*, 33 Tex. 135; King *v. Gray*, 17 Tex. 62; Reynolds *v. Williams*, 1 Tex. 311; Buckingham *v. Thompson* (Tex. Civ. App.), 147 S. W. 290; Badu *v. Satterwhite* (Tex. Civ. App.), 125 S. W. 929; Friar *v. Orange*, etc. R. Co., 45 Tex. Civ. App. 564, 101 S. W. 274. **Utah.**—Oregon Short Line R. Co. *v. Russell*, 27 Utah 457, 76 Pac. 345. See Law *v. Smith*, 34 Utah 394, 98 Pac. 300. **Vt.**—Needham *v. Boston & M. R. R.*, 82 Vt. 518, 74 Atl. 226. **Wash.**—Tingley *v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098. **Wis.**—Cayouette *v. Raddant Brew. Co.*, 136 Wis. 634, 118 N. W. 204; Guetzkow *v. Smith*, 105 Wis. 94, 80 N. W. 1109; Reed *v. Madison*, 85 Wis. 667, 56 N. W. 182.

Wyo.—United States *v. Trabing*, 3 Wyo. 144, 6 Pac. 721.

64. Ariz.—McDonald *v. Cox*, 12 Ariz. 171, 100 Pac. 457; Turner *v. Franklin*, 10 Ariz. 188, 85 Pac. 1070. **Ark.**—Griffith *v. McPherrin*, 22 S. W. 29; Taylor *v. Van Meter*, 53 Ark. 204, 13 S. W. 699; Smith *v. Hollis*, 46 Ark. 17. **Cal.**—Rankin *v. Newman*, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304; Raskin *v. Roberts*, 101 Cal. xviii, 35 Pac. 763; Reed *v. Bernal*, 40 Cal. 628. **Canal Zone.**—Camors & Co. *v. Gris*, 2 Canal Zone 176. **Fla.**—Manatee County State Bank *v. Wade*, 56 Fla. 492, 47 So. 927. **Idaho.**—Toulouse *v. Burkett*, 2 Idaho 184, 10 Pac. 26. **Ind.**—Walters *v. Walters*, 168 Ind. 45, 79 N. E. 1037; Gardner *v. Case*, 111 Ind. 494, 13 N. E. 36. **Ia.**—Brayton *v. Boone*, 19 Iowa 506. **Kan.**—McClain *v. Chicago, R. I. & P. R. Co.*, 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699; McNally *v. Kephlinger*, 37 Kan. 556, 15 Pac. 534. **Ky.**—Albin Co. *v. Ellinger*, 103 Ky. 240, 44 S. W. 655; Humphreys *v. Walton*, 2 Bush 580. **Mo.**—Blakely *v. Hannibal & St. J. R. Co.*, 79 Mo. 388; Hobein *v. Murphy*, 33 Mo. 43; Mahan *v. School Dist. No. One*, 29 Mo. App. 269. **Mont.**—Harrington *v. Butte & Boston Min. Co.*, 35 Mont. 530, 90 Pac. 748. **Neb.**—State *ex rel.* McKee *v. Porter*, 90 Neb. 233, 133 N. W. 189; State *ex rel.* McDonald *v. Harrington*, 86 Neb. 653, 126 N. W. 91; Wollam *v. Brandt*, 56 Neb. 527, 76 N. W. 1081. **Nev.**—State *ex rel.* Cook *v. Langan*, 32 Nev. 176, 105 Pac. 568; Finnegan *v. Ulmer*, 31 Nev. 523, 104 Pac. 17. **N. Y.**—Peil *v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Third Ave. R. Co. *v. Ebling*, 100 N. Y. 98, 2 N. E. 878. **Ohio.**—Everett, Weddell & Co. *v. Sumner*, 32 Ohio St. 562; Spangler *v. Brown*, 26 Ohio St. 389; Turner *v. Turner*, 17 Ohio St. 449. **Okl.**—Muskogee *v. Irvin*, 45 Okla. 118, 145 Pac. 415. **P. I.**—Zaragoza *v. M. de Viademonte*, 10 Phil. Isl. 23. **S. D.**—Subera *v. Jones*, 20 S. D. 628, 108 N. W. 26; Northwestern Elevator Co. *v. Lee*, 15 S. D. 114, 87 N. W. 581, 13 S. D. 450, 83 N. W. 565. **Tex.**—Head *v. Altman* (Tex. Civ. App.), 159 S. W. 125; Western Union Tel. Co. *v. Hartfield* (Tex. Civ. App.), 138 S. W. 418. **Wyo.**—Johnson *v. Golden*, 6 Wyo. 537, 48 Pac. 196.

In a few states, however, a contrary view has been held.⁶⁵

r. *Instructions*.—It is the general rule that alleged errors in the giving, or in the refusing to give, instructions, will not be reviewed upon appeal in the absence of a previous motion for a new trial in the court below.⁶⁶ In some jurisdictions, however, it is held that such a motion is not a prerequisite.⁶⁷

s. *Misconduct*.—Alleged misconduct of counsel in the case,⁶⁸ of the

65. **Minn.**—*Jordan v. Humphrey*, 31 Minn. 495, 18 N. W. 450; *St. Paul F. & M. Ins. Co. v. Allis*, 24 Minn. 75. **Utah**.—*Paulson v. Lyon*, 26 Utah 438, 73 Pac. 510. **Wis.**—*North Hudson Mut. Bldg. & L. Assn. v. Childs*, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57; *Walsh v. Dart*, 23 Wis. 334, 99 Am. Dec. 177.

66. **Ala.**—*McCary v. Alabama Gt. So. R. Co.*, 182 Ala. 597, 62 So. 18; *Montgomery Traction Co. v. Haygood*, 152 Ala. 142, 44 So. 560. **Ariz.**—*Pringle v. King*, 9 Ariz. 76, 78 Pac. 367. **Ark.**—*Wilhelm v. Young*, 119 Ark. 629, 178 S. W. 372; *Rose v. Lilly*, 170 S. W. 483; *Thomas v. Jackson*, 105 Ark. 353, 151 S. W. 521; *Thielman v. Reinsch*, 103 Ark. 307, 146 S. W. 525; *Schenck v. Griffith*, 74 Ark. 557, 86 S. W. 850. **Ga.**—*Smith v. Smith*, 112 Ga. 351, 37 S. E. 407; *Irvin v. Corbin*, 57 Ga. 594. **Ind.**—*Carlisle v. Drake*, 109 N. E. 39; *Young v. Montgomery*, 161 Ind. 68, 67 N. E. 684; *Louisville, etc. R. Co. v. Hart*, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; *Northwestern Mut. Ins. Co. v. Heilmann*, 93 Ind. 24. **Ky.**—*Kentucky Tr. & T. Co. v. Peel*, 160 Ky. 239, 169 S. W. 689; *Board, etc. of Frankfort v. Buttner*, 146 Ky. 815, 143 S. W. 410; *Shannon v. Stratton*, 144 Ky. 26, 137 S. W. 850; *Gray v. Parrott*, 30 Ky. L. Rep. 777, 99 S. W. 640; *Louisville Water Co. v. Phillips' Admr.*, 28 Ky. L. Rep. 557, 89 S. W. 700. **Minn.**—*Helmer v. Shevlin-Mathieu Lumb. Co.*, 129 Minn. 25, 151 N. W. 421. **Mo.**—*Davenport v. Silvey*, 265 Mo. 543, 178 S. W. 168, L. R. A. 1916A, 1240; *State v. Douglas*, 258 Mo. 281, 167 S. W. 552; *Pettis County v. Reavis*, 256 Mo. 466, 165 S. W. 990; *State v. Thompson*, 149 Mo. 441, 51 S. W. 98. **Neb.**—*Tarpenning v. Knapp*, 79 Neb. 62, 112 N. W. 290; *Schmitt, etc. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99; *Peaks v. Lord*, 42 Neb. 15, 60 N. W. 349; *Wanzer v. State*, 41 Neb. 238, 59 N. W. 909. **N. M.**—*Rogers v. Richards*, 8 N. M. 658, 47 Pac. 719. **Okla.**—*Shuler v. Collins*, 40 Okla. 126,

136 Pac. 752; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944. **S. C.**—*Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762. **W. Va.**—*Brown v. Brown*, 29 W. Va. 777, 2 S. E. 808. **Wyo.**—*Iowa State Sav. Bank v. Henry*, 22 Wyo. 189, 136 Pac. 863. **Can.**—*La-montague v. Quebec R. L. H. P. Co.*, 50 Can. Super. 423.

67. **Fla.**—*Williams v. La Penotiere*, 32 Fla. 491, 14 So. 157. **Ill.**—*Oil Belt R. Co. v. Lewis*, 259 Ill. 108, 102 N. E. 228; *Illinois Cent. R. Co. v. O'Keefe*, 154 Ill. 508, 39 N. E. 606; *Kelly v. The Aurora E. & C. R. Co.*, 168 Ill. App. 386; *Hill v. Chicago City R. Co.*, 126 Ill. App. 152; *Brecher v. Chicago Junction R. Co.*, 119 Ill. App. 554. **Ia.**—*Schulte v. Chicago, etc. R. Co.*, 124 Iowa 191, 99 N. W. 714; *Ellis v. Leonard*, 107 Iowa 487, 78 N. W. 246; *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150, 12 N. W. 222. **N. C.**—*Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. C. 821, 21 S. E. 922; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513. **N. D.**—*Seckerson v. Sinclair*, 24 N. D. 326, 625, 140 N. W. 239; *Security Bank of Minnesota v. Kingsland*, 5 N. D. 263, 65 N. W. 697; *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685. **Tenn.**—*Luty v. Purdy*, 2 Overt. 163. **Tex.**—*Houston Oil Co. v. Drumwright (Tex. Civ. App.)*, 162 S. W. 1011; *Lee v. Moore (Tex. Civ. App.)*, 162 S. W. 437; *State Mut. Fire Ins. Co. v. Taylor (Tex. Civ. App.)*, 157 S. W. 950. *Contra*, *Ross v. Jackson (Tex. Civ. App.)*, 165 S. W. 513.

68. **Ark.**—*St. Louis, etc. R. Co. v. Earle*, 103 Ark. 356, 146 S. W. 520. **Kan.**—*Branner v. Nichols*, 61 Kan. 356, 59 Pac. 633. **Ky.**—*Louisville, etc. R. Co. v. Wilkins*, 143 Ky. 572, 136 S. W. 1023, Ann. Cas. 1912D, 518. **Minn.**—*Price v. Minnesota, D. & W. R. Co.*, 130 Minn. 229, 153 N. W. 532. **Mo.**—*Taylor v. Metropolitan St. R. Co.*, 256 Mo. 191, 165 S. W. 327; *St. Louis Belt,*

jury,⁶⁹ or of the court,⁷⁰ must, in accord with the general rules, be presented to the trial court in connection with a motion for a new trial before they can be considered on appeal.

t. *Verdict*.—Defects in the form of a verdict,⁷¹ or objections to irregularities therein,⁷² or that the verdict is tainted with fraud⁷³ must first be raised by a motion for a new trial before they will be considered on appeal.

u. *Judgment*.—Alleged errors either in rendering, or in entering a judgment,⁷⁴ or a decree,⁷⁵ should be called to the attention of the trial court by a motion for a new trial to obtain a review of the same in the appellate court.

v. *Sufficiency of Motion*.—The motion for a new trial as a prerequisite for appellate review should be a regular motion, proper in form and contents, complying with the requirements applicable to new trial motions in general.⁷⁶

etc. R. Co. *v.* Cartan Real Estate Co., 204 Mo. 565, 103 S. W. 519; Rickards *v.* Kansas City, 181 Mo. App. 336, 168 S. W. 845; Underwood *v.* Caruthersville, 146 Mo. App. 288, 129 S. W. 1076. **Utah**.—Law *v.* Smith, 34 Utah 394, 98 Pac. 300. **Vt.**—Lockwood *v.* Fletcher, 74 Vt. 72, 52 Atl. 119.

69. **Cal.**—People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719. **Idaho**.—State *v.* Rooke, 10 Idaho 388, 79 Pac. 82. **Mo.**—State *v.* Tucker, 232 Mo. 1, 133 S. W. 27. **Neb.**—Houston *v.* City of Omaha, 44 Neb. 63, 62 N. W. 251. **Utah**.—Law *v.* Smith, 34 Utah 394, 98 Pac. 300. **Wash.**—Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449, 1029.

70. **Mo.**—Gardner *v.* Metropolitan St. R. Co., 223 Mo. 389, 122 S. W. 1068; McClintock *v.* Kansas City Central R. Co., 120 Mo. 127, 24 S. W. 1052. **N. Y.**—O'Connor *v.* National Ice Co., 24 Jones & S. 410, 4 N. Y. Supp. 537, 21 N. Y. St. 907, *affirmed*, 121 N. Y. 662, 24 N. E. 1092. **Okla.**—Gast *v.* Barnes, 44 Okla. 107, 143 Pac. 856; Missouri, O. & G. R. Co. *v.* Flanagan, 40 Okla. 502, 139 Pac. 696.

[a] **Motion Held Unnecessary**. Where in the course of counsel's argument of the case, the court made erroneous and prejudicial remarks, and the matter was brought to the attention of the judge, no motion for a new trial was necessary to present the error to the supreme court. Coldren *v.* Le Gore, 118 Iowa 212, 91 N. W. 1066.

71. **Ark.**—St. Louis, etc. R. Co. *v.* Raines, 90 Ark. 482, 119 S. W. 266. **Ill.**—Parmelee *v.* Smith, 21 Ill. 620. **Ind.**—Bennett *v.* West, 44 Ind. App. 398, 88 N. E. 309. **Mo.**—Chapman *v.*

White, 52 Mo. 179; Coatsworth Lumber Co. *v.* Owen, 186 Mo. App. 543, 172 S. W. 436. **Neb.**—Crooker *v.* Stover, 41 Neb. 693, 60 N. W. 10. **N. H.**—Hewett *v.* Woman's Hospital Aid Assn., 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496. **Tex.**—Von Carlowitz *v.* Bernstein, 28 Tex. Civ. App. 8, 66 S. W. 464.

72. Louisville, N. A. & C. R. Co. *v.* Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Lures *v.* Botte, 26 Ind. 343; Hart *v.* Weber, 57 Neb. 442, 77 N. W. 1085.

73. McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314.

74. **Ark.**—Hot Springs R. Co. *v.* McMillan, 76 Ark. 88, 88 S. W. 846. **Ind.**—Smith *v.* Foster, 59 Ind. 595. **Wis.**—Jenkins *v.* Esterly, 22 Wis. 128. **Wyo.**—City of Rawlins *v.* Murphy, 19 Wyo. 238, 115 Pac. 436.

See also: **Ind.**—Migatz' *v.* Stieglitz, 166 Ind. 361, 77 N. E. 400; Albaugh Bros., Dover & Co. *v.* Lynas (Ind. App.), 90 N. E. 908. **Ohio.**—Devereaux *v.* Hutchinson, 21 Ohio C. C. (N. S.) 462. **Tex.**—United States & Mexican Trust Co. *v.* Austin (Tex. Civ. App.), 176 S. W. 87.

[a] **Motion for New Trial Unnecessary**.—National Council of Knights & Ladies of Security *v.* McGinn, 70 Ore. 457, 138 Pac. 493 (by force of statute); Westphal *v.* Nelson, 25 S. D. 100, 125 N. W. 640.

75. Elley *v.* Caldwell, 158 Mo. 372, 59 S. W. 111.

76. See *infra*, this note, and III, E.

[a] **What Treated as a Motion**. Where, however, a motion is in sub-

II. GROUNDS FOR NEW TRIAL. — A. IN GENERAL. — 1. At Common Law. — The reasons or causes for which new trials are granted, aside from statutory provisions, is a question to be answered purely by the usage of the courts of common law.⁷⁷ The practice of granting new trials grew up by very slow degrees,⁷⁸ and at first, they were granted with much reluctance and great strictness. A broader and more just view came in time, however, and, in Lord Mansfield's day, that great jurist said new trials should be granted according to the exigency of each particular case, upon principles of substantial justice.⁷⁹ Moreover, at first, whatever was alleged for cause of new trial, must have appeared of record.⁸⁰ Gradually, however, the courts relaxed this ancient rule and exercised a discretion to set aside verdicts in the interest of justice, although the cause did not appear of record.⁸¹ In other words, the first, broad, fundamental ground to be established as the cause for granting a new trial was injustice.⁸²

stance and effect a motion for a new trial, it should be regarded and treated as such on appeal. *Jones v. Pennsylvania R. Co.*, 7 Mackey (D. C.) 426; *Goode v. Lewis*, 118 Mo. 357, 24 S. W. 61, where, in a partition suit, exceptions to a sheriff's report of sale were so considered.

[b] **Motion To Set Aside Verdict or Judgment.**—(1) In *Hartley v. Chidester*, 36 Kan. 363, 13 Pac. 578, a motion to set aside and vacate the verdict was treated as a motion for a new trial. (2) In *Childs v. Kansas City, St. J. & C. B. R. Co.*, 117 Mo. 414, 23 S. W. 373, a motion to set aside the judgment for alleged error, such motion not being filed within the time required for a motion for a new trial, was not, however, regarded as such a motion.

[c] **Should Be in Writing.**—*Ind. Shover v. Jones*, 32 Ind. 141. *Neb. Phoenix Ins. Co. v. Readinger*, 28 Neb. 587, 44 N. W. 864. **Wyo.**—*Wilson v. O'Brien*, 1 Wyo. 42.

[d] **Errors should be so specifically and definitely assigned in the court below as to challenge the court's attention to each decision complained of, and thus give the trial judge an opportunity to review his own rulings and correct any errors therein.** Each specification of error in a motion for a new trial should be complete in itself—so framed as to embrace a single ruling. *Aultman & Co. v. Martin*, 49 Neb. 103, 68 N. W. 340.

77. *Milliken v. Ross*, 4 Woods 69, 9 Fed. 855.

78. *Erskine* in argument, *King v.*

Mawbey, 6 T. R. 619, 622, 101 Eng. Reprint 736.

79. *Bright v. Eynon*, 1 Burr. 390, 97 Eng. Reprint 365.

[a] **Attainment of Justice.**—In the case of *Bright v. Eynon*, 1 Burr. 390, 97 Eng. Reprint 365, *Denison, J.*, said: "It would be difficult perhaps, to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."

80. *Dulaney v. Rankin*, 47 Miss. 391.

81. *Dulaney v. Rankin*, 47 Miss. 391.

82. See *infra*, this note.

[a] "Whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law, or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages; the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties." *Cowperthwaite v. Jones*, 2 Dall. (U. S.) 55, 1 L. ed. 287.

[b] **Verdict Must Be Flagrantly Wrong.**—*Tyssen v. Clarke*, 2 W. Bl. 941, 3 Wils. 541, 96 Eng. Reprint 556.

[c] **Where complete and substantial justice has been done a new trial will not be granted, though the judge who tried the cause may be mistaken in**

This being the purpose of new trials, the courts, from time to time, extended their rules in order to meet with and remedy conditions as they arose.⁸³ It is difficult except in very broad terms, to designate all the specific causes for which new trials are granted at common law.⁸⁴ Some of the classifications which have been made will be found in the notes.⁸⁵

Mere Technicalities. — Where substantial justice has been done upon

point of law. *Edmondson v. Machell*, 2 T. R. 4, 100 Eng. Reprint 2. See also *Wilkinson v. Payne*, 4 T. R. 468, 100 Eng. Reprint 1123.

[d] **Not To Gratify Litigious Passion.**—In *Farewell v. Chaffey*, 1 Burr. 54, 97 Eng. Reprint 187, Lord Mansfield said, that a new trial ought to be granted to attain real justice, but not to gratify litigious passions on every point of summum jus. So in the following cases, although the verdicts were against evidence or the strict rule of law, yet the court would not give a second chance to a hard action, or an unconscionable defense. *Macrow v. Hull*, 1 Burr. 11, 97 Eng. Reprint 161 (which was an action for a trespass reported to be sufficiently proved, but trifling, frivolous, and vexatious); *Burton v. Thompson*, 2 Burr. 664, 97 Eng. Reprint 500 (an action for libel in which the charge was proved, but the injury appeared very inconsiderable); *Reavely v. Mainwaring*, 3 Burr. 1306, 97 Eng. Reprint 846 (where the defendant W. sent a press-gang to take some apprentices of the plaintiff by their own consent, but appeared to act with good intentions); and *Marsh v. Bower*, 2 W. Bl. 851, 96 Eng. Reprint 502, an action for words wherein small damages should have been given. See also *Norris v. Tyler*, 1 Cowp. 37, 98 Eng. Reprint 954; *Smith v. Brampton*, 2 Salk. 644, 91 Eng. Reprint 543.

83. *Smith v. Parkhurst*, Andrews 315 (1738), 2 Str. 1105, 95 Eng. Reprint 414.

84. See *infra*, this note.

[a] "The courts of the common law have usually granted new trials when the verdict is against the weight of the evidence, or contrary to law, or when excessive or manifestly insufficient damages have been awarded; for the admission of illegal evidence, or the rejection of competent evidence; or when a party has been deprived of evidence by accident and

without fault on his part, or is taken by surprise in a matter that he could not reasonably anticipate; for misdirection of the court upon material questions of law, or for serious irregularity in the trial; or misconduct of the jury; or unfair conduct of the prevailing party; or manifest injustice has been done. Courts of law have also granted new trials when the losing party has discovered material evidence since the trial, and satisfied the court that he had used due diligence in preparing his case for trial; that the newly-discovered evidence will tend to prove a *material fact* which was not directly in issue on the trial, or was not then known and investigated by proof, and will probably produce a different result." *Chandler v. Thompson*, 30 Fed. 38, 44. See also *Pringle v. Guild*, 119 Fed. 962; *United States v. Chaffee*, 2 Bond 147, 25 Fed. Cas. No. 14,773; *Dulaney v. Rankin*, 47 Miss. 391.

85. See the note preceding and *infra*, this note.

[a] An English writer of a hundred years ago (1817), John Peter Grant, barrister of London, published a little book, "On the Law Relating to New Trials," in which he reviewed all the then reported English cases upon new trial. He classified the grounds upon which they had been granted as follows: (1) Defects or irregularities affecting the judge or jury; (2) uncertainty or insufficiency in the verdict itself; (3) the offer of new evidence; (4) the plea of surprise; (5) misdirection of the judge; (6) the rejection of competent or the admission of incompetent evidence; (7) the departure of the judge from due and accustomed mode of proceeding at the trial; (8) the jury returning a general verdict when the judge had directed a special; (9) the verdict against the law; (10) the verdict against the evidence; (11) excessive damages.

the merits of the case, a new trial will not be granted upon mere technicalities.⁸⁶

2. Statutory Grounds.—a. *In General.*—In many jurisdictions, the grounds for which new trials may be granted are expressly enumerated by statute.⁸⁷ In some states, the grounds for a new trial are held to be limited to the statutory enumeration,⁸⁸ and accordingly in such jurisdictions, an aggrieved party must bring himself within the causes therein prescribed.⁸⁹ In other states, however, the statutory enumeration is not exclusive, but in the interests of justice, the court may, by virtue of its inherent common law right, grant new trials for other good and sufficient reasons.⁹⁰

Some statutes prescribe no specific grounds for new trial, but merely confer statutory authority in a general way, as, for example, that new trials may be granted "for reasons for which new trials have been

86. U. S.—*Ford v. United States*, 18 Ct. Cl. 62. **Ia.**—*Woodward v. Horst*, 10 Iowa 120; *Fanning v. McCraney*, *Morris* 398. **N. H.**—*Tarbell v. Whiting*, 5 N. H. 63. **N. Y.**—*Phyfe v. Master-son*, 13 Jones & S. 338. **Ohio.**—*Bush v. Critchfield*, 5 Ohio 109.

87. See the statutes.

[a] These grounds are intended to be distinct and independent grounds, it not being the purpose that one specified ground should include another. *Brumagim v. Bradshaw*, 39 Cal. 24.

88. Cal.—*Townley v. Adams*, 118 Cal. 382, 50 Pac. 550; *Benjamin v. Stewart*, 61 Cal. 605. **Ga.**—*McElveen Com. Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428. **Ind.**—*Amacher v. Johnson*, 174 Ind. 249, 91 N. E. 928; *Ferdinand R. Co. v. Bretz*, 59 Ind. App. 123, 108 N. E. 967; *Johnson v. Citizens' State Bank*, 57 Ind. App. 348, 107 N. E. 35. **Kan.**—*St. Louis, etc. R. Co. v. Werner*, 70 Kan. 190, 78 Pac. 410. **Minn.**—*Peterson v. Lundquist*, 106 Minn. 339, 119 N. W. 50; *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534; *Flower v. Grace*, 23 Minn. 32. **Mo.**—*State v. Adams*, 84 Mo. 310. **Mont.**—*State ex rel. Culbertson Ferry Co. v. District Court*, 49 Mont. 595, 144 Pac. 159; *Canning v. Fried*, 48 Mont. 560, 139 Pac. 448. **Neb.**—*Risse v. Gasch*, 43 Neb. 287, 61 N. W. 616. **N. D.**—*Higgins v. Rued*, 30 N. D. 551, 153 N. W. 389. **Okla.**—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 39 Okla. 677, 136 Pac. 296; *Butts v. Anderson*, 19 Okla. 367, 91 Pac. 906. **P. R.**—*Gandia v. Hermanos*, 17 Porto Rico 880. **R. I.**—*Thrift v. Thrift*, 30 R. I. 456, 76 Atl.

105. S. D.—*Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126.

89. See *State v. Richeson*, 36 Ind. App. 373, 75 N. E. 846. See also cases in preceding note.

90. Ia.—*Hensley v. Davidson Bros. Co.*, 135 Iowa 106, 112 N. W. 227, 14 Ann. Cas. 62; *Allen v. Wheeler*, 54 Iowa 628, 7 N. W. 111. **Mass.**—*Forbes v. New York Life Ins. Co.*, 178 Mass. 139, 59 N. E. 636; *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800. **Mich.**—*Ft. Wayne & B. I. Ry. Co. v. Donovan*, 110 Mich. 173, 68 N. W. 115. **Minn.**—*Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868. **Mo.**—*Fine v. Rogers*, 15 Mo. 315; *Nulton v. Croskey*, 111 Mo. App. 18, 85 S. W. 644. **Neb.**—*Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35. **Ohio.**—*Brenzinger v. American Exchange Bank*, 66 Ohio St. 242, 64 N. E. 118. **Ore.**—*Pullen v. City of Eugene*, 77 Ore. 320, 146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474. **Wash.**—*Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486. **Wis.**—*Schlag v. Chicago, M. & St. P. R. Co.*, 152 Wis. 165, 139 N. W. 756.

[a] "Notwithstanding the statute quoted, the court has inherent power to order a new trial for any palpable error committed by it, or by the jury, even in the absence of a motion for a new trial. The judge is something more than a mere moderator. He has certain duties to perform, and when convinced that errors have been committed which resulted in a palpable miscarriage of his justice, it is his province, as well as his duty, to interfere and to grant a new trial." *Thomas v. Illinois Cent. R. Co.*, 169 Iowa 337, 151 N. W. 387, 389.

usually granted at common law,"⁹¹ or "where justice requires,"⁹² or "for any cause for which a new trial may by law be granted,"⁹³ or "upon good cause shown,"⁹⁴ or after certain enumerated grounds, "for other reasonable causes,"⁹⁵ "according to the provisions of the common law and practice of the courts."⁹⁶

b. *Specific Enumeration.*—An examination of the statutes of the various states that expressly set forth the grounds for which new trial may be granted, shows, as would be expected, great similarity in the enumerated causes, both in civil and criminal cases. There are differences in some details, from time to time, and the grounds in criminal cases often slightly vary, in the same jurisdiction from the grounds specified in civil cases. The general scope, however, of the different statutes is practically the same. Prefaced, usually, by the statement that "new trials may be granted for any of the following causes materially affecting the substantial rights of the aggrieved party," a number of statutes specify the grounds as follows: (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial;⁹⁷ (2) misconduct of jury or prevailing party;⁹⁸ (3) accident or surprise which ordinary prudence could not have guarded against;⁹⁹ (4) newly discovered evidence material for the party making the application which he could not with reasonable diligence have discovered and produced at the trial;¹ (5) excessive damages, appearing to have been given under the influence of passion or prejudice;² (6) insufficiency of the evidence to justify the verdict, or other decision, or that it is against law;³ (7) error in law occurring at the trial and excepted to by the party making the application.⁴ In addition to the preceding general grounds, various special grounds may be found in some of the statutes, although such special grounds are usually only a phase of some general grounds.⁵

91. See U. S. Rev. St., §726; *Pringle v. Guild*, 119 Fed. 962; *Milliken v. Ross*, 4 Woods 69, 9 Fed. 855. See R. I. Gen. Laws, 1909, ch. 298, §12.

92. Mich. Anno. Sts., 1882, vol. II, §9576.

93. Mass. Rev. Laws, 1902, pp. 1569, 1856; Mich. Comp. Laws, 1915, §15,836.

94. Mo. Rev. Sts., 1909, §1994. See, however, §2022.

95. Conn. Gen. Sts., 1902, §815.

96. Park's Anno. Code (Ga.), 1914, §6088.

97. Alaska. — Comp. Laws, 1913, §1058. Ariz.—Rev. Sts., 1913, §584, adding "referee," reading, "court, referee, jury," etc. Ark.—Dig. Sts., 1916, §7654. Cal.—Fairall's Code Civ. Proc. 1916, §657. Colo.—Anno. Code, 1910, §236, adding "referee," reading, "court, referee, jury," etc. Kan. Gen. St., 1915, §7205. N. D.—Comp.

Laws, 1913, §7660. Ohio.—See Anno. Gen. Code, 1912, §11,576.

98. Alaska. — Comp. Laws, 1913, §1058. Ariz.—Rev. Sts., 1913, §584. Ark.—Dig. Sts., 1916, §7654. Cal. Code Civ. Proc., 1916, §657. Colo. Anno. Code, 1910, §236. Kan.—Gen. Sts., 1915, §7205. La.—See Rev. Codes of Prac., 1914, art. 560. N. D.—Comp. L. 1913, §7660. Ohio.—Anno. Gen. Code, 1912, §11,576.

99. See preceding notes, and Ala. Code, 1907, §5372. Mo.—Rev. Sts., 1909, §2022. N. D.—Comp. Laws, 1913, §7660.

1. See preceding notes.

2. See preceding notes, and Ariz. Rev. Sts., 1913, §584; Kan. Gen. Sts., 1915, §7205.

3. See preceding notes.

4. See preceding notes.

5. See the statutes and *infra*, this note.

c. *Criminal Cases*.—As in civil cases, the statutes sometimes set forth the grounds for which new trials may be granted in criminal cases. The designation may be very general,⁶ or the statute may declare that new trials in criminal cases may be granted for like causes as in civil actions.⁷ Other statutes specifically enumerate the grounds, as for example: (1) irregularity in the proceedings;⁸ (2) jury received evidence out of court other than view of premises;⁹ (3) jury separated without leave of court after retiring to deliberate, or has been guilty of misconduct;¹⁰ (4) verdict decided by lot or any other unfair means;¹¹ (5) when the court has misdirected the jury in a material matter of law;¹² (6) verdict contrary to law or evidence;¹³ (7) newly discovered evidence;¹⁴ (8) accident or surprise.¹⁵

Insanity.—That the defendant was insane at the time he committed the crime is not of itself ground for a new trial,¹⁶ particularly where insanity was not pleaded.¹⁷

3. United States Courts.—The federal statutes specify no express grounds for new trials, but provide that the district courts may, after trial by jury, grant new trials “for reasons for which new trials have usually been granted in the courts of law.”¹⁸ Moreover, a state statute restricting the grounds for which new trials might be granted is unconstitutional as applied to a federal court, since in the language of the seventh amendment to the constitution of the United States, “no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.”¹⁹

4. Summary.—As a general summary of the preceding matters, it may be said, first, that courts of common law, without limiting the grounds for a new trial to any fixed enumeration of causes, will grant a new trial whenever justice requires it, but never where its ends have

[a] **Lost Release Found.**—Ala. Code, 1907, §5371.

[b] **Connecticut.**—“Misleading; the discovery of new evidence; want of actual notice of the suit . . . or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed; or other reasonable cause.” Gen. Sts., 1902, §815. See *Wildman v. Wildman*, 72 Conn. 262, 270, 44 Atl. 224.

[c] **Missouri.—Failure of Proof.** In case of failure of proof and the court is satisfied from the proof given that the party has a good cause of action or defense. Mo. Rev. Sts., 1909, §2021.

6. See Mich. Comp. Laws, 1915, §15,836.

7. See Conn. Gen. Sts., 1902, §1521; Mass. Rev. Laws, 1902, p. 1856.

8. Ohio Anno. Gen. Code, 1912, §13,745.

[a] **Trial had in absence of the defendant in felony.** Cal. Pen. Code, §1181.

9. Ark.—Dig. Sts., 1916, §2594. Cal. Pen. Code, §1181. Kan.—See Gen. Sts., 1915, §8191.

10. See preceding note, and Ohio Gen. Code, 1912, §13,745.

11. See preceding note.

12. See Ark.—Dig. Sts., 1916, §2594. Cal.—Pen. Code, §1181. Kan.—Gen. Sts., 1915, §8191. Ohio.—Gen. Code, 1912, §13,745.

13. See preceding note.

14. See preceding note.

15. Ohio Gen. Code, 1912, §13,745.

16. *O'Neal v. State*, 7 Ga. App. 815, 68 S. E. 309; *Burton v. State*, 33 Tex. Crim. 138, 25 S. W. 782, where a plea of guilty is entered.

17. *Green v. State*, 88 Tenn. 614, 14 S. W. 430.

18. U. S. Rev. St., §726; *Pringle v. Guild*, 119 Fed. 962; *Milliken v. Ross*, 4 Woods 69, 9 Fed. 855; *Clark v. Sohler*, 1 Woodb. & M. 368, 5 Fed. Cas. No. 2,835.

19. *Hughey v. Sullivan*, 80 Fed. 72.

been attained;²⁰ second, that a survey of the recognized grounds for a new trial, both at common law and under the statutes, would seem to justify their broad classification under seven general heads, namely; (1) irregularities; (2) misconduct; (3) errors of law; (4) accident or surprise; (5) verdict contrary to law; (6) verdict contrary to evidence; (7) newly discovered evidence. This classification will consequently be followed and discussed in the succeeding pages.

B. IRREGULARITIES. — 1. **In General.** — A new trial may be grantable at common law, for defects or irregularities in the proceedings,²¹ or according to many of the statutes, for "irregularities in the proceedings of the court, jury, referee, or prevailing party."²²

2. **Meaning of Irregularity.** — In many of the statutes irregularities and misconduct are made separate and distinct grounds for a new trial,²³ and the terms may be distinguished in that an irregularity is a failure to observe that particular course of proceeding which according to practice should have been observed;²⁴ or, as also defined, it is a want of adherence to a prescribed rule, and may consist of an omission, or the doing of something at the improper time or in an improper manner.²⁵ Misconduct, on the other hand, is wrong conduct, bad behavior.²⁶ It implies a wrongful intention.²⁷ Consequently, under the statutes, allowing new trials for irregularities in the proceedings of the jury, and also for misconduct on the part of the jury, the grounds are obviously not intended to be identical.²⁸ Irregularities, properly speaking, embrace only such prejudicial occurrences, out of the usual procedure, that do not amount to rulings on matters of law.²⁹

20. Ga.—*Green v. Cock*, 39 Ga. 339. Ill.—*Wheeler v. Shields*, 3 Ill. 348. La.—*Taylor v. Sutton*, 6 La. Ann. 709; *Wilkins v. Parish of East Baton Rouge*, 10 Rob. 57; *Roberts v. Rodes*, 3 Mart. (N. S.) 100. Miss.—*Haber v. Lane*, 45 Miss. 608. Vt.—*State v. Camp*, 23 Vt. 551; *Dodge v. Kendall*, 4 Vt. 31.

21. See, in general, *Tidd's Pr.*, II, 906.

[a] "For serious irregularities in the trial." *Chandler v. Tompson*, 30 Fed. 38, 44.

22. See the statutes and *supra*, II, A, 2, b.

23. See the statutes.

24. *Griggs v. Hanson*, 86 Kan. 632, 121 Pac. 1094, 1096, Ann. Cas. 1913C, 242, 52 L. R. A. (N. S.) 1161.

25. *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164, 165. And see *Tidd's Pr.*, 434.

26. *Bar Assn. of Boston v. Hale*, 197 Mass. 423, 83 N. E. 885, 887; *Bailey v. Examining & Trial Board of Police Dept.*, 45 Mont. 197, 122 Pac. 572, 574.

27. *United States v. Warner*, 4 McLean 463, 28 Fed. Cas. No. 16,643;

Smith v. Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580.

28. See *People v. Fair*, 43 Cal. 137, 146, *overruling People v. Plummer*, 9 Cal. 298, 312.

Affidavits.—The statutes distinguish the grounds by usually requiring affidavits in support of motions on the ground of misconduct, while in case of irregularities no such requirement applies. See *infra*, III, F, 9, g.

[a] However, the terms, in practice, are sometimes used interchangeably, and it has been held that personal misconduct on the part of a judge, having under advisement a case tried in his court, may be an "irregularity," that is, "an irregularity in the proceedings of the court." *Gay v. Torrence*, 145 Cal. 144, 78 Pac. 540, 542.

29. *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534.

[a] The term "irregularity" is not properly applied to a ruling made upon a question of law regularly presented for decision, as, for example, the court's refusal to allow a peremptory challenge to a juror. Such a ruling is

3. Must Be Pointed Out.—Irregularities are not presumed, but must be alleged and shown to exist,³⁰ and in a motion for a new trial the particular irregularity must be pointed out. It is not sufficient to allege irregularity in general.³¹

4. Must Work Injury.—The irregularity must be such as to prevent the aggrieved party from having a fair trial.³² It cannot be made the basis of a new trial if it would not affect the verdict or prejudice the complaining parties.³³ A mere informality, for example, in drawing a jury, or an irregularity in the jurors themselves, will not be sufficient ground for setting aside a verdict, either in a civil or criminal case, unless some injury is shown;³⁴ and where the court is satisfied that the complaining party has not been injured, a new trial will not be granted.³⁵

5. Particular Matters.—*a. Jurisdiction.*—A motion for a new trial is not the proper remedy to raise the question of jurisdiction, because want of jurisdiction is not a ground for a new trial.³⁵

b. Theory and Form of Action.—A new trial will not be granted in order that plaintiff may bring his action upon a different theory,³⁷ or on account of objections to the form of action.³⁸ Where, however, a

not an "irregularity" but "an error in law appearing at the trial." *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

30. Ala.—*Smith v. State*, 88 Ala. 73, 7 So. 52. **Fla.**—*Woodward v. State*, 33 Fla. 508, 15 So. 252. **Mich.**—*People v. Coughlin*, 67 Mich. 466, 35 N. W. 72. **N. Y.**—*Gardiner v. People*, 6 Park. Crim. 155. **Wis.**—*Osgood v. State*, 64 Wis. 472, 25 N. W. 529.

31. Scoville v. Chapman, 17 Ind. 470; *Phelps v. Tilton*, 17 Ind. 423; *Tomer v. Densmore*, 8 Neb. 384, 1 N. W. 315; *Lowrie v. France*, 7 Neb. 191.

32. Telford v. Wilson, 71 Ind. 555.

[a] Statutory Provision.—Where the statutes specify irregularities in the proceedings as a ground for new trial, the modification, by which either party was prevented from having a fair trial, is usually added. See the various statutes.

33. Ala.—*Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105. **Fla.**—*Broward v. Roche*, 21 Fla. 465. **Ga.**—*Eagle & Phenix Mfg. Co. v. West*, 61 Ga. 120; *Bethea v. Prothro*, 28 Ga. 109. **Mass.**—*Crane v. Lincoln*, 2 Gray 401; *Cunningham v. Kimball*, 7 Mass. 65. **Mo.**—*O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257. **Wis.**—*Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141.

34. Hardenburgh v. Crary, 15 How. Pr. (N. Y.) 307; *Smith v. Thompson*, 1 Cow. (N. Y.) 221; *Wilson v. Abrahams*, 1 Hill (N. Y.) 207; *People v. Ransom*, 7 Wend. (N. Y.) 417.

35. People v. Ransom, 7 Wend. (N. Y.) 417.

36. Conn.—*State v. Cady*, 47 Conn. 44. **Ga.**—*Hawkins v. Chambliss*, 120 Ga. 614, 48 S. E. 169; *Heery v. Burkhalter*, 113 Ga. 1043, 39 S. E. 406; *Evans v. Allgood*, 16 Ga. App. 24, 84 S. E. 603, 604. **Ind.**—*Chapin v. Jackson*, 45 Ind. 153. **Wash.**—See *Eaid v. Connolly*, 48 Wash. 584, 94 Pac. 188. **Can.**—*Campbell v. Davidson*, 19 U. C. Q. B. 222.

[a] Jurisdiction of Subject Matter. *Hawkins v. Chambliss*, 120 Ga. 614, 48 S. E. 169.

[b] Jurisdiction of Person.—It is no ground for a new trial that the court had no jurisdiction of the person of defendant. *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183.

37. Ga.—*Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303; *Phillips v. Stewart*, 27 Ga. 402; *Fitzgerald v. Garvin*, P. Charlt. 281. **Ill.**—*Gottschalk v. Jar-muth*, 69 Ill. App. 623. **Ind.**—*Lake Shore, etc. Ry. Co. v. Peterson*, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1; *Darnall v. Simpkins*, 10 Ind. App. 469, 38 N. E. 219; *Carico v. Moore*, 4 Ind. App. 20, 29 N. E. 928. **Mass.**—*Cogswell v. Brown*, 1 Mass. 237. **Ohio.**—*Buck v. Waddle*, 1 Ohio 357. **S. D.**—*Mather v. Dunn*, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

38. Booden v. Ellis, 7 Mass. 507; *Cogswell v. Brown*, 1 Mass. 237.

[a] Whether Action Properly

case is tried on an erroneous theory of the law, and a verdict is returned on such a theory, a new trial ought to be granted,³⁹ and a misunderstanding of the issues involved may be sufficient ground for a new trial.⁴⁰

c. *Arraignment of Accused*.—In some jurisdictions it is held that the failure to arraign and enter the plea of a defendant in a criminal case is an irregularity sufficient to set aside a verdict of guilty and to order a new trial.⁴¹

d. *Premature Trial*.—Proceedings may also be irregular and warrant a new trial where a defendant over his objection is required to defend a cause upon its merits at a term when it was not triable, and before the issues were framed.⁴²

e. *Motions*.—(I.) *In General*.—As a general rule, rulings on motions, either before or after the trial, are not irregularities that can be made ground for new trials.⁴³

(II.) *Abuse of Discretion*.—Some of the statutes expressly specify "abuse of discretion by the court" as a ground for a new trial.⁴⁴ "Abuse of discretion" as used in such statute, means abuse of discretion during the trial, and does not cover matters preceding the trial.⁴⁵

(III.) *Dismissals*.—The overruling of a motion to dismiss the action is not generally recognized as a ground for a new trial.⁴⁶

Brought.—Questions as to the proper form of actions cannot be considered upon motion for new trial. *Crowley v. Pendleton*, 46 Conn. 62.

39. **III.**—*Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987. **Kan.**—*Union Pac. Ry. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774. **N. Y.**—*Voisin v. Commercial Mut. Ins. Co.*, 60 App. Div. 139, 70 N. Y. Supp. 147.

40. *Ross v. McCarthy*, 168 App. Div. 533, 153 N. Y. Supp. 104.

41. *Shoffner v. State*, 93 Ind. 519; *State v. Vanhook*, 88 Mo. 105; *State v. Jaques*, 68 Mo. 260; *State v. Saunders*, 53 Mo. 234; *State v. Andrews*, 27 Mo. 267; *Maeder v. State*, 11 Mo. 363.

[a] **Federal Court**.—Under the federal statute (Rev. St., §1025) providing that "no indictment found shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," it is held that the irregularity in the failure of a formal arraignment is remedied where the defendant was present in court throughout the trial, took the stand as a witness, and as a witness denied the

charge. Moreover, a federal criminal court sitting in Missouri is not controlled by the Missouri practice. *United States v. Molloy*, 31 Fed. 19.

42. *Harris v. Anthony Salt Co.*, 57 Kan. 24, 45 Pac. 58.

43. **Ind.**—*Shoemaker v. Smith*, 74 Ind. 71; *Vawter v. Gilliland*, 55 Ind. 278; *Markson v. Haney*, 47 Ind. 31. **Mo.**—*Johnson v. Latta*, 84 Mo. 139; *Slagel v. Murdock*, 65 Mo. 522; *Meek v. Hewitt*, 48 Mo. 337; *Bruce v. Vogel*, 38 Mo. 100. **Mont.**—*Scherrer v. Hale*, 9 Mont. 63, 22 Pac. 151. **Neb.**—*Clafflin v. American Nat. Bank*, 46 Neb. 884, 65 N. W. 1056.

44. See the statutes.

45. *City of Winona v. Minnesota Ry. Const. Co.*, 27 Minn. 415, 423, 6 N. W. 795, 8 N. W. 148 (in allowing amendment before trial); *Luke v. Coffee*, 31 Nev. 165, 101 Pac. 555. Compare *infra*, II, B, 5, e, (IV).

46. *Brandon & Co. v. Akers*, 134 Ga. 78, 67 S. E. 540; *Hill v. Lundy*, 118 Ga. 93, 44 S. E. 830; *Heery v. Burkhalter*, 113 Ga. 1043, 39 S. E. 406; *Hicks v. State*, 83 Ind. 483; *Bray v. Black*, 57 Neb. 417; *Tyler v. Bowlus*, 54 Ind. 333.

[a] **Refusal of Dismissal and Directing Verdict**.—But where the court refused to permit plaintiff to dismiss

(IV.) **Continuances.** — The abuse of discretion in granting or refusing a continuance is a sufficient irregularity for the granting of a new trial,⁴⁷ and the trial court should of its own motion grant a new trial where it appears that the refusal of a continuance resulted in an injustice.⁴⁸

(V.) **Change of Venue.** — The granting, or the refusing to grant, a change of venue may be an irregularity warranting a new trial.⁴⁹

(VI.) **Right to Jury Trial.** — The failure or refusal of the court to call a jury when rightfully demanded is ground for a new trial.⁵⁰

f. **Pleadings.** — (I.) **In General.** — Rulings on matters of pleading are not generally grounds for new trial,⁵¹ appeal being the appropriate

his case without prejudice, and directed a verdict against him, the action of the court was erroneous, and justified the granting of a new trial. *Arpy v. Iowa Brick Mfg. Co.*, 150 Iowa 431, 130 N. W. 393.

47. **Ind.**—*Davis v. Hardy*, 76 Ind. 272; *Kent v. Lawson*, 12 Ind. 675, 74 Am. Dec. 233. **Kan.**—*McGowen v. Campbell*, 28 Kan. 25. **Ky.**—*Elrod v. Anderson*, 2 Ky. Op. 141. **Mo.**—*State v. Maddox*, 117 Mo. 667, 23 S. W. 771; *State v. Anderson*, 96 Mo. 241, 9 S. W. 636; *State v. Walker*, 69 Mo. 274; *Moore v. McCullough*, 6 Mo. 144. **Neb.**—*Richelieu v. Union P. R. Co.*, 97 Neb. 360, 149 N. W. 772. **N. Y.**—*Smith v. Lidgerwood Mfg. Co.*, 60 App. Div. 467, 69 N. Y. Supp. 975. **Tex.**—*Young v. Gibson*, 2 Tex. 417; *Wade v. State*, 75 Tex. Crim. 572, 172 S. W. 215. **Eng.**—*Wilkin v. Reed*, 15 C. B. 192, 196, 2 C. L. R. 796, 32 L. J. C. P. 193, 18 Jur. 1081, 2 W. R. 556, 139 Eng. Reprint 394. **Can.**—*Hale v. Tobique Mfg. Co.*, 36 N. Bruns. 360.

Review on appeal, see 5 STANDARD PROC. 495.

[a] **Harmless Error.**—The denial of a continuance, requested because certain witnesses were absent, is not ground for a new trial where the witnesses later appeared and testified. *Sinclair v. State* (Tex. Crim.), 168 S. W. 530. And see *Gibson v. Sutton*, 24 Ky. L. Rep. 868, 70 S. W. 188.

48. **Miss.**—*McDaniel v. State*, 8 Smed. & M. 401, 47 Am. Dec. 93. **Nev.**—*State v. Salge*, 2 Nev. 321. **Tex.**—*Chilsson v. Reeves*, 29 Tex. 275; *McAdams v. State*, 24 Tex. App. 86, 5 S. W. 826. **Va.**—*Walton v. Com.*, 32 Gratt. (73 Va.) 855.

49. *Walker v. Heller*, 73 Ind. 46; *Krutz v. Howard*, 70 Ind. 174; *Berlin v. Oglesee*, 65 Ind. 303; *Knarr v.*

Conaway, 53 Ind. 120; *Dawson v. Coffman*, 28 Ind. 220; *Horton v. Wilson*, 25 Ind. 316; *Goodwin v. Bentley*, 30 Ind. App. 477, 66 N. E. 496.

50. *Alley v. State*, 76 Ind. 94.

51. **U. S.**—*Freund v. Greene & Sons Corp.*, 139 Fed. 703; *Book v. Justice Min. Co.*, 58 Fed. 827. **Ark.**—*Clark v. Hare*, 39 Ark. 258. **Cal.**—*People v. Turner*, 39 Cal. 370. **Conn.**—*State v. Cady*, 47 Conn. 44; *Tolland v. Willington*, 26 Conn. 578; *Canterbury v. Bennett*, 22 Conn. 623; *Minor v. Mead*, 3 Conn. 289. **Ga.**—*Henley v. Brockman*, 124 Ga. 1059, 53 S. E. 672; *Johnson v. Thrower*, 123 Ga. 706, 51 S. E. 636; *Vickers v. Graham*, 122 Ga. 178, 50 S. E. 59; *Simpson v. Wicker*, 120 Ga. 418, 47 S. E. 965; *Lowery v. Idelson*, 117 Ga. 778, 45 S. E. 51; *Southern R. Co. v. Beach*, 117 Ga. 31, 43 S. E. 413; *City of Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451. **Ill.**—*Cella v. Chicago & W. I. R. Co.*, 217 Ill. 326, 75 N. E. 373. **Ind.**—*Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 72 N. E. 869; *Chapin v. Jackson*, 45 Ind. 153; *Ward v. Bateman*, 34 Ind. 110; *Kent v. Lawson*, 12 Ind. 675, 74 Am. Dec. 233. **Ky.**—*Brown's Heirs v. Wilson*, 12 B. Mon. 100; *Burns v. Allen*, 2 B. Mon. 246. **Me.**—*Winslow v. Cumberland Bank*, 26 Me. 9. **Mass.**—*Dwyer v. Brannon*, 6 Mass. 330. **Minn.**—*Hemphill v. Holley*, 4 Minn. 233. **N. Y.**—*White v. Spencer*, 14 N. Y. 247; *Corning v. Corning*, 6 N. Y. 97; *Pike v. Evans*, 15 Johns. 210. **R. I.**—*Cleasby v. Reynolds*, 26 R. I. 236, 58 Atl. 786. **S. C.**—*Stoll v. Ryan*, 3 Brev. 238, 1 Treadw. 96. **Utah.**—*Smith v. Faust*, 1 Utah 90. **Vt.**—*Beardsley v. Knight*, 4 Vt. 471; *Barney v. Bliss*, 2 Aik. 60. **Va.**—*Green v. Judith*, 5 Rand. (26 Va.) 1,

remedy in such cases.⁵² Defects either in the substance,⁵³ or form,⁵⁴ of pleadings, or alleged errors in refusing to make a complaint more specific,⁵⁵ or in striking out pleadings,⁵⁶ or in refusing leave to file pleadings out of time,⁵⁷ are not subject to motions for new trials, such rulings, even if erroneous, are not errors affecting the trial of an issue formed, but errors preventing the forming of an issue to try.⁵⁸

(II.) **Sufficiency.** — The question of the sufficiency of the declaration or petition cannot, as a rule, be raised by a motion for a new trial.⁵⁹

[a] **Pleadings Confused.** — Issues **Uncertain.**—Where several demurrers to pleas and replications were undisposed of, no issue joined, and the pleadings generally were in such a defective condition as to make it manifest that the jury could not have had an intelligent apprehension of the issues, the judgment will be reversed, and a new trial granted on appeal. *Pearce & Son v. Jordan*, 9 Fla. 526; *McKinnon v. McCollum*, 6 Fla. 376. And see *Martin v. Tarver*, 43 Miss. 517.

52. *Clark v. Hare*, 39 Ark. 258; *Tolland v. Willington*, 26 Conn. 578.

53. **Conn.**—*State v. Cady*, 47 Conn. 44. **Ga.**—*Taylor v. Globe Refinery Co.*, 127 Ga. 138, 56 S. E. 292; *Kelly v. Strouse & Bros.*, 116 Ga. 872, 43 S. E. 280. **Ia.**—*Linden v. Green*, 81 Iowa 365, 46 N. W. 1108. **Tex.**—*Grand Lodge A. O. U. W. v. Bollman*, 22 Tex. Civ. App. 106, 53 S. W. 829.

See *infra*, II, B, 5, f, (II).

[a] That issue was joined on an insufficient plea, where, however, no injustice was done, is not ground for a new trial. *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105.

[b] In a criminal case, however, a trial upon an indictment or information without a plea constitutes such an irregularity in the proceedings as entitles the defendant to a new trial if the verdict is against him. *Shoffner v. State*, 93 Ind. 519; *State v. Vanhook*, 88 Mo. 105; *State v. Jaques*, 68 Mo. 260.

54. **Ill.**—*Florsheim v. Dullaghan*, 58 Ill. App. 626. **Ind.**—*Daubenspeck v. Daubenspeck*, 44 Ind. 320. **Mass.** *Dwyer v. Brannon*, 6 Mass. 330. **N. Y.** *Meyer v. McLean*, 1 Johns. 509. **S. C.** *Stoll v. Ryan*, 3 Brev. 238, 1 Treadw. 96. **Vt.**—*Dodge v. Kendall*, 4 Vt. 31. 55. *Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 72 N. E. 869; *Indiana, etc. Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

[a] **Pleadings Not Specific.**—Where

there has been a fair trial, the fact that the pleadings were not as specific as they should have been, is no ground for a new trial. *Aldrich v. Aldrich*, 143 Mass. 45, 8 N. E. 870.

56. *Ledbetter v. McWilliams*, 90 Ga. 43, 15 S. E. 634; *Vandever v. Garshwiler*, 63 Ind. 185; *Marshall v. Beeber*, 53 Ind. 83; *Hamilton v. Elkins*, 46 Ind. 213; *Milliken v. Ham*, 36 Ind. 166; *Brackett v. Brackett*, 23 Ind. App. 530, 55 N. E. 783.

57. *Rigdon v. Ferguson*, 172 Mo. 49, 72 S. W. 504.

58. *Fleming v. Dorst*, 18 Ind. 493, where the court erroneously rejected a paragraph of an answer.

59. **Ark.**—*Clark v. Hare*, 39 Ark. 258. **Ind.**—*New Albany v. White*, 100 Ind. 206; *Craig v. Ensey*, 63 Ind. 140; *Mann v. Barkley*, 21 Ind. App. 152, 51 N. E. 946; *Leiter v. Jackson*, 8 Ind. App. 98, 35 N. E. 289. **Mass.**—*Dwyer v. Brannon*, 6 Mass. 330. **Mo.**—*O'Connor v. Koch*, 56 Mo. 253; *Bruce v. Vogel*, 38 Mo. 100; *Parker v. Waugh*, 34 Mo. 340.

[a] **Insufficient Declaration or Complaint.**—A motion for a new trial cannot be founded upon the fact that the declaration does not disclose a cause of action; that is ground for a motion in arrest of judgment. *Sargent v. —*, 5 Cow. (N. Y.) 106. *Contra*, *Arizona-Parral Min. Co. v. Forbes*, 16 Ariz. 395, 146 Pac. 504; *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. 74.

[b] **Criminal Prosecution.**—That the complaint in a criminal prosecution is insufficient in law cannot be raised by a motion for a new trial. *State v. Cady*, 47 Conn. 44.

[c] **Plea Bad.**—If the plea is bad, the remedy is by writ of error and not by motion for new trial. *Dwyer v. Brannon*, 6 Mass. 330.

[d] **Verdict Unsupported by Evidence.**—A plaintiff can prove only what is alleged. Consequently, special

Moreover, such a motion is not requisite even for appellate review in such a case, since the question of the sufficiency of pleadings can, on appeal, be determined by the record itself.⁶⁰

(III.) *Demurrers.* — By great weight of authority, decisions sustaining or overruling demurrers do not constitute a ground for a new trial, and have no place in a motion therefor.⁶¹ Errors in such matters are, moreover, not “errors of law occurring at the trial,” under such a statutory designation of cause for new trial, but are rulings of the court on questions preliminary to the trial.⁶²

(IV.) *Parties.* — Technical defects in the misjoinder,⁶³ or non-joinder of parties, where no injustice has been done, will not warrant a new trial.⁶⁴

damages found by a verdict must be supported not only by the evidence but also by the allegations of the complaint. If the allegations are insufficient, necessarily the proof is also, and a judgment for special damages cannot be sustained in the absence of sufficient allegations in the complaint. In such a case, a motion for a new trial for insufficiency of evidence involves the sufficiency of the allegations. *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S. C. 483, 72 S. E. 15.

60. *Kan.*—*Dodge City Water Supply Co. v. Dodge City*, 55 Kan. 60, 39 Pac. 219. *Mo.*—*Childs v. Kansas City, St. J. & C. B. R. Co.*, 117 Mo. 414, 23 S. W. 373. *Neb.*—*Scarborough v. Myrick*, 47 Neb. 794, 66 N. W. 867; *Schmid v. Schmid*, 37 Neb. 629, 56 N. W. 207.

Compare supra, I, B, 9.

61. *Ark.*—*Clark v. Hare*, 39 Ark. 258. *Cal.*—*Bone v. Hayes*, 154 Cal. 759, 99 Pac. 172; *Jacks v. Buell*, 47 Cal. 162. *Ga.*—*Hurt v. Barnes*, 140 Ga. 743, 79 S. E. 775; *Tompkins v. American Land Co.*, 139 Ga. 377, 77 S. E. 623; *Lang v. Yearwood*, 127 Ga. 155, 56 S. E. 305; *Savannah, F. & W. Ry. Co. v. Renfroe*, 115 Ga. 774, 42 S. E. 88; *Carter v. Johnson*, 112 Ga. 494, 37 S. E. 736; *Equitable Securities Co. v. Worley*, 108 Ga. 760, 33 S. E. 49; *Southern R. Co. v. Cook*, 106 Ga. 450, 32 S. E. 585; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156, 32 S. E. 83; *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448; *Willbanks v. Untriner*, 98 Ga. 801, 25 S. E. 841. *Ind.*—*Irwin v. Smith*, 72 Ind. 482; *Glendy v. Lanning*, 68 Ind. 142; *Davis v. Pool*, 67 Ind. 425; *Caress v. Foster*, 62 Ind. 145; *Line v. Huber*, 57 Ind. 261; *Rodgers v. Lacey*, 23 Ind.

507; *Huber Mfg. Co. v. Blessing* (Ind. App.), 99 N. E. 132. *Kan.*—*Earlywine v. Topeka, S. & W. Ry. Co.*, 43 Kan. 746, 23 Pac. 940. *Ky.*—*Johnson v. United States Bank*, 2 B. Mon. 310. *Mo.*—*Hannah v. Hannah*, 109 Mo. 236, 19 S. W. 87. *Neb.*—*O'Donohue v. Hendrix*, 13 Neb. 255, 13 N. W. 215. *S. D.*—*Ross v. Wait*, 2 S. D. 638, 51 N. W. 866. *Tex.*—*Harbert's Admr. v. Henly*, 31 Tex. 666. *Wyo.*—*Perkins v. McDowell*, 3 Wyo. 328, 23 Pac. 71.

[a] Whether a decision overruling a demurrer be right or wrong, it cannot be made the ground for getting another jury trial. *Nicholls v. Popwell*, 80 Ga. 604, 6 S. E. 21.

[b] *Contra*, Where No Cause of Action Stated.—*Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431, holding that an error of law committed by the court in overruling a demurrer by defendant to plaintiff's declaration, where the cause of action was created by statute, and the facts as stated showed that no right of action existed, is sufficient ground for awarding a new trial. See also *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. 74.

62. *Rodgers v. Lacey*, 23 Ind. 507; *Button v. Ferguson*, 11 Ind. 314.

63. *Conn.*—*Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7. *Ga.*—*Bullock v. Dunbar*, 114 Ga. 754, 40 S. E. 783. *Tex.*—*Texas, etc. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

64. *Ga.*—*Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303; *Phillips v. Stewart*, 27 Ga. 402. *Ill.*—*Gottschalk v. Jar-muth*, 69 Ill. App. 623. *Ind.*—*Daniell v. Simpkins*, 10 Ind. App. 469, 38 N. E. 219; *Carico v. Moore*, 4 Ind. App. 20, 29 N. E. 928. *S. D.*—*Mather v. Dunn*,

(V.) **Amendments.** — As a rule, errors in connection with the allowance of amendments are not subject to a motion for a new trial,⁶⁵ especially where no injustice has been done.⁶⁶ Allowing, however, a declaration to be amended, after the close of the evidence, to make additional allegations of special damages, is error for which a new trial may be granted.⁶⁷ Moreover, under some decisions, a new trial may be granted for a refusal to allow proper amendments.⁶⁸

g. *Variance.* — A new trial will not be granted on a mere technical variance,⁶⁹ although there may be a new trial where the variance is so great as to result in a verdict unsupported by sufficient evidence to establish the material allegation of the pleadings.⁷⁰

11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788. **Tex.**—*Brackenridge v. Claridge* (Tex. Civ. App.), 42 S. W. 1005.

[a] **Yet, where the evidence develops the fact that there is a defect in the parties plaintiff prejudicial to the rights of the defendant, the latter may be entitled to a new trial upon failure of proper amendment.** *Gulf, etc. R. Co. v. Kizziah*, 86 Tex. 81, 23 S. W. 578; *Ft. Worth, etc. R. Co. v. Wilson*, 85 Tex. 516, 22 S. W. 578; *East Line, etc. R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820; *Dallas & Wichita R. Co. v. Spiker*, 59 Tex. 435; *Galveston, H. & S. A. Ry. Co. v. McCray* (Tex. Civ. App.), 43 S. W. 275.

65. **Ga.**—*Georgia Life Ins. Co. v. Hanvey*, 143 Ga. 786, 85 S. E. 1036; *Granger v. Knight*, 134 Ga. 839, 68 S. E. 648; *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51; *Hammond v. George*, 116 Ga. 792, 43 S. E. 53. **Ind.**—*Reed v. Light*, 170 Ind. 550, 85 N. E. 9. **Ia.**—*Myers v. Chicago, B. & Q. R. Co.*, 152 Iowa 330, 131 N. W. 770. **Can.**—*Haines v. Dunlap*, 33 N. Bruns. 556; *Smith v. Gerow*, 15 N. Bruns. 425.

[a] **Amendment After Verdict.** Where, after verdict, an amendment of the declaration was permitted by inserting the name of an additional person as a partner of the firm suing as plaintiffs, it was held that a new trial should have been granted. *Floyd v. Woods & Co.*, 4 Yerg. (Tenn.) 165.

[b] **Amendable Defects.**—A new trial will not be granted for defects in a declaration that might have been amended, when substantial justice has been done. *Walker v. Grand Trunk Ry. Co.*, 29 Fed. Cas. No. 17,070.

[c] **The unauthorized filing of an amended complaint, and the trial of the cause upon such complaint, with-**

out notice to defendant, and in his absence, warrants the setting aside of the judgment and the award of a new trial. *Galligan v. Luther*, 54 Colo. 118, 123 Pac. 1123.

66. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

67. *Brewer v. Jacobs*, 22 Fed. 217.

68. *Lestrade v. Barth*, 17 Cal. 285; *Church v. Syracuse Coal & Salt Co.*, 32 Conn. 372. See *Wilkin v. Reed*, 15 C. B. 192, 196, 2 C. L. R. 796, 32 L. J. C. P. 193, 18 Jur. 1081, 2 W. R. 556, 139 Eng. Reprint 394.

69. **U. S.**—*Crittenden v. Cobb*, 156 Fed. 535; *Freund v. S. H. Greene & Sons Corp.*, 139 Fed. 703; *Gravelle v. Minneapolis & St. L. Ry. Co.*, 11 Fed. 569. **Conn.**—*Rice v. Almy*, 32 Conn. 297; *Allen v. Jarvis*, 20 Conn. 38. **Ga.** *Haiman v. Moses*, 39 Ga. 708. **Mass.** *Aldrich v. Aldrich*, 143 Mass. 45, 8 N. E. 870. **Minn.**—*Short v. McRea*, 4 Minn. 119. **N. Y.**—*Udpike v. Abel*, 60 Barb. 15; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470; *Carlin v. New York, etc. R. Co.*, 71 Misc. 521, 130 N. Y. Supp. 828. **Pa.**—*Philadelphia & R. R. Co. v. Reading, etc. R. Co.*, 2 Pa. Dist. 857. **R. I.**—*Cleasby v. Reynolds*, 26 R. I. 236, 58 Atl. 786. **W. Va.** *Duckworth v. Stalnaker*, 74 W. Va. 247, 81 S. E. 989. **Eng.**—*Sampson v. Appleyard*, 3 Wils. K. B. 272, 95 Eng. Reprint 1051.

70. **Ark.**—*Watkins v. Rogers*, 21 Ark. 298. **Ga.**—*Port Royal & A. Ry. Co. v. Tompkins*, 83 Ga. 759, 10 S. E. 356. **Miss.**—*Drake v. Surget*, 36 Miss. 458. **Mo.**—*Eddy v. Baldwin*, 32 Mo. 369. **N. J.**—*Powell v. Mayo*, 26 N. J. Eq. 120. **Ohio.**—*Conn's Admrs. v. Gano's Exrs.*, 1 Ohio 483, 13 Am. Dec. 639. **W. Va.**—*Hutchinson v. Parkersburg*, 25 W. Va. 226.

h. *The Jury*. — (I.) *In General*. — Matters connected with the drawing, summoning, returning, selection and empaneling of the jury, together with the effect of errors and irregularities in these matters, have been treated elsewhere in this work, and the same is true of irregularities in the custody, conduct and deliberations of the jury.⁷¹

(II.) *Must Prevent Fair Trial*. — To warrant a new trial, however, in such cases, the substantial rights of a complaining party must have been affected, and a fair trial prevented.⁷² Where no injury has resulted, a new trial will not be granted merely because the jury has been irregularly selected, when the alleged irregularity applies merely to the formalities of their selection,⁷³ and the same principle has been applied where a juror disqualified merely propter defectum has been retained.⁷⁴ And where the challenge for cause of a competent juror was sustained by the court, but another competent juror took his place, it was held that no injury was caused, and a new trial not warranted.⁷⁵ It has been held, however, that regardless of the question of injury, it is good ground for a new trial, in a criminal case, that one of the jurors was incompetent,⁷⁶ and where good cause for challenge on the *voir dire* existed but was erroneously refused, prejudice will be presumed.⁷⁷

71. See the title "*Juries and Jurors*."

72. *Cal.*—Thrall *v.* Smiley, 9 Cal. 529. *Ga.*—Faulkner *v.* Snead, 122 Ga. 28, 49 S. E. 747. *Ky.*—Louisville, etc. R. Co. *v.* King, 161 Ky. 324, 170 S. W. 938. *Me.*—Walker *v.* Green, 3 Me. 215. *Mass.*—Orrok *v.* Com. Ins. Co., 21 Pick. 456, 32 Am. Dec. 271. *N. H.*—Pittsfield *v.* Barnstead, 40 N. H. 477; Bodge *v.* Foss, 39 N. H. 406. *R. I.*—Sprague *v.* Brown, 21 R. I. 329, 43 Atl. 636. *Wis.*—Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393. *Can.*—Power *v.* Ruttan, 5 U. C. Q. B. (O. S.) 132.

73. *Ga.*—Pool *v.* Callahan, 88 Ga. 468, 14 S. E. 867; Osgood *v.* State, 63 Ga. 791; Edwards *v.* State, 53 Ga. 428. *Mo.*—State *v.* Riddle, 179 Mo. 287, 78 S. W. 606; State *v.* Williams, 136 Mo. 293, 38 S. W. 75; State *v.* Breen, 59 Mo. 413. *N. Y.*—Cole *v.* Perry, 6 Cow. 584. *Vt.*—Mann *v.* Fairlee, 44 Vt. 672. *Eng.*—R. *v.* Hunt, 4 Barn. & Ald. 430, 6 E. C. L. 547, 106 Eng. Reprint 994.

74. Jewell *v.* Jewell, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473.

[a] *Propter Defectum*.—As said by the supreme court of Tennessee: "Motions for a new trial in Tennessee, even in criminal cases, have been always regarded with disfavor by courts when the motions are grounded on such dis-

qualifications of a juror as a challenge propter defectum upon the trial would disclose. The want of these purely statutory qualifications, such as citizenship, age, property, sex, etc., which do not go to make up the really (not purely legal) necessary and essential qualities to enable the juror to do his duty intelligently and impartially in the case, have never in this state, or elsewhere, been treated with the same strictness as objections to the juror for bias, partiality, criminality and the like causes reached by challenge propter affectum and propter delictum as designated in the common law. Indeed, the courts are swift to lay hold of an argument or fact in the record on which to ground a denial of these motions when based upon the propter defectum class of juror disqualifications, especially where they can see that no injury has thereby resulted to the party objecting to the verdict." *Brewer v. Jacobs*, 22 Fed. 217, 234.

75. *West v. Forrest*, 22 Mo. 344; *Stoner v. State*, 4 Mo. 368; *King v. State*, 1 Mo. 717; *Gore v. City of Scranton*, 5 Pa. Co. Ct. 545.

76. *United States v. Angney*, 6 Mackey (D. C.) 66.

77. *Houston & T. C. Ry. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

(III.) **Waiver of Irregularities.** — Irregularities in connection with the jury may be waived by the complaining party.⁷⁸

(IV.) **Necessity of Objection.** — Objections to the irregular selection and impaneling of the jury, should be made in season, usually by challenge to the array, before the jury is sworn. They cannot be raised for the first time, after verdict, by motion for a new trial.⁷⁹ Moreover, in general, objections to the qualifications of jurors should be taken advantage of by challenge, otherwise such irregularities will be waived,⁸⁰ unless, possibly, in certain exceptional cases affecting the

78. *Casey v. Briant*, 1 Stew. & P. (Ala.) 51; *Boland v. Greenville & C. R. Co.*, 12 Rich. L. (S. C.) 368. See the title "Juries and Jurors."

Waiver by Failure To Object.—See following section.

[a] Where a juror, struck from the list by one of the parties, was subsequently sworn with such party's knowledge, the injury, if any, was waived. *Jordan v. Meredith*, 1 Bin. (Pa.) 27.

79. *Ala.*—*State v. Williams*, 3 Stew. 454; *Collier v. State*, 2 Stew. 388. *Ark.* *Brown v. State*, 12 Ark. 623. *Cal.* *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. *Ga.*—*Mitchell v. Bradberry*, 76 Ga. 15; *Stewart v. State*, 66 Ga. 90; *Gormley v. Laramore*, 40 Ga. 253. *Idaho.*—*People v. Ah Hop*, 1 Idaho 698. *Ia.*—*Buford & Co. v. McGetchie*, 60 Iowa 298, 14 N. W. 790. *Kan.*—*State v. Jenkins*, 32 Kan. 477, 4 Pac. 809. *La.*—*State v. Morgan*, 20 La. Ann. 442; *State v. Da Rocha*, 20 La. Ann. 356. *Mass.*—*Amherst v. Hadley*, 1 Pick. 38. *Mich.*—*Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505. *N. C.*—*State v. Underwood*, 28 N. C. 96. *Pa.*—*Com. v. Freeman*, 166 Pa. 332, 31 Atl. 115. *Tex.*—*Brill v. State*, 1 Tex. App. 572. *Va.*—*Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640.

See the title "Juries and Jurors."

[a] **Irregularity in Summoning Grand Jury.**—After trial and conviction, it is too late to raise the objection that the district attorney omitted to issue a precept to the sheriff requiring him to summon the grand jury by whom the indictment was found. *People v. Robinson*, 2 Park. Cr. Cas. (N. Y.) 235.

80. *Ala.*—*Sowell v. Brewton Bank*, 119 Ala. 92, 24 So. 585; *Larkin v. Baty*, 111 Ala. 303, 18 So. 666. *Ark.*—*Whitehead v. Wells*, 29 Ark. 99; *Daniel v. Guy*, 23 Ark. 50. *Colo.*—*Turner v. Hahn*, 1 Colo. 23. *Ga.*—*Georgia R.*

Co. v. Cole, 73 Ga. 713. *Ill.*—*Byars v. Mt. Vernon*, 77 Ill. 467; *Bradshaw v. Hubbard*, 6 Ill. 390; *Rabberman v. Peirce*, 66 Ill. App. 391. *Ind.*—*Alexander v. Dunn*, 5 Ind. 122. *Ia.*—*Light v. Chicago*, etc. R. Co., 93 Iowa 83, 61 N. W. 380; *McKinney v. Simpson*, 51 Iowa 662, 2 N. W. 535. *Kan.*—*Missouri, K. & T. R. Co. v. Munkers*, 11 Kan. 223. *Ky.*—*Louisville R. Co. v. Smock*, 157 Ky. 11, 162 S. W. 546. *Me.*—*Minot v. Bowdoin*, 75 Me. 205; *Jameson v. Androscoggin R. Co.*, 52 Me. 412. *Md.*—*Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722. *Mass.* *Daniels v. Lowell*, 139 Mass. 56, 29 N. E. 222; *Smith v. Earle*, 118 Mass. 531; *Jeffries v. Randall*, 14 Mass. 205. *Mich.*—*Sleight v. Henning*, 12 Mich. 371. *Minn.*—*Wells-Stone Merc. Co. v. Bowman*, 59 Minn. 364, 61 N. W. 135. *Mo.*—*Pitt v. Bishop*, 53 Mo. App. 600. *Neb.*—*Olmsted v. Noll*, 82 Neb. 147, 117 N. W. 102; *Wilcox v. Saunders*, 4 Neb. 569. *N. H.*—*Ready v. Manchester Gas Light Co.*, 67 N. H. 147, 36 Atl. 878, 68 Am. St. Rep. 642; *Harrington v. Manchester*, etc. R. Co., 62 N. H. 77. *N. Y.*—*Cole v. Van Keuren*, 51 How. Pr. 451. *Ohio.*—*Watts v. Ruth*, 30 Ohio St. 32; *Simpson v. Pitman*, 13 Ohio 365. *R. I.*—*Sprague v. Brown*, 21 R. I. 329, 43 Atl. 636; *Fiske v. Paine*, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498. *S. C.*—*Blassingame v. Laurens*, 80 S. C. 38, 61 S. E. 96; *Jones v. Fitzpatrick*, 47 S. C. 40, 24 S. E. 1030. *Tenn.*—*Calhoun v. State*, 4 Humph. 477; *Ward v. State*, 1 Humph. 253. *Tex.*—*Schuster v. La Londe*, 57 Tex. 28; *Wooters v. Craddock* (Tex. Civ. App.), 46 S. W. 916. *Va.*—*Simmons v. McConnell's Admr.*, 86 Va. 494, 10 S. E. 838.

See the title "Juries and Jurors."

[a] **Propter Defectum.**—"If the juror is not a good and lawful man, can he be challenged after he is sworn? The ancient and well-settled English

qualifications of a particular juror.⁸¹ Knowledge of any disqualification, accompanied with failure to object thereto when the jury is impaneled, will be considered a waiver of a new trial,⁸² and where there has been no examination to determine the matter, mere ignorance of the ground of objection does not excuse the failure to make an objection.⁸³ But where reasonable diligence to discover the disqualification has been exercised, a new trial may be granted.⁸⁴

(V.) **Drawing, Summoning, Returning, Selection and Impaneling** — Irregularities in the writ of venire, or in the drawing, summoning, or returning jurors, providing such irregularities affect the substantial rights of an aggrieved party, may be good ground for a new trial,⁸⁵ unless the statute is such as to forbid it.⁸⁶ New trials have been granted for such irregularities as excluding from the jury-wheel, solely on account of race, all persons of the African race,⁸⁷ that the jury was summoned

authorities are that you cannot challenge the juror after he has been sworn unless it be for cause arising afterwards. . . . It would be most dangerous to pursue a different practice." *Brewer v. Jacobs*, 22 Fed. 217, 235.

[b] **Property Disqualifications.** — In *Oreutt v. Carpenter*, 1 Tyler (Vt.) 250, 4 Am. Dec. 722, a juror was a freeholder when his name was put into the box, but not when he was drawn, summoned, and served as a juror in the case. The new trial was refused on this ground, because "the juror being legally qualified when put into the box, his subsequent disqualification by divesting himself of his freehold, and thus not being a freeholder when drawn, summoned, and sworn, should have been taken advantage of in challenge, and cannot prevail after verdict.

[c] **Juror an Atheist.** — Where the objection was that one of the jurors was an atheist, but was not challenged at the trial, the objection came too late. *McClure v. State*, 1 Yerg. (Tenn.) 206.

81. *Horbach v. State*, 43 Tex. 242; *Ray v. State*, 4 Tex. App. 450; *Hardin v. State*, 4 Tex. App. 355.

82. *Cal.* — *People v. Sanford*, 43 Cal. 29; *People v. Stonecipher*, 6 Cal. 405. *Conn.* — *Quinebaug Bank v. Leavens*, 20 Conn. 87, 50 Am. Dec. 272. *Ga.* — *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269. *Kan.* — *Florence, E. D. & W. V. R. Co. v. Ward*, 29 Kan. 354. *Mass.* — *Russell v. Quinn*, 114 Mass. 103; *Com. v. Dailey*, 12 Cush. 80; *Davis*

v. Allen, 11 Pick. 466, 22 Am. Dec. 386. *N. H.* — *Rollins v. Ames*, 2 N. H. 349, 9 Am. Dec. 79. *Can.* — *Widder v. Buffalo & L. H. R. Co.*, 24 U. C. Q. B. 222, 520.

83. *Watts v. Ruth*, 30 Ohio St. 32.

[a] That the same person has served on both the grand and petit juries is not ground for a new trial where there was failure to make inquiry as to such service, or to exercise the right of challenge. *Ryan v. State*, 10 Ohio Cir. Ct. (N. S.) 497, 20 Ohio Cir. Dec. 306.

84. *Moody's Exr. v. Pearce*, 7 J. J. Marsh. (Ky.) 221; *Eastman v. Wight*, 40 Ohio St. 156.

85. *Ohio.* — *Watts v. Ruth*, 30 Ohio St. 32. *S. C.* — *Civ. Code*, 1902, §2947. *Tex.* — *Houston & T. C. Ry. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670. *Vt.* — *Mann v. Fairlee*, 44 Vt. 672. *Wis.* — *Shaw v. Fisk*, 21 Wis. 368, 94 Am. Dec. 547.

But see 16 STANDARD PROC. 976 (note 92), 996 (note 74), 1002, note 32.

[a] **Errors in mere matters of form in selecting the jury**, not prejudicing the rights of a defendant, in a criminal case, are not ground for a new trial; as where, for example, the sheriff instead of the clerk called the panel of the jurors. *State v. Page*, 212 Mo. 224, 110 S. W. 1057; *State v. Holme*, 54 Mo. 153.

But as to failure to serve all persons named in writ, see 16 STANDARD PROC. 1003, note 54.

86. See Pa. Pr. Act, 1887, §37; *Purdon's Dig.*, 1907, vol. 3, p. 3653.

87. *Fields v. State*, 4 Ohio N. P. (N. S.) 401, 17 Ohio Dec. 16.

by an officer closely related to one of the parties;⁸⁸ that the return of the jury did not comply with the law;⁸⁹ and that a juror was misnamed in the panel.⁹⁰ The absence of a seal from a writ of venire is not ground for new trial,⁹¹ and a plea of not guilty in a criminal case, will cure all defects or irregularities in the drawing and summoning of either grand or petit jurors.⁹² Irregularities in connection with the selection and challenging of jurors may be cause for new trial.⁹³

Swearing the Jury. — Where it appears that the jury was not sworn in the manner required by law, a new trial may be ordered,⁹⁴ but it is held that a merely formal irregularity in swearing the jury is not ground for a new trial, especially where no objection was made at the time.⁹⁵

(VI.) **Disqualifications.** — (A.) **IN GENERAL.** — A new trial may be granted on the ground that a juror was disqualified, providing the disqualification was not known at the time of his selection.⁹⁶

(B.) **PROPERTY.** — The lack of requisite property qualifications⁹⁷ in

88. *Rector v. Hudson*, 20 Tex. 234.

89. *Tidd's Pr.*, p. 906. But see *United States v. Davis*, 103 Fed. 457, shortage in jury panel.

90. Anonymous, 12 Mod. 567, 88 Eng. Reprint 1525, where "Turnor" was written for "Taverner." However, in *Dickenson v. Blake*, 7 Bro. P. C. 177, 3 Eng. Reprint 114, it was held that a mere mistake in a juror's name in the panel is not ground for a new trial.

[a] **Misnaming in Record.** — If, however, the juror were correctly named in the panel, it was held that a subsequent misnaming in the record constituted no ground. *Countess of Rutland's Case*, 5 Coke 42a, 77 Eng. Reprint 119; *Wrey v. Thorn*, *Barnes' Notes C. P. (Eng.)* 454.

[b] **Cured by Verdict.** — A mistake in spelling the name of a juror is cured by verdict. *Swope v. Donnelly*, 21 Pa. Co. Ct. 167.

[c] **The omission of the name of a juror from the jury list is not ground for a new trial.** *Urquhart v. Powell*, 59 Ga. 721.

91. *State v. Benton*, 85 S. C. 107, 67 S. E. 143, since it works no injury.

92. *Com. v. Cressinger*, 193 Pa. 326, 44 Atl. 433; *Com. v. Freeman*, 166 Pa. 332, 31 Atl. 115.

93. See *infra*, this note, and the following section.

[a] **The allowance of a peremptory challenge after the juror has been accepted, although not yet sworn, is**

cause for new trial. *McLean v. State*, 1 Tenn. Cas. 478, 482. See *United States v. Davis*, 103 Fed. 457, 461, criticizing this case.

[b] **But requiring a defendant to announce his challenges first**, although the statute provides that the plaintiff shall announce his first, is not an irregularity materially affecting the merits of the action. *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587. See also *State v. Hays*, 23 Mo. 287.

94. *Horton v. State*, 47 Ala. 58.

95. *Seymour v. Parnell*, 23 Fla. 232, 2 So. 312; *Caldwell v. Irvine's Admr.*, 4 J. J. Marsh. (Ky.) 107.

96. **U. S.** — *Hyman v. Eames*, 41 Fed. 676. **Ga.** — *Brown v. State*, 28 Ga. 439. **Ill.** — *Vennum v. Harwood*, 6 Ill. 659. **Ind.** — *Hudspeth v. Herston*, 64 Ind. 133. **Ky.** — *Vance v. Haslett*, 4 Bibb 191; *Pierce v. Bush*, 3 Bibb 347. **Me.** *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 853, 18 L. R. A. 473; *Chase v. Jennings*, 38 Me. 44; *Hardy v. Sprowle*, 32 Me. 310. **N. H.** — *Wiggin v. Plumer*, 31 N. H. 251. **Eng.** — See *Rex v. Sutton*, 8 Barn. & C. 417, 15 E. C. L. 208, 108 Eng. Reprint 1097; *Herbert v. Shaw*, 11 Mod. 118, 88 Eng. Reprint 937.

97. *Finley v. Hayden*, 3 A. K. Marsh. (Ky.) 330; *Rennick v. Walthal*, 2 A. K. Marsh. (Ky.) 23.

[a] **Bankruptcy of Juror.** — It has been held, however, no ground for a new trial that a juror had become disqualified by bankruptcy. *Guckian v. Newbold*, 23 R. I. 553, 594, 51 Atl. 210.

a juror may be ground for a new trial, as, for example that the juror was not a freeholder.⁹⁸

(C.) AGE. — That a juror was exempt by reason of advanced age is not ground for a new trial,⁹⁹ but it is if he is disqualified by reason of insufficient age.¹

(D.) CITIZENSHIP. — In some jurisdictions the fact that a juryman was an alien justifies a new trial,² as, also, that one of the jurors had not taken the oath of allegiance.³ Other cases hold, however, that the fact of alienage does not, in itself, amount to a sufficient ground.⁴

(E.) NONRESIDENT. — A new trial has been refused in a federal court on the ground that one of the jurors was a nonresident of the district,⁵ likewise in a state court, where the juror was a nonresident of the county.⁶

(F.) DEAFNESS. — A new trial was refused in a federal case on the ground that one of the jurors was deaf,⁷ but other cases hold that where the deafness of a juror prevented him from hearing the testimony, a new trial ought to be granted.⁸

(G.) NOT UNDERSTANDING ENGLISH. — Some cases hold that regardless of the fact that the disqualification was not discovered on his voir dire, the inability of a juror to understand the English language is a proper cause for a new trial,⁹ but other cases hold that such a disqualification is waived, since it is a matter that should have been ascertained on the juror's preliminary examination.¹⁰

98. *State v. Crawford*, 3 N. C. 298; *Reed v. State* (Tex. Civ. App.), 11 S. W. 372; *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463. *Contra*, *Briggs v. Georgia*, 15 Vt. 61. *Compare* *Oreutt v. Carpenter*, 1 Tyler (Vt.) 250.

99. Ill.—*Davis v. People*, 19 Ill. 74. Mass.—*Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Munroe v. Brigham*, 19 Pick. 368. Miss.—*Williams v. State*, 37 Miss. 407. N. Y.—*Seacord v. Burling*, 1 How. Pr. 175. S. C. *State v. Fisher*, 2 Nott & M. 261.

1. Md.—*Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722. Mass.—*Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258. Mo.—*Pitt v. Bishop*, 53 Mo. App. 600. And see *Blair v. Paterson*, 131 Mo. App. 122, 110 S. W. 615. Ohio. *Watts v. Ruth*, 30 Ohio St. 32.

2. *Richards v. Moore*, 60 Vt. 449, 15 Atl. 119; *Mann v. Fairlee*, 44 Vt. 672. [a] Alien Juror.—An alien is not a legally qualified juror, and if one sit in a case, a new trial will be granted if the disqualification be not known to the moving party until after verdict. *Quinn v. Halbert*, 52 Vt. 353.

3. *Hawaii v. Coelho*, 11 Hawaii 213; *Shane v. Clarke*, 3 Har. & McH. (Md.) 101.

4. U. S.—*Hollingsworth v. Duane*, 4 Dall. 353, 1 L. ed. 864, Wall. Sr. 147, 12 Fed. Cas. No. 6,618. Colo. *Turner v. Hahn*, 1 Colo. 23. Ill.—*Greenup v. Stoker*, 8 Ill. 202. Mich.—*Neal v. Neal*, 181 Mich. 114, 147 N. W. 624; *Johr v. People*, 26 Mich. 427. N. Y.—*Bennett v. Matthews*, 40 How. Pr. 428.

5. *Fisher v. Yoder*, 53 Fed. 565.

6. Ark.—*Fain v. Goodwin*, 35 Ark. 109. Ky.—*Major v. Pulliam*, 3 Dana 582. Minn.—*Keegan v. Minneapolis*, etc. R. Co., 76 Minn. 90, 78 N. W. 965. Neb.—*Wilcox v. Saunders*, 4 Neb. 569. Pa.—*Baird v. Otte*, 2 Pa. Dist. 449, 12 Pa. Co. Ct. 445. Wis.—*Rockwell v. Elderkin*, 19 Wis. 367.

7. *United States v. Baker*, 3 Ben. 68, 24 Fed. Cas. No. 14,499.

8. *Conover v. Jones*, 5 N. J. L. J. 349; *Cameron v. Ottawa Electric R. Co.*, 32 Ont. (Can.) 24.

9. *Lafayette Plankroad Co. v. New Albany*, etc. R. Co., 13 Ind. 90, 74 Am. Dec. 246; *Shaw v. Fisk*, 21 Wis. 368, 94 Am. Dec. 547. But see *contra*, *Dickerson v. North Jersey St. Ry. Co.*, 68 N. J. L. 45, 52 Atl. 214.

10. Ark.—*Whitehead v. Wells*, 29

(H.) **INSANITY.**—A new trial was refused on the ground of the insanity of a juror who showed no evidence of mental unsoundness at the time of the trial, although he was admittedly insane soon after.¹¹

(I.) **IMMORALITY.**—It is within the discretion of the court to allow a new trial where a juror who was disqualified on the ground of immorality sat in the case.¹²

(J.) **BIAS, PREJUDICE.**—Where a fair trial has been prevented by the bias or prejudice of a juror, such disqualification being unknown when the juror was accepted, a new trial may be granted,¹³ especially in cases where, on his examination, the juror had denied or concealed this disqualification.¹⁴ This ground may arise where a juror has formed and expressed an opinion upon the merits of the case,¹⁵ by reason of the relationship of a juror to one of the parties,¹⁶ or to counsel in

Ark. 99. **N. J.**—*Dickerson v. North Jersey St. R. Co.*, 68 N. J. L. 45, 52 Atl. 214. **Ohio.**—*Watts v. Ruth*, 30 Ohio St. 32; *Eastman v. Wight*, 4 Ohio St. 156. **Tex.**—*Boetge v. Landa*, 22 Tex. 105.

11. *Burik v. Dundee Woolen Co.*, 66 N. J. L. 420, 49 Atl. 442.

12. *Manning v. Boston Elevated R. Co.*, 187 Mass. 496, 73 N. E. 645.

13. **U. S.**—*Wilson v. Clement*, 126 Fed. 808. **Ill.**—*Nomaque v. People*, 1 Ill. 145, 12 Am. Dec. 157. **Ky.**—*Cain v. Cain*, 1 B. Mon. 213. **Miss.**—*Childress v. Ford*, 10 Smed. & M. 25. **Vt.** *Deming v. Hurlbut*, 2 D. Chip. 45.

[a] **Prejudice Discovered During Trial.**—Where the prejudice of two jurors was not discovered till some time during the trial, the unsuccessful party did not lose his right to a new trial by proceeding with the trial by order of the court. *Clement v. Wilson*, 135 Fed. 749, 68 C. C. A. 387; *Wilson v. Clement*, 126 Fed. 808.

14. **Ill.**—*West Chicago St. R. Co. v. Huhnke*, 82 Ill. App. 404. **Mass.** *Gray v. Boston Elev. R. Co.*, 215 Mass. 143, 102 N. E. 71. **Tex.**—*Makey v. Dryden* (Tex. Civ. App.), 128 S. W. 633. **Wash.**—*Heasley v. Nichols*, 38 Wash. 485, 80 Pac. 769.

15. **U. S.**—*Hyman v. Eames*, 41 Fed. 676. **Ill.**—*Vennum v. Harwood*, 6 Ill. 659; *People v. Strauch*, 144 Ill. App. 283. **Ky.**—*Stein v. Chesapeake, etc. R. Co.*, 132 Ky. 322, 116 S. W. 733; *Vance v. Haslett*, 4 Bibb 191. **Miss.**—*Jones v. State*, 97 Miss. 269, 52 So. 791. **N. H.** *Wiggin v. Plumer*, 31 N. H. 251. **Vt.** *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616. **Wash.**—*Heasley v. Nichols*, 38 Wash. 485, 80 Pac. 769.

[a] Where, in a capital case, the

previous declaration of a juror showed bias against the accused, a new trial was granted. *United States v. Fries*, 3 Dall. 515, 518, 1 L. ed. 701, 9 Fed. Cas. No. 5,126.

16. **Ga.**—*Bank of University v. Tuck*, 107 Ga. 211, 33 S. E. 70; *Moore v. Farmers' Mut. Ins. Assn.*, 107 Ga. 199, 33 S. E. 65; *Swift v. Mott*, 92 Ga. 448, 17 S. E. 631; *Georgia R. Co. v. Cole*, 73 Ga. 713; *Beall v. Clark*, 71 Ga. 818; *Brown v. State*, 28 Ga. 439. **Ind.**—*Hudspeth v. Herston*, 64 Ind. 133. **Ky.**—*Dailey v. Gaines*, 1 Dana 529. **Me.**—*Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473; *Lane v. Goodwin*, 47 Me. 593; *Chase v. Jennings*, 38 Me. 44; *Hardy v. Sprowle*, 32 Me. 310. **Pa.**—*Caldwell v. Kumerant*, 20 Pa. Co. Ct. 608. **Tex.**—*Powers v. State*, 27 Tex. App. 700, 11 S. W. 646; *Page v. State*, 22 Tex. App. 551, 3 S. W. 745.

[a] **Juror Ignorant of Relationship.** Persons related within the prohibited degree to parties to an action are incompetent to serve as jurors, notwithstanding ignorance on the part of the disqualified jurors of the fact of their kinship. It is contrary to public policy to allow a juror, after participating in the making of a verdict, to assert ignorance of any fact which rendered him incompetent to serve. *Bank of University v. Tuck*, 107 Ga. 211, 33 S. E. 70.

[b] **Son of Stockholder.**—Where in a suit against a corporation, the son of a stockholder was a juror in the case, a new trial was granted. *Georgia R. Co. v. Hart*, 60 Ga. 550.

[c] **Brother-in-Law.**—A new trial was, however, refused where the only ground was that one of the jurors was

the case,¹⁷ or to some other interested person,¹⁸ provided that the aggrieved party was ignorant of the relationship when the juror was accepted.¹⁹ That a juror was pecuniarily interested in a case may be a ground for a new trial,²⁰ but, as in other cases, a new trial will not be granted in such a case unless such interest produced prejudicial bias.²¹

(K.) TRYING CASE WITH ELEVEN JURORS. — Trying a case with eleven jurors is an irregularity for which a new trial should be granted unless the defect was waived.²²

i. *During the Trial.* — (I.) **In General.** — Prejudicial departure from established procedure, during the trial, may be good cause for granting a new one. Irregularities of this sort may be committed by the court, a referee, court officials, the prevailing party or witnesses or they may occur in other miscellaneous ways.²³

(II.) **On the Part of the Court.** — (A.) **IN GENERAL.** — Irregularities in the proceedings of the court, materially affecting the substantial rights of an aggrieved party, or which prevent either of the parties from having a fair trial, constitute a generally recognized ground for new trial.²⁴ It has been said that it is impossible to answer with precision the question, "What is an irregularity of the court?" since no ac-

brother-in-law of the plaintiff. *Orme v. Pratt*, 4 Cranch C. C. 124, 18 Fed. Cas. No. 10,578.

17. *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171.

18. *Beall v. Clark*, 71 Ga. 818 (juror half-brother of leading witness); *Bullard v. Trice*, 63 Ga. 165; *Georgia R. Co. v. Hart*, 60 Ga. 550.

19. *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. (N. S.) 473.

20. **Ind.**—*Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673. **Ia.**—*Seaton v. Swem*, 58 Iowa 41, 11 N. W. 726. **Eng.**—*Bailey v. Macaulay*, 13 Q. B. 815, 14 Jur. 80, 19 L. J. Q. B. 73, 66 E. C. L. 815, 116 Eng. Reprint 1475.

21. **U. S.**—*Berry v. De Witt*, 27 Fed. 723, 23 Blatchf. 544. **Ga.**—*Glover v. Woolsey & Co.*, Dudley 85. **Miss.** *Childress v. Ford*, 10 Smed. & M. 25. **Tenn.**—*Magness v. Stewart*, 2 Coldw. 509.

22. *Cowles v. Buckman*, 6 Iowa 161.

23. **As to the general distinction between irregularity and misconduct**, see *supra*, II, B, 2.

24. **Cal.**—*Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540. **Ind.**—*Alley v. State*, 76 Ind. 94. **Mont.**—*Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123. **Va.**—*McDowell's Exr. v. Crawford*, 11 Gratt. (52 Va.) 377.

[a] **From a very early date**, the departure of the judge from a due and accustomed mode of proceeding at the trial has, where injustice results, warranted the setting aside of the verdict. *Grant*, *New Trial* (London, 1817).

[b] **Must Work Injury.**—However irregular or indiscreet the alleged conduct of the judge may be, yet if such irregularity was unknown to the jury, and had no effect or influence upon the verdict, it will not entitle the complaining party to a new trial. *Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340.

[c] **Irregularity in Matter of a Brief.**—At the close of his argument, counsel handed to the court, without notice to the other party, a brief upon a matter material to the case. This brief was read by the court before its decision was rendered. It was held that this was such a departure from the usual and regular method of procedure that a new trial was warranted. The statement of the trial judge that he was not influenced by the contents of the brief cannot be accepted as conclusive. To permit counsel upon one side to present such arguments without giving his opponent an opportunity to reply amounts to a denial of the right to be heard in court. *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13.

curate classification of things which are irregular is possible.²⁵ In many of the statutes, "irregularities in the proceedings of the court" are distinguished from "errors of law occurring at the trial," the former meaning, it has been said, prejudicial proceedings or rulings before or after the trial, and the latter, erroneous rulings during the trial proper.²⁶ However, there may be irregularities in the proceedings of the court during the trial. Irregularity here does not include "error," since "error" occurs only when a ruling is made upon a question of law. Irregularities during the trial embrace prejudicial occurrences not amounting to rulings on matters of law.²⁷

(B.) **DISQUALIFICATION. — ABSENCE FROM COURT ROOM.** — A party may be prevented from having a fair trial for the reason that the judge was disqualified, as, for example, that he had an interest in the case,²⁸ or because the judge was temporarily absent from the court room during the trial,²⁹ although it has been held that in such a case injury will not be presumed.³⁰

(C.) **CONDUCT OF TRIAL.** — The supervision and conduct of the trial are in many respects largely within the discretion of the court, and the exercise of this discretion is not ordinarily subject to a motion for

25. *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540, quoting Hayne on New Trial and Appeal.

26. See *infra*, this note.

[a] **Illustrations.** — (1) A ruling upon a motion for continuance is not a ruling made in the course of a trial. *Cook v. Larson*, 47 Kan. 70, 27 Pac. 113. (2) Likewise, a ruling upon a demurrer. *Bank v. Harding*, 65 Kan. 655, 70 Pac. 655. (3) Trial does not commence until an issue is joined. *Bank v. Harding*, *supra*. See *infra*, II, D.

27. *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534.

Irregularities, Misconduct, Errors. New trials may be granted for irregularities, misconduct, or errors on the part of the court, and not a little confusion has been occasioned, at times, by the interchange of these terms. In a broad sense, every irregularity is an error, and often error sufficient to warrant a new trial, but, properly speaking, the two terms are quite distinct. The border line between irregularity and misconduct on the part of the court is, however, at times, more difficult to trace. In fact, some of the matters herein cited as irregularities could properly be classed with misconduct. See *infra*, this section, and II, C and D.

28. *Mass.* — *Crosby v. Blanchard*, 7 Allen 385. *N. Y.* — *Wehrum v. Kuhn*,

2 Jones & S. 336. *Can.* — *Barrett v. Phillips*, 33 Ont. L. Rep. 203, 8 Ont. W. N. 2.

29. *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Western Union Tel. Co. v. Lewelling*, 58 Ind. 367.

[a] **Judge Absent.** — Where the judge during the trial was so far absent and for such length of time as to prevent his control of the conduct of the jury, and during such time the prosecuting attorney made statements prejudicial to the accused, a new trial was granted. *Miller v. State*, 73 Ohio St. 195, 76 N. E. 823.

[b] **Absence During Taking of Testimony.** — Where the trial was without a jury, the absence of the judge while a part of the testimony was being taken, is not sufficient cause for a new trial when the judge was present a large part of the time and when the testimony not heard by him was substantially conceded in the argument addressed to the court on both sides at the close of the trial. *Crook v. Hamlin*, 71 Hun 136, 24 N. Y. Supp. 543, 54 N. Y. St. 77, *affirmed*, 140 N. Y. 297, 35 N. E. 499. *Earl and Gray, JJ.*, dissenting.

30. *Colo.* — *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493. *Ia.* — *Baxter v. Ray*, 62 Iowa 336, 17 N. W. 576. *N. Y.* — *Crook v. Hamlin*, 71 Hun 136, 24 N. Y. Supp. 543, 54 N. Y. St. 77, *affirmed* in 140 N. Y. 297, 35 N. E. 499.

a new trial.³¹ A failure to swear a witness in the case will not justify a new trial where no harm by such omission was caused,³² or where it does not appear that the complaining party was ignorant of the fact at the time,³³ or, if he knew of it, nevertheless did not object.³⁴ However, the court's inattention to the evidence may amount to such an irregularity as may warrant a new trial.³⁵ To refuse the right to open and close an argument may also justify a new trial,³⁶ as may the improper withdrawal of the case from the jury,³⁷ or the giving of judgment upon the opening statement,³⁸ or improperly submitting or not submitting certain questions to the jury.³⁹

(D.) **EXPRESSION OF OPINION.** — In some states, where by expressed opinion upon the facts of the case, the court interferes with the lawful province of the jury to the prejudice of the party complaining, a new trial will be granted.⁴⁰

31. *Bedell v. Powell*, 13 Barb. (N. Y.) 183 (as to order of proof); *Allen v. Bodine*, 6 Barb. (N. Y.) 383, cross-examination as to collateral matters.

[a] **Plea in Abatement; How To Be Tried.**—It is not ground for a new trial that the court submitted to the jury a plea in abatement, with the proof bearing upon it, jointly with the case upon its merits. Whether the plea in abatement should be first submitted is a matter vested in the discretion of the court, and where no injury is shown to have resulted no cause for a new trial arises. *Tynberg v. Cohen*, 67 Tex. 220, 2 S. W. 734.

[b] **Sending to the jury on their request, in the absence of the prisoner, a copy of the statutes calling their attention to the sections relating to homicide, which presumably the court had already read to them, is not prohibited by law and is not prejudicial, and is therefore not ground for new trial.** *Gandolfo v. State*, 11 Ohio St. 114. Compare 13 STANDARD PROC. 809, 966, 978; 16 STANDARD PROC. 487, 515, 558, 567.

32. **Fla.**—*Seymour v. Purnell*, 23 Fla. 232, 2 So. 312. **Ga.**—*Candler v. Hammond*, 23 Ga. 493. **Ind.**—*Sheeks v. Sheeks*, 98 Ind. 288. **Ia.**—*Riley v. Monohan*, 26 Iowa 507. **Tex.**—*Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

33. *Sheeks v. Sheeks*, 98 Ind. 288.

34. **Ind.**—*Sheeks v. Sheeks*, 98 Ind. 288. **Ia.**—*Riley v. Monohan*, 26 Iowa 507. **Tex.**—*Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. Rep. 479. **W. Va.**—*Neill v. Rogers Bros. Produce Co.*, 38 W. Va. 228, 18 S. E. 563.

35. *Alley v. State*, 76 Ind. 94, where the court considered a motion for postponement while a witness was testifying.

[a] **But the interruption of the trial by applications of persons for naturalization, no prejudice having resulted, has been held insufficient.** *Higgins v. Drucker*, 22 Ohio Cir. Ct. 112, 12 Ohio Cir. Dec. 220.

36. *Davis v. Mason*, 4 Pick. (Mass.) 156; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218.

37. *Brearley v. London & North Western Ry. Co.*, 15 T. L. R. (Eng.) 237; *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. (Eng.) 193.

38. *Fletcher v. London & North Western Ry. Co.*, 1 Q. B. 122, 61 L. J. Q. B. 24, 65 L. T. 605, 40 W. R. 182.

39. *Young v. Hoffman Mfg. Co., Ltd.*, (1907) 2 K. B. Div. 646. See *Seaton v. Burnand*, (1900) App. Cas. 135, 143; *Nevill v. Fine Arts & General Insurance Co.*, (1897) App. Cas. 68, 76, 66 L. J. Q. B. 195, 75 L. T. N. S. 606, 61 J. P. 500.

40. **Ga.**—*Savannah, etc. R. Co. v. Hardin*, 110 Ga. 433, 35 S. E. 681; *Lellyett v. Markham*, 57 Ga. 13. **Kan.**—*Heithecker v. Fitzhugh*, 41 Kan. 50, 20 Pac. 465. **Mo.**—*Richter v. United R. Co. of St. Louis*, 145 Mo. App. 1, 129 S. W. 1055. **Okla.**—*St. Louis & S. F. R. Co. v. Wilson*, 32 Okla. 752, 124 Pac. 326. **Va.**—*McDowell's Exr. v. Crawford*, 11 Gratt. (52 Va.) 377. **W. Va.**—*Neill v. Rogers Bros. Produce Co.*, 38 W. Va. 228, 18 S. E. 563. **Can.**—*Witty v. London, etc. R. Co.*, 1 Ont. W. R. 288.

(III.) **Officers of the Court.** — Irregularities with respect to referees, or other officers of the court, may also give rise to new trials. Where, for example, a referee has a personal interest in the case,⁴¹ or compels a party to call a hostile witness,⁴² new trials may be proper. Harmless irregularities, however, on the part of referees,⁴³ or a failure of a referee to file his report, will not entitle one to a new trial.⁴⁴ Nor is it a ground for a new trial that the official stenographer failed to file his transcribed notes within the time specified by statute.⁴⁵ Irregularities of officers in connection with the custody and deliberations of the jury may or may not justify a new trial, and are fully treated elsewhere in this work.⁴⁶

(IV.) **Of Counsel.** — Irregularities on the part of counsel during the trial, may be sufficient ground for new trial.⁴⁷

(V.) **Prevailing Party.** — The distinction between irregularity and misconduct on the part of the prevailing party,⁴⁸ is not easily drawn, and, in practice, new trials are, as a rule, based rather upon the misconduct of a party than upon irregularity. Such irregularity, however, is sometimes urged as ground for new trial.⁴⁹ Prejudicial irregularities on the part of an agent, employee, relative, or interested friend of the prevailing party will be imputed to the latter.⁵⁰

Instructions as to facts or evidence, see 13 STANDARD PROC. 829, et seq.

41. *Wehrum v. Kuhn*, 2 Jones & S. (N. Y.) 336, *affirmed*, 61 N. Y. 623.

42. *Beaman v. Todd*, 41 Hun 645, 4 N. Y. St. 84.

43. *Hunt v. Fish*, 4 Barb. (N. Y.) 324.

44. *McQuillan v. Donahue*, 49 Cal. 157; *Emerson v. Bigler*, 21 Mont. 200, 53 Pac. 621.

[a] The fact that a referee absconded without obeying an order to file with the court a transcript of the evidence, though it resulted in inconvenience, or even injustice, to the defendant, was no ground for a new trial where new trials are limited to specific statutory grounds, such a cause not being specified. *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.

45. *Hawaii v. Maga*, 19 Hawaii 157.

[a] That the court stenographer was unable to transcribe his notes and could not, therefore, furnish a transcript for appeal, does not warrant a new trial where the court granted the appellant ample time to prepare the evidence in the old way. *Crouch v. O'Banion*, 163 Ky. 581, 174 S. W. 3.

46. See the title "Juries and Jurors."

47. See *infra*, this note.

[a] Where counsel read in argument to the jury, under permission of the

court, certain prejudicial matter not in evidence and commented thereon, a new trial was granted for the irregularity. *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573.

48. **As to misconduct**, see *infra*, II, C.

49. *Louisville & N. R. Co. v. Turney*, 183 Ala. 398, 62 So. 885, new trial granted where party boarded and slept with a juror.

[a] The prevailing party's hysteria while on the witness stand is not sufficient ground for new trial. "Of course, if it appeared that the dramatic occurrence that took place in the midst of the trial was intentional, and for an improper motive, it would afford ground for setting aside the verdict. But here the affidavits . . . indicate quite clearly that the plaintiff's condition was not feigned, but was owing to the mental strain of several days of trial acting upon a weak and exhausted physical condition and a shattered nervous system." *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290.

50. *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123, where a female employee of a prevailing defendant had, during the trial, written letters, with reference to the case, to the judge.

j. *Verdict*.—(I.) *In General*.—Although new trials may be awarded upon the ground that the verdict is contrary to law,⁵¹ yet a verdict may be objectionable by reason of irregularity or defect, and still not "contrary to law," as that expression is used in the statute.⁵²

(II.) *Objection Necessary*.—For defects or irregularities which do not inherently render a verdict invalid, objection must be duly made, otherwise they will be considered waived.⁵³

(III.) *Harmless Error*.—The doctrine of harmless error likewise applies here as elsewhere, since irregularities and defects which do not affect the result, or work injury to a party, cannot be made the ground for a new trial.⁵⁴

(IV.) *Defects or Irregularities*.—That a verdict was received on Sunday is not a cause for setting it aside,⁵⁵ but a refusal to allow a poll of the jury has been held such an irregularity as justifies a new trial.⁵⁶ New trials have also been granted where the verdict was altered after it was recorded and the jury dismissed;⁵⁷ where because of clerical errors it failed to embody the true finding of the jury;⁵⁸ also for defects as to parties, as, for example, where a joint verdict was rendered against parties improperly joined.⁵⁹ A new trial will not be granted, however, for a mere clerical error in the form of the verdict.⁶⁰

(V.) *Uncertainty, Insufficiency*.—A new trial will be granted where the verdict is void on account of its obscurity or uncertainty.⁶¹

51. See *infra*, II, F.

52. *Bosseker v. Cramer*, 18 Ind. 44. Compare *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146.

53. *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Blake v. Bayley*, 16 Gray (Mass.) 531. See the title "Verdict."

54. Cal.—*Gates v. McLean*, 70 Cal. 42, 11 Pac. 489; *McKinney v. Smith*, 21 Cal. 374. Ia.—*Petrie v. Boyle*, 56 Iowa 163, 9 N. W. 114. Kan.—*Hart v. Gerretson Co.*, 91 Kan. 569, 138 Pac. 595. Me.—*Warren v. Williams*, 52 Me. 343. Minn.—*Finch v. Green*, 16 Minn. 355.

55. Ala.—*Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627. Ind.—*Cory v. Silcox*, 5 Ind. 370. Kan.—*Stone v. Bird*, 16 Kan. 488. N. Y.—*Hoghtaling v. Osborn*, 15 Johns. 119. Ohio.—*State v. Engle*, 13 Ohio 490.

[a] *Reaching Agreement on Sunday*. In the case of *Gholston v. Gholston*, 31 Ga. 625, a motion for a new trial on the ground that the jury retired and considered their verdict on Sunday was refused. It was held that such fact did not vitiate the verdict.

56. *Jackson ex dem. Fink v. Hawks*, 2 Wend. (N. Y.) 619; *Fox v. Smith*, 3 Cow. (N. Y.) 23; *White v. Archbald*

School Dist., 2 Pa. Co. Ct. 1. *Contra*, *Rutland v. Hathorn*, 36 Ga. 380; *Martin v. Maverick*, 1 McCord (S. C.) 24.

57. Ia.—*Oleson v. Meader*, 40 Iowa 662. S. D.—*Peterson v. Siglinger*, 3 S. D. 255, 52 N. W. 1062. Vt.—*McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408.

58. *Weston v. Gilmore*, 63 Me. 493. 59. *McVean v. Scott*, 46 Barb. (N. Y.) 379.

[a] *Otherwise by statute in Rhode Island*. *Maher v. James Hanley Brewing Co.*, 23 R. I. 343, 50 Atl. 392.

60. *State v. Morrow*, 13 Kan. 119. [a] *A motion for a new trial does not reach a defect in the form of the verdict*. *Bohr v. Neuenschwander*, 120 Ind. 449, 22 N. E. 416; *Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508; *Ridenour v. Miller*, 83 Ind. 208; *Bell v. State*, 42 Ind. 335.

61. Ga.—*Abbott v. Roach*, 113 Ga. 511, 38 S. E. 955; *Lake v. Hardee*, 55 Ga. 667. Mass.—*Barker Auto Co. v. Bennett*, 219 Mass. 304, 106 N. E. 990. N. Y.—*Hvatt v. New York Central, etc. R. Co.*, 6 Hun 306. N. C. *Turrentine v. Richmond, etc. R. Co.*, 92 N. C. 633. S. C.—*Eason v. Miller*, 18 S. C. 381. Eng.—*Oakley v. Ood-Deen*,

Accordingly, where it is not responsive to the issue,⁶² or where it fails to cover the material issues in a case,⁶³ or where it fails to set out the exact amount found to be due,⁶⁴ or where it includes items not appearing in evidence,⁶⁵ or where, in a criminal case, it is so defective that sentence cannot be imposed upon it,⁶⁶ new trials will, generally, be granted.

(VI.) **Special Verdicts.**—In special verdicts, where there is a failure to give specific answers to interrogatories,⁶⁷ or where the special findings are contradictory on material questions, or inconsistent either in

2 L. T. N. S. 357. **Can.**—Hosking v. Le Roi, 34 Can. Sup. Ct. 244; Buck v. Canadian, etc. R. Co., 7 Ont. W. R. 71.

[a] Where the statutory grounds are exclusive and do not include this as a ground, new trial cannot be granted because the verdict is indefinite. **Trask v. Boise King Placers Co.**, 26 Idaho 290, 142 Pac. 1073.

62. **Ill.**—Launtz v. Brown, 147 Ill. App. 99. **Ind.**—Jeffersonville Water Supply Co. v. Riter, 138 Ind. 170, 37 N. E. 652. **Ia.**—Maynard v. Des Moines, 159 Iowa 126, 140 N. W. 208; Farmers' Sav. Bank v. Burr, Forbes & Son, 159 Iowa 110, 140 N. W. 216. **Neb.**—Wilson v. City Nat. Bank, 51 Neb. 87, 70 N. W. 501. **Nev.**—Marshall v. Golden Fleece Gold & S. Min. Co., 16 Nev. 156. **N. Y.**—Fowler v. Anderson, 132 App. Div. 603, 116 N. Y. Supp. 1092. **R. I.**—Bowen v. White, 26 R. I. 68, 58 Atl. 252. **Tex.**—Marsalis v. Patton, 83 Tex. 521, 18 S. W. 1070; Waco Cement Stone Wks. v. Smith (Tex. Civ. App.), 162 S. W. 1158. **Can.**—Jamieson v. Harris, 35 Can. Sup. Ct. 625; Duns-muir v. Lowenberg, 34 Can. Sup. Ct. 228.

63. **Cal.**—Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Millard v. Supreme Council A. L. H., 3 Cal. (Unrep.) 96, 21 Pac. 825. **Fla.**—Connor v. Elliott, 59 Fla. 227, 52 So. 729. **Ind.**—Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146; Louisville, etc. R. Co. v. Green, 120 Ind. 367, 22 N. E. 327; Louisville, etc. R. Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Indiana, etc. R. Co. v. Finnell, 116 Ind. 414, 19 N. E. 204. **Mass.**—Brooks v. Prescott, 114 Mass. 392. **Tex.**—Collins v. Kay, 69 Tex. 365, 6 S. W. 313. **Va.**—Triplett v. Micou, 1 Rand. (22 Va.) 269. **Can.**—Jamieson v. Harris, 35 Can. Sup. Ct. 625; McPherson v. Moody, 35 N. Bruns. 51; Myers v. To-

ronto R. Co., 30 Ont. L. Rep. 263, 5 Ont. W. N. 587; Blois v. Midland, etc. R. Co., 39 Nova Scotia 242; Bickle v. Mathewson, 26 U. C. Q. B. 137.

[a] **Finding of Facts; Request for Modification.**—If, upon the trial of a question of fact by the district court material facts have been proved, but not found, the district court should be requested, before any motion for a new trial, to modify the finding made to include the additional facts, or to make further findings covering such facts; and only in the advent of a refusal of the court to make the correction or to supply the omission does ground for a new trial exist. **Shuler v. Lashhorn**, 67 Kan. 694, 74 Pac. 264.

64. **Ga.**—Lake v. Hardee, 57 Ga. 459. **Ia.**—Collings v. Hamilton, 14 La. 343; Hosea v. Miles, 13 La. 107. **Mass.**—Peterson v. Patrick, 126 Mass. 395. **Okla.**—Fitch v. Green, 39 Okla. 18, 134 Pac. 34. **Va.**—Eppe's Admrs. v. Smith, 4 Munf. (18 Va.) 466. **Can.**—Bletcher v. Burn, 24 U. C. Q. B. 124.

65. **McDole v. Simmons**, 45 Ill. App. 328.

66. **State v. Lowry**, 74 N. C. 121.

[a] In a criminal case where the verdict fails to show the degree of the offense of which the defendant was convicted, it is fatally defective and a new trial should be granted. **State v. Huber**, 8 Kan. 447.

67. **Cal.**—People v. Russ, 132 Cal. 102, 64 Pac. 111. **Ind.**—Staser v. Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Astley v. Capron, 89 Ind. 167. **Kan.**—Baehler v. Consolidated Ranch Co., 31 Kan. 502, 3 Pac. 343; Minneapolis Harvester Works Co. v. Cummings, 26 Kan. 367. **S. C.**—Hedley v. Jordan, 2 Rich. 453. **Vt.**—Whitney v. Londonderry, 54 Vt. 41. **Can.**—McPhee v. Esquimalt, etc. R. Co., 49 Can. Sup. Ct. 43; Marshall v. Gowans, 24 Ont. L. R. 522, 20 Ont. W. R. 37; Reid v. Barnes, 25 Ont. 223.

themselves, or with the general verdict returned,⁶⁸ or where the special verdict fails to cover the issues,⁶⁹ new trials, in a number of states, are likewise allowed.

k. *Judgments and Decrees*.—Irregularities in judgments and decrees are not grounds for new trials.⁷⁰ Thus, an irregularity in the entry of the judgment,⁷¹ or the allegation that the judgment is contrary to law, or is not supported by the evidence,⁷² is not cause for a new trial.

68. **Cal.**—*Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574; *Harris v. Harris*, 59 Cal. 623. **Ga.**—*Mitchell v. Printup*, 27 Ga. 469. **Idaho.**—*Gwin v. Gwin*, 5 Idaho 271, 48 Pac. 295. **Ill.** *St. Louis Bridge Co. v. Fellows*, 31 Ill. App. 282. **Ind.**—*Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Van Hook v. Young's Est.*, 29 Ind. App. 471, 64 N. E. 670. **Kan.**—*Roediger v. Union Pac. R. Co.*, 95 Kan. 146, 147 Pac. 837; *Anders v. Atehison, T. & S. F. R. Co.*, 91 Kan. 378, 137 Pac. 966; *Wood v. Union Pac. R. Co.*, 88 Kan. 477, 129 Pac. 193; *Francis v. Brock*, 80 Kan. 100, 102 Pac. 472. **Neb.**—*Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, 50 N. W. 10. **Wash.**—*Loy v. Northern Pac. R. Co.*, 68 Wash. 33, 122 Pac. 372. **Wis.**—*Farley v. Chicago, M. & St. P. Ry. Co.*, 89 Wis. 206, 61 N. W. 769; *Burns v. North Chicago Rolling Mill Co.*, 60 Wis. 541, 19 N. W. 580. **Wyo.**—*Wyoming Coal Min. Co. v. Stancko*, 22 Wyo. 110, 135 Pac. 1090, 138 Pac. 182. **Can.**—*Higgins v. Hamilton Elect. Light, etc. Co.*, 5 Ont. W. R. 136; *Snow v. Fraser*, 30 Nova Scotia 80.

[a] **Error of the Court.**—Probably the correct ground in such cases is that it is error for the court to render judgment on such contradictory findings. See *Shoemaker v. St. Louis & S. F. Ry. Co.*, 30 Kan. 359, 2 Pac. 517.

69. **Ind.**—*Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146. **Minn.**—*Crich v. Williamsburg City F. Ins. Co.*, 45 Minn. 441, 48 N. W. 198. **N. C.**—*Hilliard & Co. v. Outlaw*, 92 N. C. 266.

70. **Cal.**—*Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22; *Martin v. Matfield*, 49 Cal. 42. **Ga.**—*Coleman v. Slade*, 75 Ga. 61. **Idaho.**—*Curtis v. Walling*, 2 Idaho 416, 18 Pac. 54. **Ind.**—*Rosenzweig v. Frazer*, 82 Ind.

342. **Mont.**—*Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692. **N. Y.**—*Garbutt v. Garbutt*, 43 Hun 635, 4 N. Y. St. 416.

[a] **No Reason for New Trial.** "Why should the case itself be tried over because the court has erred in framing the proper judgment on the verdict? Surely the verdict is not vitiated by what is and must be subsequent to it in the order of proceedings." *Bleckley, J.*, in *Green v. Frank*, 63 Ga. 78, 83.

The proper procedure in such cases is a motion to vacate the judgment. See the title "Judgments."

71. **Fla.**—*Broward v. Roche*, 21 Fla. 465. **Ga.**—*Bond v. Sullivan*, 133 Ga. 160, 65 S. E. 376, 134 Am. St. Rep. 199; *Green v. Frank*, 63 Ga. 78. **Neb.** *Burlington & M. R. R. Co. v. Beebe*, 14 Neb. 463, 16 N. W. 747. **Ohio.** *Backus v. Aurora F. & M. Ins. Co.*, 4 Ohio Dec. (Reprint) 470, 2 Cleve. L. Rep. 204. **S. C.**—*Gage v. Sartor*, 2 Mill 247.

72. **Cal.**—*Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22; *Martin v. Matfield*, 49 Cal. 42. **Ga.**—*Crow v. Crow*, 134 Ga. 10, 67 S. E. 400; *Bond v. Sullivan*, 133 Ga. 160, 65 S. E. 376, 134 Am. St. Rep. 199; *Booth & Co. v. L. Mohr & Sons*, 122 Ga. 333, 50 S. E. 173. **Idaho.**—*Curtis v. Walling*, 2 Idaho 416, 18 Pac. 54. **Ind.**—*Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Rodefer v. Fletcher*, 89 Ind. 563; *Rosenzweig v. Frazer*, 82 Ind. 342; *Groves v. Ruby*, 24 Ind. 418. **Mont.** *Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692. **N. Y.**—*Walsh v. Kelly*, 27 How. Pr. 359, *affirmed*, 40 N. Y. 556.

[a] **Rule Governing Verdicts Not Applicable.**—(1) While new trials are regularly granted on the ground that the verdict or findings are not supported by the law and evidence, yet it is no ground for a new trial that the judgment is not so sustained and

1. *Taxing Costs or Fees.*—An irregularity in taxing costs or fees does not ordinarily constitute ground for a new trial.⁷⁵

C. MISCONDUCT.—1. *In General.*—Another broad ground for the granting of a new trial may be summed up under the general terms of misconduct, including misconduct of the prevailing party or his counsel, misconduct of witnesses, misconduct of jurors, misconduct of the court, and misconduct of third persons. It is a ground recognized both at common law and under many of the statutes, in both civil and criminal cases,⁷⁴ though under some statutes the term misconduct is not used or is confined to particular persons such as the jury.⁷⁵

Although the terms are sometimes interchanged, yet the technical difference between misconduct and irregularity has been previously pointed out;⁷⁶ but it should be further said that the term "misconduct" used in the statutes relative to new trials does not necessarily imply an evil or corrupt motive.⁷⁷

2. *Of Prevailing Party.*—Any misconduct of the prevailing party that prevents the losing party from having a fair trial is a general ground for a new trial.⁷⁸ Such misconduct, moreover, is not confined to matters occurring at the trial, but includes acts which although occurring before the trial operate at it.⁷⁹ A party's mis-

a motion for a new trial is not the proper remedy in such cases. *Cal.* *Martin v. Matfield*, 49 Cal. 42. *Ga.* *Coleman v. Slade*, 75 Ga. 61. *Idaho.* *Curtis v. Walling*, 2 Idaho 416, 18 Pac. 54. *Ind.*—*Rosenzweig v. Frazer*, 82 Ind. 342. *N. Y.*—*Garbutt v. Garbutt*, 43 Hun 635, 4 N. Y. St. 416. (2) A motion for a new trial reaches errors in the verdict or such errors of the court as may lead to the verdict, but it is not the proper method of correcting errors in a decree or judgment. *Potts v. Atlanta*, 140 Ga. 431, 79 S. E. 110; *First State Bank v. Carver*, 111 Ga. 876, 36 S. E. 960.

[b] But in a criminal case, the imposing of a sentence not authorized by law is an error for which the reviewing court may order a new trial. *Brown v. State*, 47 Ala. 47.

73. *Broward v. Roche*, 21 Fla. 465; *Green v. Frank*, 63 Ga. 78.

74. *Ga.*—*Carey v. King*, 5 Ga. 75. *Ia.*—*Clesle v. Frerichs*, 95 Iowa 83, 63 N. W. 581. *Mo.*—*Boyce v. Aubuchon*, 34 Mo. App. 315. *N. H.*—*Barron v. Jackson*, 40 N. H. 365. *Ohio.*—*Foreman v. Sandusky, D. & C. R. Co.*, 2 Ohio Dec. 611. *Eng.*—*Biggs v. Evans*, 132 L. T. 606; *Hughes v. Budd*, 8 Dowl. P. C. 315.

[a] Misconduct which may or may not be fraudulent is as well recognized

a ground for the granting of new trials as either surprise or newly discovered evidence. *Corley v. New York & H. R. Co.*, 12 App. Div. 409, 42 N. Y. Supp. 941.

[b] If the successful party or any officer of the court or the jury have been guilty of gross misconduct, a new trial should be granted. *Meyer v. Fiegel*, 38 How. Pr. (N. Y.) 424.

As to misconduct of jury and others in connection with custody and deliberations of jury, see the title "Juries and Jurors."

75. See the statutes.

76. See *supra*, II, B, 2.

77. *Chicago, St. P., M. & O. Ry. Co. v. Deaver*, 45 Neb. 307, 63 N. W. 790.

78. *Kan.*—*Atchison & N. R. Co. v. Wagner*, 19 Kan. 335, 347; *Pond v. Barton*, 8 Kan. App. 601, 56 Pac. 139. *Ohio.*—*Foreman v. Sandusky, D. & C. R. Co.*, 2 Ohio Dec. 611. *Eng.*—*Wolff v. Goldring*, 44 L. J. C. P. 214, 32 L. T. N. S. 161, 23 Wkly. Rep. 473.

[a] Abusive language by a prevailing party to the other party's counsel, during argument, may be prejudicial misconduct. See *Mulcahy v. National Surety Co.*, 167 App. Div. 651, 153 N. Y. Supp. 37.

79. *Phares v. Krhut*, 76 Kan. 238, 91 Pac. 52.

conduct that warrants a new trial may be, for example, illegal means, on his part, to gain an advantage in selecting a jury;⁸⁰ tampering with witnesses;⁸¹ perjury;⁸² attempting to influence unlawfully the jury;⁸³ or any undue intimacy on his part with jurors.⁸⁴ Indeed, it has been said that for any, even the least, intermeddling on the part of the prevailing party with a juror, the verdict will be set aside.⁸⁵ Consequently, the treating of a juror by the prevailing party has been repeatedly held a cause for a new trial,⁸⁶ unless it is clearly⁸⁷

80. **Ark.**—*Pelham v. Page*, 6 Ark. 535. **Ga.**—*Walker v. Walker*, 11 Ga. 203. **Kan.**—*Perry v. Bailey*, 12 Kan. 539; *May, Weil & Co. v. Ham*, 10 Kan. 598; *Madden v. State*, 1 Kan. 340. **Me.**—*Studley v. Hall*, 22 Me. 198. **Mass.**—*Knight v. Freeport*, 13 Mass. 218; *Amherst v. Hadley*, 1 Pick. 38. **N. H.**—*Allen, Cummings & Co. v. Aldrich*, 29 N. H. 63. **R. I.**—*Tucker v. South Kingston*, 5 R. I. 558.

81. **Ga.**—*Carey v. King*, 5 Ga. 75, procuring a witness to absent himself. **Ia.**—*First Nat. Bank v. Wabash, St. L. & P. Ry. Co.*, 61 Iowa 700, 17 N. W. 48, procuring false testimony. **Kan.**—*Atchison & N. R. Co. v. Wagner*, 19 Kan. 335. **Me.**—*Inhab. of Warren v. Inhab. of Hope*, 6 Me. 479, suppression of evidence. **Tex.**—*Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702.

[a] A party's unsuccessful attempt to persuade a witness to testify falsely is no ground for a new trial. *Sullivan v. Herrick*, 161 Iowa 148, 140 N. W. 359.

82. *Green v. Bulkley*, 23 Kan. 130.

As to perjury of witnesses, in general, see *infra*, II, C, 4.

For misconduct of the prevailing party as a witness, see *infra*, II, C, 4.

83. *Perry v. Bailey*, 12 Kan. 539. See the title "Juries and Jurors."

[a] Upon view of premises by the jury, the calling of attention to pertinent facts, by the prevailing party, is misconduct and vitiates the verdict. *Nypano Ry. Co. v. Wadsworth Salt Co.*, 9 Ohio Cir. Ct. (N. S.) 114.

84. *Grovenor v. Fenwick*, 7 Mod. 156, 87 Eng. Reprint 1162. See 17 STANDARD PROC. 491.

85. **Ark.**—*Pelham v. Page*, 6 Ark. 535. **Ga.**—*Walker v. Walker*, 11 Ga. 203. **Kan.**—*Perry v. Bailey*, 12 Kan. 539. **N. H.**—*Allen, Cummings & Co. v. Aldrich*, 29 N. H. 63. **Ohio.**—*Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507.

[a] **Unsuccessful Attempts.**—Any attempt on the part of the prevailing party to corrupt a juror, though unsuccessful, is good ground for a new trial. *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 Ohio St. 328. But see 17 STANDARD PROC. 502, note 47.

86. **U. S.**—*Harrison v. Rowan*, 4 Wash. C. C. 32, 11 Fed. Cas. No. 6,142, dictum. **Ark.**—*Pelham v. Page*, 6 Ark. 535. **Cal.**—*Wright v. Eastlick*, 125 Cal. 517, 58 Pac. 87. **Ga.**—*Walker v. Walker*, 11 Ga. 203. **Idaho.**—*Burke v. McDonald*, 3 Idaho 296, 29 Pac. 98. **Ind.**—*Huston v. Vail*, 51 Ind. 299. **Kan.**—*Perry v. Bailey*, 12 Kan. 539. **Me.**—*Studley v. Hall*, 22 Me. 198. **Mich.**—*Harrington v. Probate Judge*, 153 Mich. 660, 117 N. W. 62. **Neb.**—*Vose v. Muller*, 23 Neb. 171, 36 N. W. 583. **N. J.**—*Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193. **Ohio.**—*Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507. **Pa.**—*Keegan v. McCandless*, 7 Phila. 248; *Redmond v. Royal Ins. Co.*, 7 Phila. 167. **Tex.**—*Palm v. Chernowsky*, 28 Tex. Civ. App. 405, 67 S. W. 165; *Marshall v. Watson*, 16 Tex. Civ. App. 127, 40 S. W. 352. **Wash.**—*Vollrath v. Crow*, 9 Wash. 374, 37 Pac. 474.

See 17 STANDARD PROC. 502, et seq.

[a] **Illustrations.**—(1) In *Vollrath v. Crow*, 9 Wash. 374, 37 Pac. 474, the plaintiff and one of the jurors were playing cards and drinking together in a saloon, and out walking together and talking, though not about the case, during the time of the trial and the verdict for the plaintiff was set aside. (2) In *Wright v. Eastlick*, 125 Cal. 517, 58 Pac. 87, one of the jurors attended a dance with a party in the action. The two drank together, and appeared intimate. A verdict for the offending party was set aside.

87. *Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507; *Marsh v. Clark Co.*, 11 Ohio Dec. (Reprint)

shown it was not intended to influence his action, and that it had no influence on his mind as a juror.

3. Of Counsel.—Misconduct of counsel is imputable to the party whom he represents,⁸⁸ and counsel's misconduct sufficient to give rise to a new trial may consist of abusive or improper remarks in the presence of the jury during the trial of the case,⁸⁹ made, for example, in connection with the examination of witnesses,⁹⁰ or in his argument to the jury.⁹¹ Persistent attempts to introduce prejudicial evidence which is entirely inadmissible, after the court has repeatedly denied the right to do so, is, also, misconduct, and may be ground for a new trial.⁹² Social intercourse between counsel and jurors during trial, if not merely conventional or a matter of common civility, may be misconduct sufficient to require a new trial.⁹³ Thus it is misconduct for counsel to treat the jurors in the case,⁹⁴ or to otherwise

442, 27 Wkly. L. Bul. 56. See 17 STANDARD PROC. 504.

[a] **Mere Social Drinking.**—That the prevailing party drank liquor socially with some of the jury during an intermission of the trial, is not sufficient ground for a new trial. *Insurance Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046.

[b] **Cigars as if From Bailiff.**—That the prevailing party gave cigars to the bailiff to be given to the jurors, not as from the party but as from the bailiff, is not grounds for new trial. *Wichita & W. R. Co. v. Feehheimer*, 49 Kan. 643, 31 Pac. 127. But see 17 STANDARD PROC. 504, notes 57-59.

88. *Atchison, T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010; *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. 870.

89. *Colo.*—*Heller v. People*, 22 Colo. 11, 43 Pac. 124. *Kan.*—*Holman v. Raynesford*, 3 Kan. App. 676, 44 Pac. 910. *Tex.*—*Laubach v. State*, 12 Tex. App. 583.

90. *Nalley v. State*, 28 Tex. App. 387, 13 S. W. 670.

91. *Fla.*—*Newton v. State*, 21 Fla. 53. *Kan.*—*Huckell v. McCoy*, 38 Kan. 53, 15 Pac. 870. *Miss.*—*Martin v. State*, 63 Miss. 505, 56 Am. Rep. 813. *N. C.* *State v. Rogers*, 94 N. C. 860; *State v. Smith*, 75 N. C. 306. *Ohio.*—*Miller v. State*, 73 Ohio St. 195, 76 N. E. 823. *Tex.*—*Hardy v. State* (Tex. App.), 13 S. W. 1008; *Bryson v. State*, 20 Tex. App. 566.

As to proper limits of argument, see the title "Arguments."

[a] **Must Overstep Legitimate Ar-**

gument.—With reference, however, to improper remarks of counsel in the presence of the jury, there must be something in such remarks, beyond truthful statement of pertinent facts or legitimate and respectful argument. *Warnke v. Leschen & Sons Rope Co. (Mo.)*, 178 S. W. 76.

[b] **Comments on accused's failure to testify** may be sufficient ground for a new trial. *U. S.*—*Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765, 27 L. ed. 650. *Ill.*—*Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132. *Miss.* *Yarbrough v. State*, 70 Miss. 593, 12 So. 551. *Mo.*—*State v. Degonia*, 69 Mo. 485. See fully 2 STANDARD PROC. 776, 783.

92. *McClendon v. Bank of Advance*, 188 Mo. App. 417, 174 S. W. 203.

93. See 17 STANDARD PROC. 494, 502.

94. *Ga.*—*Rainy v. State*, 100 Ga. 82, 27 S. E. 709; *Walker v. Hunter*, 17 Ga. 364. *Ia.*—*Stafford v. Oskaloosa*, 57 Iowa 748, 11 S. W. 668. *Mich.*—*People v. Montague*, 71 Mich. 447, 39 N. W. 585. *N. Y.*—*Steenburgh v. McRorie*, 66 Misc. 510, 113 N. Y. Supp. 1118. *Can.*—*Nadeau v. Theriault*, 37 N. Bruns. 498; *Stewart v. Woolman*, 26 Ont. 714.

See 17 STANDARD PROC. 502.

[a] **Waiver.**—In the case of *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188, the court said: "The entertainment of the jury by the plaintiff and his sons ought not to have been permitted by the officer in charge of them; it was highly improper since its natural tendency was to predispose and bias the jury in favor of the plaintiff. It does not appear, however, that the plaintiff or

improperly attempt to influence their verdict.⁹⁵ However, although the conduct of counsel may violate professional ethics, yet it may not be sufficient ground for a new trial.⁹⁶ While a new trial will not generally be granted for improper remarks of counsel which have been provoked by the counter misconduct of opposing counsel,⁹⁷ yet the fact that counsel of both parties participate in harmful misconduct, may be only an added reason for a new trial.⁹⁸

4. Of Witnesses.—Where it is apparent that the misconduct of a witness affects the verdict, a new trial may be granted.⁹⁹ The misconduct of a witness may consist in perjury,¹ although it is sometimes held that a conviction of perjury must first be obtained before a new trial will be granted by reason of it,² and that a new trial is not justified merely because the judge from his observations of the demeanor of witnesses thinks them unworthy of belief.³ Yet a trial

his sons had any such intention, or that they took advantage of the opportunity to influence any of the jury against the defendant or in favor of the plaintiff. . . . The defendant having proceeded without objection to what had occurred, and thereby subjected the plaintiff to the expense of a trial occupying several days which might have been avoided if the objection had been seasonably made, ought not to be permitted, after the jury have rendered a verdict adverse to it, to urge that objection as a reason for setting aside that verdict."

But treating after verdict is not ordinarily misconduct warranting a new trial. 17 STANDARD PROC. 504.

95. See 17 STANDARD PROC. 501, 502.

[a] **Unsuccessful Attempt.**—Any attempt on the part of counsel to corrupt a juror, although unsuccessful, is misconduct. *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 Ohio St. 328. But see 17 STANDARD PROC. 502, notes 57-58.

96. *Wolpers v. Spokane*, 72 Wash. 562, 131 Pac. 230.

[a] **Where counsel appeared before the jury in the court room under the influence of liquor** it was held not a ground for a new trial. *Robishaw v. Schiller Piano Co.*, 179 Ill. App. 163.

97. *Miner v. Lorman*, 66 Mich. 530, 33 N. W. 866; *Willis v. McNatt*, 75 Tex. 69, 12 S. W. 478.

98. *Ensor v. Smith*, 57 Mo. App. 584.

99. *Mo.*—*Ensor v. Smith*, 57 Mo. App. 584. *N. Y.*—*Chesebrough v. Conover*, 59 Hun 623, 13 N. Y. Supp. 374, 36 N. Y. St. 644. *Ohio.*—*State v. Ross*,

9 Ohio Dec. (Reprint) 590, 15 Wkly. L. Bul. 238.

See 17 STANDARD PROC. 496, 503, note 53.

1. *Cal.*—*Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336. *Ga.*—*Munro v. Moody*, 78 Ga. 127, 2 S. E. 688. *N. Y.*—*Chesebrough v. Conover*, 59 Hun 623, 13 N. Y. Supp. 374, 36 N. Y. St. 644.

2. *Ga.*—*Munro v. Moody*, 78 Ga. 127, 2 S. E. 688; *Richardson v. Roberts*, 25 Ga. 671. *N. H.*—*Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574. *N. Y.*—*Holtz v. Schmidt*, 12 Jones & S. 327. *N. C.* *Dyche v. Patton*, 56 N. C. 332.

[a] **Perjured Witnesses.**—Where the witnesses on whose testimony the verdict was obtained were later convicted of perjury in giving such evidence, new trials may be granted. *Seward v. Cease*, 50 Ill. 228; *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574.

[b] **The death of a witness** since the trial, rendering his conviction impossible, obviates the rule, and upon other satisfactory proof of the perjury, if material, a new trial may be granted. *Dyche v. Patton*, 56 N. C. 332.

[c] **Where the conviction for perjury is procured through testimony of an interested party** the court may refuse to grant a new trial—as in a divorce case where the defeated party's testimony was largely responsible for the conviction. *Horne v. Horne*, 75 N. C. 101.

[d] **An affidavit of the witness admitting his perjury** may be sufficient. *Seward v. Cease*, 50 Ill. 228.

3. *Bergh v. Spivakowski*, 86 Conn.

court may, according to some authorities, grant a new trial for insufficiency of the evidence where it disbelieves some of the witnesses.⁴

The perjury of witnesses is a matter that is also included in the ground of surprise,⁵ and, moreover, in case of perjury subsequently established or admitted, a new trial might be appropriately granted on the ground of newly discovered evidence.⁶

Plaintiff's hysteria on the witness stand is not ground for a new trial,⁷ though his malingering may be.⁸ Improper communications by a witness with the jury may be ground for new trial.⁹

5. Of Jury.—The principles that should control the conduct of the jury and the effect of their misconduct on their verdict have been set forth elsewhere in this work.¹⁰ But a juror may be guilty of harmful misconduct before the trial begins.¹¹ Thus, he may, on his preliminary examination, conceal his bias and prejudice, and by misrepresentation be accepted as a juror, thereby warranting a new

98, 84 Atl. 329, 41 L. R. A. (N. S.) 855. It appeared in this case that the reason why the trial judge set aside the verdict was that from "his observation of the demeanor of the witness (the plaintiff) on the stand," he "judged that he was neither frank nor honest in his statements," and that the jury should not have believed him." The supreme court of errors in reversing the judgment, held that the trial court erred in setting aside the verdict upon this ground, unless the evidence shows that the jury could not fairly and reasonably have credited the plaintiff's testimony. See further, *Lewis v. Healy*, 73 Conn. 136, 46 Atl. 869.

4. *Idaho*.—*Wolfe v. Ridley*, 17 Idaho 173, 104 Pac. 1014, 20 Ann. Cas. 39; *Jones v. Campbell*, 11 Idaho 752, 84 Pac. 510. *Kan.*—*Drew v. Corrigan*, 77 Kan. 839, 90 Pac. 782. *Ky.*—*Hurt v. Louisville & N. R. Co.*, 116 Ky. 545, 76 S. W. 502. *Mont.*—*Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146. *Wis.*—*Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 118 N. W. 350, 119 N. W. 289, 23 L. R. A. (N. S.) 296.

But see *infra*, II, G, 5, a, (IV), as to the right of the court to pass on the credibility of the witnesses, on motion for new trial.

[a] **New Trial Upheld.**—In the case of *Mullen v. Butte*, 37 Mont. 183, 95 Pac. 597, a new trial was granted, and the order upheld on appeal, where the trial judge set aside the verdict because he considered the testimony of the one witness, upon whose sole tes-

timony the plaintiff's case rested, unworthy of belief. The reviewing court held that it did not appear that the discretion of the lower court had been abused.

5. See *infra*, II, E, 2, k, (VI), (B). [a] **Effect of Statute.**—Although the perjury of a witness is usually classed under the doctrine of "surprise," yet under a statute expressly allowing a new trial for the perjury of a witness, it is not essential that an aggrieved party should be "surprised" by the perjury. See *Rickroad v. Martin*, 43 Mo. App. 597.

6. *Vivian Collieries Co. v. Cahall*, 184 Ind. 473, 110 N. E. 672. See *infra*, II, H, 3, d.

7. *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290.

8. See *infra*, this note.

[a] **In a personal injury case the unnecessary use of crutches by plaintiff in going to and from the witness stand, he having walked readily without crutches just before and after the trial, was held good ground.** *Cerley v. New York & H. R. Co.*, 12 App. Div. 409, 42 N. Y. Supp. 941.

9. *Simpson v. Kent*, 9 Phila. (Pa.) 30; *Mench v. Bolbach*, 4 Phila. (Pa.) 68; *Vanmeter v. Kitzmiller*, 5 W. Va. 380. See 17 STANDARD PROC. 496.

10. See the title "**Juries and Jurors.**"

11. *Campbell v. Hackney Furnishing Co., Ltd.*, 22 T. L. R. 318; *Allum v. Boulton*, 9 Exch. 738, 2 C. L. R. 1072, 23 L. J. Ex. 208, 18 Jur. 406, 2 Wkly. Rep. 459.

trial.¹² Such misrepresentations must be of a certain and definite character, however, and not mere conclusions of the aggrieved party.¹³

6. **Of the Court and Its Officers.**—There may also be misconduct on the part of the court that will justify a new trial,¹⁴ although in most cases such judicial faults may perhaps be more properly referred to as irregularities.¹⁵ Abusive, offensive, or improper remarks made by the court in the presence of the jury, such language having a tendency to influence the verdict, is ground for a new trial.¹⁶ It is also misconduct for the court to prejudice a case by asking objectionable questions of witnesses.¹⁷ Moreover, pending the trial, the personal conduct of the judge with the successful party, his agents, or representatives, may be such as to raise the questions of his impartiality and a fair trial.¹⁸ Likewise, misconduct on the part of officers of the court whereby an aggrieved party was not given a fair trial is ground for new trial.¹⁹

7. **Of Third Persons.**—Improper conduct tending to influence a jury on the part of relatives, friends, or agent of a party, may be sufficient ground for a new trial.²⁰ Improper remarks by bystanders

12. **U. S.**—Hyman *v.* Eames, 41 Fed. 676. **Ind.**—Percy *v.* Michigan Mut. L. Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673. **Mo.**—Gibney *v.* St. Louis T. Co., 204 Mo. 704, 103 S. W. 43, 47. **Utah.**—Tarpey *v.* Madsen, 26 Utah 294, 73 Pac. 411. **Wash.**—Heasley *v.* Nichols, 38 Wash. 485, 80 Pac. 769.

13. Smith *v.* Puget Sound Electric Ry., 211 Fed. 765.

[a] In a criminal case, where a juror had previously expressed a desire to serve on the jury and to punish the defendant, the court said that whether this amounted to "misconduct" under the statute or not, the court had inherent power, outside the statute, to grant a new trial by reason of the defendant's constitutional right to be tried by an impartial jury. People *v.* Bishop, 66 App. Div. 415, 73 N. Y. Supp. 226.

14. Cone *v.* Citizens' Bank, 4 Kan. App. 470, 46 Pac. 414.

[a] "The ground and foundation of granting new trials, when either the judge or the jury are to blame, is one and the same, viz, doing justice to the party." The Queen *v.* The Corporation of Helston, 10 Mod. 202 (A. D. 1714), 88 Eng. Reprint 693.

Communications between court and jury during the deliberations of the latter, see 17 STANDARD PROC. 481.

15. See *supra*, II, B; and see Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540.

16. **Ga.**—Lellyett *v.* Markham, 57 Ga. 13; Young *v.* Moody, 48 Ga. 498. **Ia.**—State *v.* Stowell, 60 Iowa 535, 15 N. W. 417. **Kan.**—Walker *v.* Coleman, 55 Kan. 381, 40 Pac. 640, 49 Am. St. Rep. 254.

See Bellamy *v.* State, 56 Fla. 43, 47 So. 868, as to demeanor of court.

17. Bellamy *v.* State, 56 Fla. 43, 47 So. 868.

18. Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123.

19. Wehrum *v.* Kuhn, 2 Jones & S. (N. Y.) 336 (*affirmed* in 61 N. Y. 623); Beaman *v.* Todd, 41 Hun 645, 4 N. Y. St. 84; State *v.* Miller, 13 Ohio C. C. 67, 7 Ohio Cir. Dec. 552.

Misconduct of officers with respect to jury, see the title "Juries and Jurors."

20. See the title "Juries and Jurors."

[a] Illustrations.—(1) In Palmer *v.* Utah & N. R. Co., 2 Idaho 315, 13 Pac. 425, the father of one of the plaintiffs and the grandfather of another, during the time the cause was being tried, visited and patronized a saloon owned by one of the jurors, and, though in his affidavit he said that he had been patronizing the same saloon for six years, a verdict for the plaintiffs was set aside. (2) In Bradbury *v.* Cony, 62 Me. 223, 16 Am. Rep. 449, it was charged that the son of the defendant had taken some of the jurors and showed them the property in con-

in the presence of the jury,²¹ or the fact that bystanders applauded remarks of the prosecuting attorney,²² especially where the judge immediately rebuked such misconduct,²³ may not be sufficiently prejudicial to require a new trial. Yet prejudicial statements in a juror's presence, or attacks, out of court, in presence of a juror, upon the credibility of witnesses, may justify a new trial.²⁴

8. Must Be Objected to.—As in other matters, misconduct should, as a rule, be objected to at the time of its occurrence if it is to be made available for a new trial.²⁵ An exception arises, however, in

controversy. A verdict for the defendant was set aside therefor. (3) In *Knigh v. Freeport*, 13 Mass. 218, a son-in-law of one of the parties talked to a juror, and told him that the case was one of great consequence to him, and the verdict was set aside. (4) In *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408, a friend of the prevailing party had talked to a juror about the case, and the verdict was set aside.

[b] **Where hand bills reflecting on the plaintiff's character** had been distributed in court and shown to the jury, a new trial was granted, although defendant denied all knowledge of the affair. *Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 726, 7 Moore 87, 129 Eng. Reprint 1289.

21. *Cal.*—*People v. Boggs*, 20 Cal. 432. *Ga.*—*Stevens v. State*, 93 Ga. 307, 20 S. E. 331; *McTyier v. State*, 91 Ga. 254, 18 S. E. 140. *Ia.*—*Ridenour v. Clarinda*, 65 Iowa 465, 21 N. W. 779. *N. J.*—*State v. Cucuel*, 31 N. J. L. 249. *N. Y.*—*Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. 141. *N. C.*—*State v. Jackson*, 112 N. C. 851, 17 S. E. 149.

But see 17 STANDARD PROC. 501.

22. *Debney v. State*, 45 Neb. 856, 64 N. W. 446, 34 L. R. A. 851. See 17 STANDARD PROC. 500, note 36.

23. *State v. Larkin*, 11 Nev. 314.

24. *Ia.*—*Welch v. Taverner*, 78 Iowa 207, 42 N. W. 650. *Me.*—*York v. Wyman*, 115 Me. 353, 98 Atl. 1024, L. R. A. 1917B. 246. *Mont.*—*State v. Landry*, 29 Mont. 218, 74 Pac. 418. *N. H.*—*State v. Ayer*, 23 N. H. 301. *Ohio.*—*Briggs v. Rowley*, 7 Ohio N. P. 651, 10 Ohio Dec. 177.

25. **Misconduct of Prevailing Party; Objection Necessary.**—*Conn.*—*James v. Bowen*, 83 Conn. 702, 78 Atl. 420. *Ill.*—*Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290. *Ind.*—*Pierce v. Cubberly*, 19 Ind. 157. *Ia.*—*Riech v. Bolch*, 68 Iowa 526, 27 N. W. 507. *N. H.*—*Tabor v. Judd*, 62 N. H. 288.

N. Y.—See *Heywood v. Doherty*, 129 N. Y. Supp. 507. *Tex.*—*Jones v. Smith*, 21 Tex. Civ. App. 440, 52 S. W. 561.

[a] **Misconduct of Counsel.**—Objectionable remarks and arguments of counsel, provided they are sufficiently prejudicial to be made the basis of a new trial, must be objected to when made, since a failure to call the attention of the court to the alleged misconduct and to invoke its ruling, will constitute a waiver. *U. S.*—*Chandler v. Thompson*, 30 Fed. 38. *Ala.*—*Louisville, etc. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 27 So. 760. *Ga.*—*Southern R. Co. v. Dean*, 128 Ga. 366, 57 S. E. 702. *Ill.*—*North Chicago St. R. Co. v. Shreve*, 70 Ill. App. 666. *Ia.*—*Riech v. Bolch*, 68 Iowa 526, 27 N. W. 507. *Mich.*—*Alpena Tp. v. Mainville*, 153 Mich. 732, 117 N. W. 338; *Saltmarsh v. Chicago, etc. R. Co.*, 122 Mich. 103, 80 N. W. 981. *Mo.*—*State v. Branch*, 151 Mo. 622, 52 S. W. 390; *Reynolds v. Metropolitan St. R. Co.*, 180 Mo. App. 138, 168 S. W. 221; *Muirhead v. Hannibal & St. J. R. Co.*, 31 Mo. App. 578. *R. I.*—*Angell v. Granger*, 22 R. I. 495, 48 Atl. 668. *Tex.*—*Jones v. Smith*, 21 Tex. Civ. App. 440, 52 S. W. 561.

[b] **Grossly Improper Remarks of Counsel.**—It is held, however, in some cases, that where remarks of counsel have been peculiarly gross and highly prejudicial, the court may in its discretion grant a new trial regardless of any failure to interpose objection thereto. *Colo.*—*Cook v. Doud*, 14 Colo. 483, 23 Pac. 906. *Ind.*—*Kinnaman v. Kinnaman*, 71 Ind. 417. *Mo.*—*Schuette v. St. Louis Transit Co.*, 108 Mo. App. 21, 82 S. W. 541. *Neb.*—*Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462. *Wash.*—*Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486. See, however, *Heywood v. Doherty*, 129 N. Y. Supp. 507.

[c] **Misconduct of Judge.**—(1) The court may upon its own motion set

those cases in which the misconduct was not known at the time,²⁶ but in such cases the party moving for the new trial must show the fact of his previous lack of knowledge.²⁷ If this is not done, the complaining party will be deemed to have waived his rights.²⁸

9. Must Prevent Fair Trial.—In order to warrant a new trial, the misconduct complained of must prejudice the aggrieved party's substantial rights, that is, must have prevented him from having a fair trial,²⁹ and, as in other cases, new trials will not be granted unless injury has been done,³⁰ and this provision is sometimes found ex-

aside a verdict and award a new trial if it is of the opinion that its remarks were prejudicial, although they were not excepted to at the time they were made. *Richter v. United Rys. Co.* of St. Louis, 145 Mo. App. 1, 129 S. W. 1055. See also *Neill v. Rogers Bros. Produce Co.*, 38 W. Va. 228, 18 S. E. 563. However, (2) in *Taylor v. Baltimore, etc. R. Co.*, 3 Del. Co. (Pa.) 545, it is held that the remarks of the judge must be duly excepted to if they are to be made the basis of a motion for a new trial. (3) Moreover, in *Richter v. United Rys. Co.*, *supra*, the court said: "The point is made by plaintiff . . . that defendant did not at the time take any exception to these remarks of the court, and, therefore, that question is eliminated. This would be true if the court had overruled the motion for new trial and defendant were here trying to reverse that action of the court by reason of these remarks, but that is not the condition of this case. In this case, the court sustained the motion for new trial, and, in doing this, if his action was erroneous and prejudicial to either party in the case, the court had the right to set the verdict aside as of its own motion, and having set it aside, the party who seeks to justify the court's action in sustaining the motion is not required to show that an error, which the court himself recognized and acted upon, was excepted to by the party at the time the error was committed."

Misconduct of Jurors.—Objection necessary. See 17 STANDARD PROC. 529.

26. *Peterson v. Skjelver*, 43 Neb. 663, 62 N. W. 43.

27. *Pittsburg, C. C. & St. L. Ry. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650; *Peterson v. Skjelver*, 43 Neb. 663, 62 N. W. 43; *Watson v. Roode*, 43

Neb. 348, 61 N. W. 625. See 17 STANDARD PROC. 530, note 19.

28. **Ia.**—*Riech v. Bolch*, 68 Iowa 526, 27 N. W. 507. **Mo.**—*Muirhead v. Hannibal & St. J. R. Co.*, 31 Mo. App. 578. **N. H.**—*Tabor v. Judd*, 62 N. H. 288. **Pa.**—*Reese v. Payne & Co.*, 2 Kulp 361; *Myers v. Devens*, 2 Kulp 312.

29. *Joyce v. Charleston Ice Mfg. Co.*, 50 Fed. 371; *Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702.

30. **U. S.**—*Lonsdale v. Brown*, 4 Wash. C. C. 148, 15 Fed. Cas. No. 8,494; *Johnson v. Root*, 2 Cliff. 108, 13 Fed. Cas. No. 7,409; *Henry v. Ricketts*, 1 Cranch C. C. 545, 12 Fed. Cas. No. 6,385. **Cal.**—*Thrall v. Smiley*, 9 Cal. 529. **Colo.**—*May v. People*, 8 Colo. 210, 6 Pac. 816. **Conn.**—*Hamilton v. Pease*, 38 Conn. 115. **Ga.**—*McKinney v. McKinney*, 72 Ga. 80; *Killen v. Sistrunk*, 7 Ga. 283. **Ill.**—*Cleveland, C. & St. L. Ry. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869. **Ind.**—*City of Indianapolis v. Scott*, 72 Ind. 196; *Wilds v. Bogan*, 57 Ind. 453; *Harrison v. Price*, 22 Ind. 165. **Ia.**—*Bowman v. Western Fur Mfg. Co.*, 96 Iowa 188, 64 N. W. 775; *Carbon v. Ottumwa*, 95 Iowa 524, 64 N. W. 413; *Truman v. Bishop*, 83 Iowa 697, 50 N. W. 278. **Kan.**—*Florence, E. D. & W. V. R. Co. v. Ward*, 29 Kan. 354. **Ky.**—*Evans v. McKinsey*, Litt. Sel. Cas. 262. **La.**—*Citizens' Bank v. Strauss*, 26 La. Ann. 736; *Littlefield v. Beamis*, 5 Rob. 145. **Me.**—*Neagle v. Neagle*, 65 Me. 468; *Newell v. Ayer*, 32 Me. 334. **Mass.**—*Tripp v. Bristol County Comrs.*, 2 Allen 556. **Minn.**—*Koehler v. Cleary*, 23 Minn. 325; *Williams v. McGrade*, 18 Minn. 82. **Mo.**—*Paramore v. Lindsey*, 63 Mo. 63. **Neb.**—*Gran v. Houston*, 45 Neb. 813, 64 N. W. 245. **N. H.**—*Smith v. Powers*, 15 N. H. 546; *Page v. Wheeler*, 5 N. H. 91. **N. Y.**—*Anthony v. Smith*, 4 Bosw. 503; *Horton v. Horton*, 2 Cow. 589; *Thomas v. Chapman*,

pressed in the statutes.³¹ Misconduct, however, by way of improper communication with the jury, on the part of the prevailing party will, usually, of itself raise a presumption of injury.³² Motions for new trials founded upon the misconduct of counsel, during the trial, in the presence of the jury are addressed largely to the judicial discretion of the trial court.³³ and it is for the trial judge who saw or heard the misconduct to determine whether justice has suffered from the wrong.³⁴ Where it appears that counsel's misconduct did not prejudice the jury,³⁵ or where such conduct was stopped or reprovod by the court,³⁶ or where retraction was made,³⁷ the misconduct will, as a rule, be held harmless, and insufficient to warrant a new trial.

Where misconduct on the part of the jury is alleged it must appear that such alleged misconduct resulted in probable injury before a new trial will be granted,³⁸ because misconduct or mere irregularities in the conduct of the jury not shown to have prejudiced the substantial

45 Barb. 98; Rankin v. Nelson, 45 Hun 591, 10 N. Y. St. 337. **Ohio**.—Stoppel v. Woolner, 2 Cleve. L. R. 252, 4 Ohio Dec. (Reprint) 489. **Pa.**—Hawley v. Acker, 2 Woodw. Dec. 237; Shomo v. Zeigler, 31 Leg. Int. 205. **R. I.**—Tucker v. Town Council of South Kingstown, 5 R. I. 558. **Tenn.**—Vaughn v. Dotson, 2 Swan 348. **W. Va.**—Flesher v. Hale, 22 W. Va. 44. **Wis.**—Graves v. Gans, 25 Wis. 41.

31. See N. Y. Crim. Code, 1913, §465, subd. 3.

32. Johnson v. Root, 2 Cliff. 108, 13 Fed. Cas. No. 7,409. See Vollrath v. Crow, 9 Wash. 374, 37 Pac. 474, and 17 STANDARD PROC. 491, 502.

[a] It is not necessary that it should appear that the misconduct of a party has actually influenced the jury, since it is sufficient if such misconduct might have done so. Johnson v. Root, 2 Cliff. 108, 13 Fed. Cas. No. 7,409. See also Preston v. Mutual Life Ins. Co., 71 Fed. 467; Huston v. Vail, 51 Ind. 299. Compare 17 STANDARD PROC. 491, et seq.; 502, et seq.

Misconduct of counsel, friends, and relatives of party, see 17 STANDARD PROC. 493, et seq.

33. Stetzler v. Metropolitan St. Ry. Co., 210 Mo. 704, 711, 109 S. W. 666. See generally the titles "Arguments;" "Trial."

34. Warnke v. Leschen & Sons Rope Co. (Mo.), 178 S. W. 76.

35. **U. S.**—Wightman v. Providence, 1 Cliff. 524, 29 Fed. Cas. No. 17,630. **Ind.**—Leach v. Ackerman, 2 Ind. App. 91, 28 N. E. 216. **Ia.**—Scott v. Chicago, M. & St. P. R. Co., 68 Iowa 360,

24 N. W. 584, 27 N. W. 276. **Kan.** Holman v. Raynesford, 3 Kan. App. 676, 44 Pac. 910. **N. C.**—Greenlee v. Greenlee, 93 N. C. 278. **Tex.**—Willis v. McNatt, 75 Tex. 69, 12 S. W. 478. 36. Greenlee v. Greenlee, 93 N. C. 278.

[a] **Reproof Insufficient When.**—"In the portions of the argument and remarks of counsel, to the jury which have just been quoted, it is seen that statements and allusions to various facts, to prove which there was no evidence adduced, were made, which it seems to us, were calculated to do much harm. The admonition of the court to counsel to keep within the record was not sufficient to repair the damage which probably resulted. When the mind of the jury is being swayed by the use of perverted and conjectured facts and the influence of zealous and impassioned advocacy, the conditions may require the application of a far more radical and drastic remedy than that administered by the court. If the warning of the court is disregarded it may, in its discretion, then suspend the argument and discharge the jury, or omitting to do that, it may later on set aside the verdict on its own motion." Ensor v. Smith, 57 Mo. App. 584, 595.

37. Cleveland City Ry. Co. v. Roebuck, 22 Ohio C. C. 99.

38. **U. S.**—Henry v. Ricketts, 1 Cranch C. C. 545, 11 Fed. Cas. No. 6,385. **Ga.**—Wilkins v. Maddrey, 67 Ga. 766. **Ind.**—Carter v. Ford Plate Glass Co., 85 Ind. 180; City of Indianapolis v. Scott, 72 Ind. 196.

rights of the defendant will not vitiate the verdict.³⁹ The same rule applies to misconduct on the part of an officer of the court. It must appear that such misconduct prejudiced the right to a fair trial, otherwise a new trial will not be granted.⁴⁰

D ERRORS OF LAW.—1. **In General.**—Another broad ground for granting new trials is prejudicial errors of the court in matters of law,⁴¹ or, as less broadly expressed in many of the statutes, “errors of law occurring at the trial.”⁴² Under such statutory provisions, errors of law occurring “at the trial” do not embrace errors made prior or subsequent thereto,⁴³ but are largely confined to erroneous rulings upon the admission or exclusion of evidence, and to prejudicial errors in the giving, or refusing to give, instructions.⁴⁴ On the other hand, it has been said that the phrase, “errors of law occurring at the trial,” is a sweeping clause, intending to embrace all errors not included in any other specified cause.⁴⁵ In a few states, however, this ground for a new trial is not recognized at all.⁴⁶

See 17 STANDARD PROC. 507, et seq.; 527.

39. **Me.**—*Newell v. Ayer*, 32 Me. 334. **Minn.**—*Koehler v. Cleary*, 23 Minn. 325. **N. Y.**—*Rankin v. Nelson*, 45 Hun 591, 10 N. Y. St. Rep. 337; *People v. Menken*, 36 Hun 90, 3 N. Y. Crim. 233; *People v. Draper*, 28 Hun 1, 1 N. Y. Crim. 138. **R. I.**—*Kaul v. Brown*, 17 R. I. 14, 20 Atl. 10.

See 17 STANDARD PROC. 527.

For a complete treatment of misconduct of the jury and its effect on the verdict, see the title “Juries and Jurors.”

40. **Mass.**—*Tripp v. Bristol County Comrs.*, 2 Allen 556. **N. Y.**—*Thomas v. Chapman*, 45 Barb. 98. **Ohio.**—*Stoppel v. Woolner*, 2 Cleve. L. R. 252, 4 Ohio Dec. 489.

Misconduct of officers in connection with the jury, see fully the title “Juries and Jurors.”

41. **U. S.**—*Rochell v. Phillips*, Hempst. 22, 20 Fed. Cas. No. 11,974a; *United States v. Barnhart*, 17 Fed. 579, 9 Sawy. 159. **Conn.**—*Edwards v. Lambert*, 2 Root 430. **Ky.**—*Louisville & N. R. Co. v. McCoy*, 81 Ky. 403. **Me.**—*Belmont v. Morrill*, 69 Me. 314. **N. C.**—*Clarke v. Diggs*, 28 N. C. 159, 44 Am. Dec. 73. **Tenn.**—*Stockell v. Ryan & Co.*, 1 Baxt. 476.

See generally the statutes.

42. See the statutes and *supra*, II, A, 2.

43. *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415, 6 N. W. 795, 8 N. W. 148.

[a] Motion for Judgment Upon

Pleadings.—An order denying a motion for judgment upon the pleadings is an order made before the trial and cannot be assigned as an error “occurring during the trial.” *Bank v. Harding*, 65 Kan. 655, 70 Pac. 655; *Powder River Cattle Co. v. Custer Co.*, 9 Mont. 145, 22 Pac. 383.

[b] **An error in the conclusions of law** (1) stated upon a special finding of facts is not an error of law occurring at the trial. *Nelson v. Cottingham*, 152 Ind. 135, 52 N. E. 702; *Clayton v. Blough*, 93 Ind. 85; *McKenzie v. Bismarck Water Co.*, 6 N. D. 361, 71 N. W. 608. (2) The reason assigned is that a new trial is a re-examination of the facts, and an error in conclusions of law upon special findings of fact may be corrected without a further examination of the facts. *Rooker v. Ludowici v. Celadon Co.*, 53 Ind. App. 275, 100 N. E. 469.

[c] **“Errors in law,” within the meaning of the statute** (subd. 7, §5472, Rev. Codes) are such errors in rulings and in instructions and the like as may occur during the progress of the trial, and before the rendition of the verdict or decision.” *McKenzie v. Bismarck Water Co.*, 6 N. D. 361, 71 N. W. 608.

44. See the discussion following.

45. *Ohio Val. Ry. & Min. Co. v. Kuhn*, 9 Ky. L. Rep. 467, 5 S. W. 419.

46. See *Grinnell Brick & Tile Co. v. Booknau*, 167 Iowa 279, 149 N. W. 239; *R. I. Gen. Laws*, 1909, ch. 298, §12.

2. Meaning of "Error." — As previously pointed out in connection with irregularities,⁴⁷ errors in law are properly confined to errors in connection with rulings upon questions of law duly raised by objection, and preserved by exception, and by some courts this technicality is observed. In a broad sense, however, irregularities and misconduct on the part of the court are often called "errors," and there is, consequently, some overlapping of these terms in the cases. For this reason, the broader meaning is employed, at times, in the following statements.⁴⁸

3. Abuse of Discretion. — The abuse of judicial discretion in connection with the mode and conduct of the trial in general, is often designated as error. Reference to this ground for a new trial has already been made.⁴⁹

4. Denying Right to Counsel. — Denying a party the right to be heard through counsel is "error," and ground for a new trial.⁵⁰

5. Refusing Right to Jury Trial. — It has also been held "error of law," warranting a new trial, to refuse to call a jury when properly demanded.⁵¹

6. Continuances. — Improperly refusing a continuance is said to be error for which a new trial may be granted.⁵² This matter has, however, already been considered.⁵³

7. Order of Proof. — The order of proof is largely a matter of discretion on the part of the court, and a new trial will not, as a rule, be granted because evidence was admitted out of its usual order.⁵⁴

8. Restricting Examination of Witnesses. — Improperly restricting the examination or cross-examination of witnesses may justify a new trial.⁵⁵

9. Failure To Check Misconduct. — It is the duty of the trial court to rebuke misconduct on the part of counsel or of parties and to do all in its power to remedy it. To permit such misconduct,⁵⁶ against

[a] **Practice in Connecticut**, see *Zaleski v. Clark*, 45 Conn. 397.

47. See *supra*, II, B, 2; II, C, 1.

48. See the discussion following.

[a] **The use of the term "exceptions"** applies only to errors of law occurring at the trial. **U. S.**—*Walton v. United States*, 9 Wheat. 651, 6 L. ed. 182. **N. Y.**—*Onondaga County Mut. Ins. Co. v. Minard*, 2 N. Y. 98. **Pa.**—*Sidwell v. Evans*, 1 Penr. & W. 383, 21 Am. Dec. 387.

49. See *supra*, II, B, 5, e, (II).

50. *Belmore v. Caldwell*, 2 Bibb (Ky.) 76.

51. *Alley v. State*, 76 Ind. 94. See *supra*, II, B, 5, e, (VI). Compare 16 STANDARD PROC. 953.

52. *Van Dyke v. Martin*, 55 Ga. 466; *Bishop v. State*, 9 Ga. 121; *Goff v. Scott*, 126 Ind. 200, 25 N. E. 906;

House v. McKinney, 54 Ind. 240.

53. See *supra*, II, B, 5, e, (IV).

54. **Cal.**—*Rice v. Cunningham*, 29 Cal. 492. **Ga.**—*Hutcheson v. Manson*, 131 Ga. 264, 62 S. E. 189. **S. C.**—*Campbell v. Ingraham*, 1 Mill 293. **Can.**—*Rex v. Higgins*, 36 N. Bruns. 18; *Bernard v. Coutellier*, 45 U. C. Q. B. 453. See *supra*, II, B, 5, i.

55. *McIntosh v. Standard Oil Co.*, 89 Kan. 289, 131 Pac. 151, Ann. Cas. 1914D, 112, 47 L. R. A. (N. S.) 730; *Allen v. Bodine*, 6 Barb. (N. Y.) 383.

56. **Ala.**—*Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 16 So. 538. **Ind.**—*Goff v. Scott*, 126 Ind. 200, 25 N. E. 906; *Campbell v. Maher*, 105 Ind. 383, 4 N. E. 911; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. 196. **Mo.**—*McDonald & Co. v. Cash*, 45 Mo. App. 66; *Norton v. St. Louis & H. Ry. Co.*,

objection, is error, unless it appears that the prejudicial tendency of such conduct has been averted.⁵⁷

10. Withdrawing Testimony.—Withdrawing testimony once legally before the jury may be error, and a new trial granted for the same.⁵⁸

11. Denial of Right To Argue.—Denying a party the right to argue the evidence before the jury has been held a cause for a new trial,⁵⁹ as, also, improperly denying the right to open and close the argument.⁶⁰

12. Failure To Admonish Jury.—A failure to admonish the jury before it separates may also amount to error for which a new trial should be granted.⁶¹

13. Admission of Illegal Evidence.—The admission of irrelevant, immaterial, incompetent, or otherwise inadmissible evidence, when duly objected to, is error for which a new trial will be granted where such evidence has a tendency to affect the verdict.⁶² But the admission

40 Mo. App. 642; *Gibson v. Zeibig*, 24 Mo. App. 65. **N. Y.**—*Lesser v. Perkins*, 39 Hun 341. **N. C.**—*Smith v. Nimocks*, 94 N. C. 243. **Ohio.**—*Cleveland, P. & E. Ry. Co. v. Pritschau*, 69 Ohio St. 438, 69 N. E. 663, 100 Am. St. Rep. 682.

57. *Cleveland, P. & E. Ry. Co. v. Pritschau*, 69 Ohio St. 438, 69 N. E. 663, 100 Am. St. Rep. 682.

58. *Brown v. Williams*, 4 Humph. (Tenn.) 22.

59. *Belmore v. Caldwell*, 2 Bibb 76.

60. **Ga.**—*Royce & Co. v. Gazan*, 76 Ga. 79. **Ind.**—*Haines v. Kent*, 11 Ind. 126. **Mass.**—*Davis v. Mason*, 4 Pick. 156. **N. Y.**—*Ayrault v. Chamberlain*, 33 Barb. 229; *Huntington v. Conkey*, 33 Barb. 213.

[a] **Must Work Injustice.**—It is held in some cases, however, that an improper refusal to open and close the argument will not of itself be a sufficient ground for a new trial. Such error may have proved harmless. It should appear that substantial prejudice was wrought by such a ruling. **Conn.**—*Scott v. Hull*, 8 Conn. 296; *Comstock v. Hadlyme E. Soc.*, 8 Conn. 254, 20 Am. Dec. 100. **Mo.**—*Lucas v. Sullivan*, 33 Mo. 389; *McClintock v. Curd*, 32 Mo. 411. **S. C.**—*Singleton v. Millet*, 1 Nott & McC. 355. **Eng.**—*Doe ex dem. Bather v. Brayne*, 5 C. B. 655, 17 L. J. C. P. 127, 57 E. C. L. 655, 136 Eng. Reprint 1035.

61. *Ehrhard v. McKee*, 44 Kan. 715, 25 Pac. 193; *Pracht v. Whittridge*, 44 Kan. 710, 25 Pac. 192.

62. **U. S.**—*Trigg v. Conway*, Hempst.

538, 24 Fed. Cas. No. 14,172. **Ark.**—*Griggs v. School Dist. No. 70*, 87 Ark. 93, 112 S. W. 215. **Cal.**—*People v. Dailey*, 59 Cal. 600; *Santillan v. Moses*, 1 Cal. 92; *People v. Martin*, 13 Cal. App. 96, 108 Pac. 1034. **Ga.**—*Friereson v. Fincher*, 134 Ga. 113, 67 S. E. 541; *Horton v. Fulton*, 130 Ga. 466, 60 S. E. 1059; *Louisville & N. R. Co. v. Varner*, 129 Ga. 844, 60 S. E. 162. **Ill.**—*Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987. **Kan.**—*State v. Frederickson*, 81 Kan. 854, 106 Pac. 1061; *Missouri Pac. R. Co. v. Johnson*, 55 Kan. 344, 40 Pac. 641. **Ky.**—*Scott v. Colmesnil*, 7 J. J. Marsh. 416. **Mass.**—*Ellis v. Short*, 21 Pick. 142; *Brown v. Cummings*, 7 Allen 507. **Mich.**—*Rickabus v. Gott*, 51 Mich. 227, 16 N. W. 384; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222. **Minn.**—*Bradstreet Co. v. Four Tr. Auto Co.*, 118 Minn. 454, 137 N. W. 180; *Flower v. Grace*, 23 Minn. 32. **Miss.**—*Melius v. Houston*, 41 Miss. 59. **Mo.**—*State v. Brown*, 188 Mo. 451, 87 S. W. 519; *Eddy v. Baldwin*, 32 Mo. 369; *Hawman v. McLean*, 139 Mo. App. 429, 122 S. W. 1094. **Neb.**—*Peterson v. State*, 84 Neb. 76, 120 N. W. 1110. **N. H.**—*Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572; *Ellingwood v. Bragg*, 52 N. H. 488. **N. Y.**—*Tierney v. Fitzpatrick*, 195 N. Y. 433, 88 N. E. 750; *Pratt v. McKee*, 147 App. Div. 72, 131 N. Y. Supp. 763; *Curtis v. Hudson*, etc. R. Co., 147 App. Div. 349, 131 N. Y. Supp. 758. **Pa.**—*Pennell v. Phillips*, 20 Pa. Dist. 843; *Hoskins v. Lindsay*, 1 Del. Co. 249. **R. I.**—*Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159. **S. C.**

of incompetent evidence will afford no ground for a new trial unless it appears that it probably influenced the verdict.⁶³ In case of immaterial evidence its admission is, by weight of authority, no ground at all for a new trial, since it cannot be presumed to have affected the result.⁶⁴ The admission of irrelevant evidence should, on principle, be also regarded as harmless, yet it has been held that the admission of such evidence justifies a new trial since it is impossible to know to what extent the jury may have been influenced by it.⁶⁵ In criminal cases, the improper reception of immaterial statements as confessions,⁶⁶ or of opinion testimony,⁶⁷ may be prejudicial error. Moreover, admission of incompetent evidence is error although the evidence be of

Langton v. Everingham, 2 McCord 157. **Vt.**—Fraser v. Blanchard, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797; Barney v. Goff, 1 D. Chip. 304. **Va.**—Chesapeake & O. R. Co. v. Parker's Admr., 116 Va. 368, 82 S. E. 183. **Eng.**—Wright v. Doe ex dem. Tatham, 7 Ad. & El. 313, 5 L. J. Exch. 340, 34 E. C. L. 178, 112 Eng. Reprint 488; Hodson v. Midland Great Western R. Co., Ir. R. 11 C. L. 109; Tait v. Beggs (1905), 2 Ir. R. 525; *In re Maplin Sands*, 71 L. T. N. S. 56; Maclaren & Sons v. Davis, 6 T. L. R. 372. **Can.**—Rex v. Deakin, 16 Brit. Col. 271; Rice v. Sockett, 27 Ont. L. Rep. 410, 4 Ont. W. N. 397, 23 Ont. W. R. 602; Ingram v. Brown, 38 N. Brunsw. 256; Jones v. Todd, 22 U. C. Q. B. 37.

[a] **Exciting sympathy of jury by improper exhibition of injury.** Butez v. Fonda, J. & G. R. Co., 20 Misc. 123, 45 N. Y. Supp. 808.

63. **U. S.**—Smith v. St. Louis, etc. R. Co., 214 Fed. 737, 131 C. C. A. 43; *In re Marsh*, 16 Fed. Cas. No. 9,108. **Ga.**—Bell v. Redd, 133 Ga. 5, 65 S. E. 90; Taylor v. Martin, 49 Ga. 572. **Ill.**—Chicago Sanitary Dist. v. Cullerton, 147 Ill. 385, 35 N. E. 723; Nevois v. St. Louis, etc. R. Co., 147 Ill. App. 113. **Me.**—Dodge v. Greeley, 31 Me. 343. **N. Y.**—Weibert v. Hanan, 136 App. Div. 388, 121 N. Y. Supp. 35; Ackley v. Kellogg, 8 Cow. 223. **N. C.**—Goins v. Trustees Indian Training School, 169 N. C. 736, 86 S. E. 629. **Pa.**—Blum v. Warner, 1 Leg. Rec. 113. **R. I.**—Ames v. Potter, 7 R. I. 265. **Tex.**—Dailey v. Starr, 26 Tex. 562; Commonwealth Bonding & Cas. Co. v. Hendricks (Tex. Civ. App.), 168 S. W. 1007. **Eng.**—Stindt v. Roberts, 5 D. & L. 460, 2 B. C. Rep. 212, 17 L. J. Q. B. 166, 12 Jur. 518. **Can.**—McLaughlin v. Westell, 41 N. Brunsw. 193; Shea v.

Portulance, 5 Newfoundl. 171; Bank of Nova Scotia v. Robinson, 33 N. Brunsw. 326.

64. **Ga.**—Thompson v. Thompson, 77 Ga. 692, 3 S. E. 261; Lockett v. Mims, 27 Ga. 207. **Mass.**—McAvoy v. Wright, 137 Mass. 207. **N. H.**—Hatch v. Hart, 40 N. H. 93; Page v. Parker, 40 N. H. 47.

Contra, see Similroth v. Lehr, 5 Phila. (Pa.) 87; Lloyd v. Moupoe, 2 Nott & McC. (S. C.) 446.

65. **Ga.**—Payne v. Miller, 89 Ga. 73, 14 S. E. 926. **N. Y.**—Dresser v. Ainsworth, 9 Barb. 619. **S. C.**—Langton v. Everingham, 2 McCord 157.

[a] **No Effect Upon Result.**—The cases generally hold, however, that the admission of irrelevant evidence does not warrant a new trial where the verdict is supported by proper testimony, and the improperly admitted evidence was not of so mischievous a character as naturally to mislead the jury. See **Ga.**—Southern Cotton Oil Co. v. Overby, 139 Ga. 209, 76 S. E. 999; Norton v. Aiken, 134 Ga. 21, 67 S. E. 425; Bell v. Redd, 133 Ga. 5, 65 S. E. 90; Lee v. Winkles, 131 Ga. 577, 62 S. E. 820. **Me.**—Dutch v. Bodwell Granite Co., 94 Me. 34, 46 Atl. 787. **Mass.**—McAvoy v. Wright, 137 Mass. 207; Flint v. Hubbard, 1 Allen 252. **Minn.**—Aske v. Duluth & I. R. R. Co., 83 Minn. 197, 85 N. W. 1011. **N. H.**—Blodgett Paper Co. v. Farmer, 41 N. H. 398; Page v. Parker, 40 N. H. 47. **N. Y.**—Lapham v. Marshall, 51 Hun 36, 3 N. Y. Supp. 601, 20 N. Y. St. 795. **Tex.**—Hunter v. Hubbard, 26 Tex. 537. **Can.**—Gallagher v. Westmoreland, 31 N. Brunsw. 194.

66. Fletcher v. State, 90 Ga. 468, 17 S. E. 100.

67. People v. Wright, 136 N. Y. 625, 32 N. E. 629.

slight importance, if the party might have suffered prejudice by such admission.⁶⁸ Where, however, by a change in the law, inadmissible testimony has been subsequently made admissible by statute, no new trial will be granted for the improper admission.⁶⁹ The fact that testimony was given in answer to leading questions is not sufficient in itself, to warrant a new trial,⁷⁰ but unfair hypothetical questions, which assume controverted facts, may be a just ground.⁷¹

There may be error sufficient to require a new trial in the improper admission of secondary evidence without first having sufficiently established a reason for the nonproduction of the original,⁷² as also in the admission of documentary evidence in absence of proof of its authenticity or authority,⁷³ or under a mistake as to its identity.⁷⁴

14. Improper Rejection of Evidence.—Where, to the prejudice of the aggrieved party, material and admissible evidence has been erroneously rejected, a new trial will be granted.⁷⁵ But the exclusion

68. *Ga.*—*Frain v. State*, 40 *Ga.* 529. *Mass.*—*Com. v. Edgerly*, 10 *Allen* 184; *Com. v. Bosworth*, 22 *Pick.* 397. *Minn.*—*Hoberg v. State*, 3 *Minn.* 262. *N. C.*—*Glover v. Flowers*, 101 *N. C.* 134, 7 *S. E.* 579. *Tenn.*—*Peek v. State*, 2 *Humph.* 78. *Va.*—*Joyce v. Com.*, 78 *Va.* 287.

[a] **Harmless Error.**—If it is clear, however, that the admission of the incompetent evidence could not have affected the result, a new trial should not be ordered. *U. S.*—*United States v. Jones*, 32 *Fed.* 569. *Fla.*—*Tilly v. State*, 21 *Fla.* 242. *Ga.*—*Matthis v. State*, 33 *Ga.* 24.

69. *State v. Marshall*, 95 *Kan.* 628, 148 *Pac.* 675. *Contra*, *Stump v. Town of Attica*, 7 *Ind.* 641.

70. *Moran v. Abbey*, 63 *Cal.* 56; *Metropolitan St. Ry. Co. v. Johnson*, 91 *Ga.* 466, 18 *S. E.* 816.

71. *McFall v. Smith*, 32 *Ill. App.* 463; *Haish v. Munday*, 12 *Ill. App.* 539.

72. *U. S.*—*Bradley's Lessee v. Bradley*, 4 *Dall.* 112, 1 *L. ed.* 763; *Savage v. D'Wolf*, 1 *Blatchf.* 343, 21 *Fed. Cas.* No. 12,383. *Ark.*—*Thomas v. Hutchinson*, 25 *Ark.* 558. *Del.*—*Bartholomew v. Edwards*, 1 *Houst.* 247. *Ind.*—*Myer v. Avery*, 23 *Ind.* 510. *Ia.*—*Herman v. Hass*, 166 *Iowa* 340, 147 *N. W.* 740, *Ann. Cas.* 1917D, 543. *Mo.*—*Kitchen v. Reinsky*, 42 *Mo.* 427. *N. Y.*—*Gautier v. Douglass Mfg. Co.*, 52 *How. Pr.* 325.

[a] **Absence of Objection.**—No new trial will be granted, however, where such secondary evidence was not objected to, at the time of its introduc-

tion, and where it does not appear affirmatively that the contents of the original writing were substantially different from the secondary evidence introduced. *Western Union Tel. Co. v. Lindley*, 89 *Ga.* 484, 15 *S. E.* 636.

73. *Thomas v. Hutchinson*, 25 *Ark.* 558; *Gibbs v. Fulton*, 2 *Ohio* 180.

74. *Thomas v. Hutchinson*, 25 *Ark.* 558.

[a] **The admission of a written instrument** on the erroneous assumption that it is an original paper, may be a ground for a new trial. *Savage v. D'Wolf*, 1 *Blatchf.* 343, 21 *Fed. Cas.* No. 12,383.

75. *U. S.*—*Cable v. Paine & Co.*, 8 *Fed.* 788, 3 *McCrary* 169. *Cal.*—*Wheeler v. Bolton*, 66 *Cal.* 83, 4 *Pac.* 981; *People v. Murphy*, 39 *Cal.* 52. *Ga.*—*Whitley v. Hudson*, 114 *Ga.* 668, 40 *S. E.* 838; *Holt v. State*, 2 *Ga. App.* 383, 58 *S. E.* 511. *Ill.*—*Nordgren v. People*, 211 *Ill.* 425, 71 *N. E.* 1042; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 *Ill.* 582, 54 *N. E.* 987. *Ind.*—*Shirk v. Cartright*, 29 *Ind.* 406. *La.*—*State v. Gregory*, 33 *La. Ann.* 737. *Minn.*—*Tunell v. Larson*, 37 *Minn.* 258, 34 *N. W.* 29. *Mo.*—*Chlanda v. St. Louis Transit Co.*, 213 *Mo.* 244, 112 *S. W.* 249; *Moreland v. McDermott*, 10 *Mo.* 605. *Mont.*—*O'Hanlon v. Ruby Gulch Min. Co.*, 48 *Mont.* 65, 135 *Pac.* 913; *Hulse v. Northern Pac. R. Co.*, 47 *Mont.* 59, 130 *Pac.* 415. *N. J.*—*Ordenez v. Manda*, 79 *N. J. L.* 236, 75 *Atl.* 740. *N. Y.*—*Wehrum v. Kuhn*, 2 *Jones & S.* 336, *affirmed* in 61 *N. Y.* 623. *N. C.*—*State v. McCurry*, 63 *N. C.* 33. *S. C.*—*McElwee v. Sutton*, 2 *Bailey* 128. *Tex.*

of competent evidence will be considered harmless error where it could not have changed the result.⁷⁶ And in no case can the exclusion of immaterial or irrelevant evidence be made the basis of a new trial, since such exclusion is right and, consequently, no error is committed.⁷⁷

15. Erroneous Instructions.—*a. In General.*—Both at common law, and under the statutes, the misdirection of a judge, in a material matter of law which may have affected the verdict, is error and ground for a new trial.⁷⁸ Giving instructions after the submission

Williams v. State, 4 Tex. App. 5. **Vt.** *Bradley Fertilizer Co. v. Fuller*, 58 Vt. 315, 2 Atl. 162. **Can.**—*Gzowski & Co. v. Forst & Co.*, 46 Can. Sup. Ct. 642, 24 Ont. L. Rep. 282, 2 Ont. W. N. 1312, 19 Ont. W. R. 645; *Barthe v. Huard*, 42 Can. Sup. Ct. 406; *Schofield v. Anderson*, 31 N. Brunsw. 518; *Filsch v. Hogg*, 35 U. C. Q. B. 94; *Walter v. Dexter*, 34 U. C. Q. B. 426; *Hamilton v. Moore*, 33 U. C. Q. B. 100.

[a] **Fault of Applicant.**—Where a motion for a new trial is made on the ground that certain letters were not admitted in evidence, but it appears that when the letters were offered as evidence the court said that when the letters were properly identified they would be competent, but the party made no attempt or offer to identify them, no ground for a new trial exists. *Rencher v. Aycock*, 104 N. C. 144, 10 S. E. 132. See *infra*, III, D, 19.

76. U. S.—*Walker v. Hawxhurst*, 5 Blatchf. 494, 29 Fed. Cas. No. 17,071. **Cal.**—*Carpenter v. Norris*, 20 Cal. 437. **Miss.**—*Cogan v. Frisby*, 36 Miss. 178. **N. Y.**—*Evans v. Sims*, 82 Hun 396, 31 N. Y. Supp. 259, 63 N. Y. St. 565; *Lippus v. Columbus Watch Co.*, 59 Hun 623, 13 N. Y. Supp. 319, 36 N. Y. St. 618. **R. I.**—*Herreshoff v. Tripp*, 15 R. I. 92, 23 Atl. 104.

77. Ga.—*Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261; *Bird v. Harville*, 33 Ga. 459; *Lockett v. Mims*, 27 Ga. 207. **Mass.**—*Packard v. New Bedford*, 9 Allen 200. **Minn.**—*Weaver v. Mississippi*, etc. Boom Co., 31 Minn. 74, 16 N. W. 494.

78. U. S.—*Blake v. Smith*, 3 Fed. Cas. No. 1,502. **Ala.**—*Woodward Iron Co. v. Brown*, 167 Ala. 316, 52 So. 829. **Ark.**—*Cumnock v. State*, 87 Ark. 34, 112 S. W. 147. **Cal.**—*Lathrope v. Flood*, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215. **Fla.**—*Atlantic C. L. R. Co. v. Wallace*, 61 Fla. 93, 54 So. 893. **Ga.**

Block v. Happ, 144 Ga. 145, 86 S. E. 316; *Wilson v. Wilson*, 130 Ga. 677, 61 S. E. 530; *Daniel v. Browder-Manget Co.*, 13 Ga. App. 392, 79 S. E. 237. **Ill.** *Ball v. Hooten*, 85 Ill. 159; *Higgins v. Lee*, 16 Ill. 495; *Riesen v. Riesen*, 148 Ill. App. 460. **Ind.**—*Bane v. Keefer*, 152 Ind. 544, 53 N. E. 834; *Deeter v. Burk*, 59 Ind. App. 449, 107 N. E. 304; *United States, etc. Ins. Co. v. Batt*, 49 Ind. App. 277, 97 N. E. 195; *Chicago, etc. R. Co. v. Richards*, 28 Ind. App. 46, 61 N. E. 18. **Ia.**—*Pettitt v. Belle Plaine*, 162 Iowa 726, 144 N. W. 1015; *Royer v. King's Crown Plaster Co.*, 147 Iowa 277, 126 N. W. 168; *Hensley v. Davidson Bros.*, 143 Iowa 742, 120 N. W. 95. **Kan.**—*State v. Clough*, 70 Kan. 510, 79 Pac. 117; *Kansas City Belt Line Ry. Co. v. Cain*, 56 Kan. 786, 44 Pac. 995. **Ky.**—*Keiner v. Collins*, 161 Ky. 696, 171 S. W. 399; *Louisville, etc. R. Co. v. Haden*, 155 Ky. 283, 159 S. W. 792. **Me.**—*Noyes v. Shepherd*, 30 Me. 173, 50 Am. Dec. 625. **Mass.**—*Weil v. Boston, etc. R. Co.*, 218 Mass. 397, 105 N. E. 983; *Eldridge v. Hawley*, 115 Mass. 410. **Mich.**—*Warner v. Beebe*, 47 Mich. 435, 11 N. W. 258. **Minn.**—*Daily v. St. Anthony F. W. Power Co.*, 129 Minn. 432, 152 N. W. 840; *Gran v. Gran*, 129 Minn. 531, 152 N. W. 269; *Johnson v. Wild Rice Boom Co.*, 127 Minn. 490, 150 N. W. 218; *Smith v. Brigham*, 106 Minn. 91, 118 N. W. 150. **Mo.** *Kellogg v. Kirkville*, 132 Mo. App. 519, 112 S. W. 296; *Ross v. Metropolitan St. R. Co.*, 132 Mo. App. 472, 112 S. W. 9. **N. Y.**—*Gale v. Wells*, 12 Barb. 84; *Brush v. Kohn*, 9 Bosw. 589; *People v. Cimino*, 163 App. Div. 217, 147 N. Y. Supp. 1079; *Wright v. Smith*, 152 App. Div. 476, 137 N. Y. Supp. 264. **N. C.**—*State v. Gaither*, 72 N. C. 458. **N. D.**—*Welter v. Leistikow*, 9 N. D. 283, 83 N. W. 9. **Okla.**—*Missouri, O. & G. R. Co. v. Diamond*, 48 Okla. 424, 150 Pac. 175. **Pa.**—*Stroh v. Hess*, 1 Watts & S. 147. **R. I.**—*Hickey v.*

of the cause, neither party or counsel being present, is also error.⁷⁹

b. *Form and Character.*—Where the statute requires the instructions to be in writing, error may be committed by charging orally.⁸⁰ Instructions may also be erroneous and warrant a new trial in that they are meaningless in a material matter,⁸¹ or because they are contradictory to other instructions in the same charge;⁸² or where they are erroneous as to the degree of proof necessary;⁸³ or where the burden of proof is charged upon the wrong party;⁸⁴ or where they are absurd and impossible, or evasive;⁸⁵ or where the instructions show the judge's prejudice and bias.⁸⁶ Moreover, instructions based upon an inaccurate assumption of facts, and expressed inaccurately and ambiguously with reference to the law applicable to the case, require a new trial.⁸⁷

Booth, 29 R. I. 466, 72 Atl. 529, 132 Am. St. Rep. 832. **S. D.**—Weller v. Hilderbrandt, 19 S. D. 45, 101 N. W. 1108. **Tex.**—Lee v. State, 54 Tex. Crim. 382, 113 S. W. 301. **Utah.**—Law v. Smith, 34 Utah 394, 98 Pac. 300. **Wash.**—Mueller v. Dennis, 83 Wash. 123, 145 Pac. 218. **W. Va.**—Roane Lumb. Co. v. Lovett, 72 W. Va. 328, 78 S. E. 102; Caroway v. Cochran, 71 W. Va. 698, 77 S. E. 278; Hull v. Geary, 71 W. Va. 490, 76 S. E. 960; Gordon v. Elmore, 71 W. Va. 195, 76 S. E. 344. **Wis.**—Smith v. Grover, 74 Wis. 171, 42 N. W. 112. **Eng.**—Hunt v. Star Newspaper Co, Ltd. (1908), 2 K. B. 309; Anderson v. Calvert, 24 T. L. R. 399; Dakhyl v. Labouchere (1908), 2 K. B. 325; Jones v. Spencer, 77 L. T. N. S. 536; Dunne v. Anderson, 3 Bing. 88, 11 E. C. L. 51, 10 Moore 407, 130 Eng. Reprint 447; Clerk v. Udall, 2 Salk. 649, 91 Eng. Reprint 552. **Can.**—Slater v. Watts, 16 Brit. Col. 36; Edmondson v. Allen, 40 N. Brunsw. 299; Bell v. Grand Trunk R. Co., 29 Ont. L. Rep. 247, 4 Ont. W. N. 1524; Canadian Rubber Co. v. Karavokiris, 44 Can. Sup. Ct. 303; McCreary v. Grundy, 39 U. C. Q. B. 316; Filschle v. Hogg, 35 U. C. Q. B. 94; Faucitt v. Booth, 31 U. C. Q. B. 263.

Where is harmless, see *infra*, II, D, 19.

79. Lewis v. Lewis, 220 Mass. 364, 107 N. E. 970, Ann. Cas. 1917A, 395, L. R. A. 1915D, 719.

80. Cal.—People v. Ah Fong, 12 Cal. 345. **Conn.**—Wilson v. Granby, 47 Conn. 59, 36 Am. Rep. 51. **Ga.**—Wheatley & Co. v. West, 61 Ga. 401; Fry v. Shehee, 55 Ga. 208; Citizens' Bank v. Fort, 15 Ga. App. 427, 83 S. E. 678.

Ind.—Bottorff v. Shelton, 79 Ind. 98; Shafer v. Stinson, 76 Ind. 374; Davis v. Foster, 68 Ind. 238; Watts v. Coxen, 52 Ind. 155. **La.**—State v. Bird, 38 La. Ann. 497. **Tex.**—Vanwey v. State, 41 Tex. 639; West v. State, 2 Tex. App. 209.

81. Singer Mfg. Co. v. Pilse, 12 Ill. App. 506.

82. **Mo.**—Frederick v. Allgaier, 88 Mo. 598; Staples v. Canton, 69 Mo. 592; Kelley v. United Rys. Co., 153 Mo. App. 114, 132 S. W. 269. **Neb.**—Samuelson v. Gale Mfg. Co., 1 Neb. (Unof.) 815, 95 N. W. 809. **N. C.**—Anderson v. Meadows, 159 N. C. 404, 74 S. E. 1019.

83. State v. Somerville, 21 Me. 20, 38 Am. Dec. 248.

[a] **Over emphasis** as to the amount of proof required should not warrant a new trial where the verdict was just and where the applicant had no meritorious defense, the verdict being also fully supported by the evidence. Denham v. Jones, 96 Ga. 130, 23 S. E. 78.

84. Peoria, D. & E. Ry. Co. v. Foltz, 13 Ill. App. 535.

85. Benham v. Cary, 11 Wend. (N. Y.) 83.

86. **Ga.**—King v. King, 37 Ga. 205. **Minn.**—Gran v. Gran, 129 Minn. 531, 152 N. W. 269. **Can.**—Bustin v. Thorne & Co., 37 Can. Sup. Ct. 532.

[a] **Leaning of a Judge.**—Where the jury have been left free to reason to their own conclusion, the mere leaning of a judge, adverse to a party, is no ground for a new trial, in civil cases, at any rate. Stoddard & Co. v. Mellwain, 7 Rich. L. (S. C.) 525.

87. King v. Ward, 74 Me. 349.

c. *Relevancy*.—Instructions must be based upon the pleadings and evidence, consequently, a charge not relevant to anything in the record,⁸⁸ or where it is not justified by the evidence;⁸⁹ or is based upon a theory not justified by the evidence;⁹⁰ or based upon assumed facts rather than those testified to,⁹¹ is erroneous and may be sufficient grounds for a new trial.

16. *Refusal or Failure To Instruct*.—The prejudicial refusal or failure of the court to give a proper instruction will justify a new trial when such instruction was properly requested,⁹² or even if not requested, when it should have been given without request.⁹³

88. *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270. But see *infra*, II, D, 19.

89. **Kan.**—*Kansas City Belt Line Ry. Co. v. Cain*, 56 Kan. 786, 44 Pac. 995. **Me.**—*Hopkins v. Fowler*, 39 Me. 568. **Mass.**—*King v. Nichols*, 138 Mass. 18. **Mich.**—*Nelson v. Dutton*, 51 Mich. 416, 16 N. W. 791. **Nev.**—*Tognini v. Hansen*, 18 Nev. 61, 1 Pac. 198. **N. Y.**—*Gale v. Wells*, 12 Barb. 84. **Wis.**—*Stutz v. Chicago & N. W. Ry. Co.*, 69 Wis. 312, 34 N. W. 147.

90. **U. S.**—*Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. ed. 1090. **Ga.**—*Central Georgia Power Co. v. Cornwell*, 139 Ga. 1, 76 S. E. 387, Ann. Cas. 1914A, 880; *Savannah Electric Co. v. Jackson*, 132 Ga. 559, 64 S. E. 680. **Ky.**—*Greenberg v. Hyman*, 159 Ky. 618, 167 S. W. 914; *Pack v. Camden Interstate R. Co.*, 154 Ky. 535, 157 S. W. 906. **Mass.**—*Renaud v. New York, etc. R. Co.*, 206 Mass. 557, 92 N. E. 710. **Mich.**—*Nelson v. Dutton*, 51 Mich. 416, 16 N. W. 791; *Warner v. Beebe*, 47 Mich. 435, 11 N. W. 258. **Minn.**—*Skow v. Dahl Tire Co.*, 129 Minn. 324, 152 N. W. 755. **Ohio.**—*Traction Co. v. Forrest*, 73 Ohio St. 1, 75 N. E. 818; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654. **Tex.**—*Acheson, T. & S. F. R. Co. v. Harrington*, 51 Tex. Civ. App. 429, 112 S. W. 100.

91. **Ga.**—*Cook v. Wood*, 30 Ga. 891, 76 Am. Dec. 677; *Formby v. Pryor*, 15 Ga. 258. **Kan.**—*Busalt v. Doidge*, 91 Kan. 37, 136 Pac. 904. **Me.**—*King v. Ward*, 74 Me. 349. **Mo.**—*Waers v. Wiesberg*, 152 Mo. App. 276, 133 S. W. 617. **Pa.**—*Edwards v. Edwards*, 4 Phila. 11. **R. I.**—*L'Esperance v. Hebron Mfg. Co.*, 25 R. I. 81, 54 Atl. 930. **S. C.**—*Johnson v. Harth*, 1 Bailey 482; *Jones v. McNeil*, 1 Bailey 235; *Murden v. South Carolina Ins. Co.*, 1 Mill 200. **Can.**—*Clark v. Western Assur. Co.*, 25 U. C. Q. B. 209.

92. **U. S.**—*Allen v. Blunt*, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217; *Malloy v. Bennett*, 15 Fed. 371. **Ark.**—*Carpenter v. Rosenbaum*, 73 Ark. 259, 83 S. W. 1047. **Cal.**—*Maine Boys' Tunnel Co. v. Boston Tunnel Co.*, 7 Cal. 40. **Colo.**—*Lacey v. Bentley*, 39 Colo. 449, 89 Pac. 789. **Conn.**—*Mack v. Starr*, 78 Conn. 184, 61 Atl. 472; *Torry v. Holmes*, 10 Conn. 499. **Ga.**—*Williams v. Way*, 135 Ga. 103, 68 S. E. 1023; *Crawford v. Verner*, 133 Ga. 836, 67 S. E. 188; *Moody v. State*, 114 Ga. 449, 40 S. E. 242; *McDaniel v. Walker*, 29 Ga. 266. **Ill.**—*Higgins v. Lee*, 16 Ill. 495. **Ind.**—*Bane v. Keefler*, 152 Ind. 544, 53 N. E. 834; *Berlin v. Oglesbee*, 65 Ind. 308. **Ia.**—*Woodbury Co. v. Dougherty, etc. Co.*, 161 Iowa 571, 143 N. W. 416. **Mass.**—*Fitch v. Jefferson*, 175 Mass. 56, 55 N. E. 623. **Minn.**—*Farris v. Koplan*, 113 Minn. 397, 129 N. W. 770. **Mo.**—*Maston v. Fanning*, 9 Mo. 305. **Mont.**—*Billing Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. 828. **N. Y.**—*Maringer v. Hill*, 146 App. Div. 720, 131 N. Y. Supp. 445; *Pratt v. McKee*, 147 App. Div. 72, 131 N. Y. Supp. 763; *Isaac v. Schnell*, 117 N. Y. Supp. 907. **N. C.**—*State v. Gaskins*, 93 N. C. 547. **Pa.**—*Wehr v. Reitz*, 11 Pa. Dist. 727, 27 Pa. Co. Ct. 136, 16 York 98; *Carpenter v. Lancaster*, 22 Lanc. L. Rev. 265. **Eng.**—*Martin v. Great Northern R. Co.*, 16 C. B. 179, 3 C. L. R. 817, 1 Jur. N. S. 613, 24 L. J. C. P. 209, 3 Wkly. Rep. 477, 81 E. C. L. 179, 139 Eng. Reprint 724. **Can.**—*Williams v. Marshall*, 20 U. C. Q. B. 230.

93. **Ga.**—*Hamilton v. Du Pre*, 111 Ga. 819, 35 S. E. 684. **Ia.**—*Rosche v. Bettendorf Axle Co.*, 168 Iowa 461, 150 N. W. 663. **Kan.**—*McMahon v. Joplin & P. R. Co.*, 96 Kan. 271, 150 Pac. 566. **Mass.**—*Page v. Pattee*, 6 Mass. 459. **Pa.**—*Cumru Tp. v. Phillips*, 19 Pa. Dist. 836. **S. C.**—*Markley v.*

17. Submitting Case to Jury.—Error may also arise, and a new trial rightly given, when the judge improperly submits a case to the jury when there is no support in evidence to support it.⁹⁴ The court may also err in ordering,⁹⁵ or in refusing to order, a nonsuit,⁹⁶ or in improperly directing a verdict.⁹⁷ In some jurisdictions, however, the grant of a nonsuit may not be reviewable by motion for a new trial.⁹⁸ An erroneous ruling sustaining a demurrer to the evidence may be made the basis of a new trial.⁹⁹

18. Objections and Exceptions.—As a general rule of practice, errors of law occurring at the trial must be met at the time with proper objection and exception, otherwise they will be waived. They cannot be raised for the first time on a motion for a new trial.¹ This

Amos, 2 Bailey 603. **Tenn.**—Knickerbocker L. Ins. Co. v. Heidel, 8 Lea 488. **Eng.**—Hadley v. Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302; Knight v. Egerton, 7 Exch. 407. **Can.** Bergklint v. Western, etc. Power Co., 50 Can. Sup. Ct. 39; Jamieson v. Harris, 35 Can. Sup. Ct. 625.

Necessity and sufficiency of request, see the title "Instructions."

94. Ga.—Hendricks v. Allen, 128 Ga. 181, 57 S. E. 224. **Mich.**—Charters v. Industrial Wks., 179 Mich. 1, 146 N. W. 128. **Neb.**—Barge v. Haslam, 65 Neb. 656, 91 N. W. 528. **N. Y.** Gale v. Wells, 12 Barb. 84; Walsh v. Riesenbergs, 94 App. Div. 466, 89 N. Y. Supp. 58; Lackawanna Steel Co. v. Pioneer S. S. Co., 69 Misc. 104, 124 N. Y. Supp. 833. **N. C.**—Prevatt v. Harrelson, 132 N. C. 250, 43 S. E. 800. **Eng.**—Young v. Hoffman Mfg. Co., Ltd. (1907), 2 K. B. 646; Weiser v. Segar (1904), W. N. 93; Seaton v. Burnand (1900), App. Cas. 135, 143; Nevill v. Fine Art & General Ins. Co. (1897), App. Cas. 68, 76. **Can.**—Shaver v. Jamieson, 25 U. C. Q. B. 156; McFarlane v. Flinn, 8 Nova Scotia 141.

95. Cal.—McCreery v. Everding, 44 Cal. 284. **Ga.**—Farmers' Union Warehouse, S. & Mfg. Co. v. Stewart, 138 Ga. 733, 75 S. E. 1131; Venable v. Randall, 113 Ga. 1042, 39 S. E. 470. **Mont.** Roach v. Butter, 40 Mont. 167, 105 Pac. 555. **Nev.**—Tonopah & G. R. Co. v. Fellanbaum, 32 Nev. 278, 107 Pac. 882. **N. Y.**—Tontorio v. New York Contracting Co., 147 App. Div. 138, 131 N. Y. Supp. 724. **Pa.**—Bodine v. Camden & A. R. Co., 1 Phila. 28. **R. I.** Thurston v. Schroeder, 6 R. I. 272. **Eng.** Edger v. Knapp, 1 D. & L. 73, 7 Jur. 583, 5 M. & G. 753, 6 Scott N. R.

707, 44 E. C. L. 393, 134 Eng. Reprint 763. **Can.**—Norton v. Fulton, 39 Can. Sup. Ct. 202; Regan v. Waters, 10 Ont. App. 85; Baker v. Fawkes, 35 U. C. Q. B. 302.

96. Fox v. Southern Pac. Co., 95 Cal. 234, 30 Pac. 384; Foot v. Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; Doing v. New York, O. & W. Ry. Co., 63 Hun 626, 17 N. Y. Supp. 689, 43 N. Y. St. 820. *Compare* Mershon v. Hobensack, 22 N. J. L. 372. See generally the title "**Dissmissal, Discontinuance and Nonsuit.**"

97. Minn.—Duff v. Bayne, 112 Minn. 44, 127 N. W. 385; Floody v. Great Northern R. Co., 104 Minn. 517, 116 N. W. 107, 932. **N. Y.**—Process Copper & Brass Co. v. Perfect Arc Lamp & Mfg. Co., 94 App. Div. 198, 87 N. Y. Supp. 987. **Pa.**—York Felt & Paper Co. v. York Haven Paper Co., 14 York 171.

See generally the title "**Verdict.**"

98. Farmers' Union Warehouse, S. & Mfg. Co. v. Stewart, 138 Ga. 733, 75 S. E. 1131; Buchanan v. James, 134 Ga. 475, 68 S. E. 72.

99. Hinote v. Simpson & Co., 17 Fla. 444; Missouri Pac. Ry. Co. v. Goodrich, 38 Kan. 224, 16 Pac. 439.

As to demurrer to evidence, see 7 STANDARD PROC. 1.

[a] **Overruling Demurrer to Evidence.**—A new trial will not be granted, however, on the sole ground of error in overruling a demurrer to the evidence. Wabash, etc. Ry. Co. v. Nice, 99 Ind. 152.

1. Ala.—Greek American Produce Co. v. Louisville & N. R. Co., 1 Ala. App. 272, 55 So. 455. **Cal.**—Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890. **Ga.**—Langley v. Simmons, 143 Ga. 699, 85 S. E. 832; Richardson

necessity is expressly covered by some of the statutes which provide that new trials may be granted for errors of law occurring at the trial "and excepted to by the party making the application."² Where, however, the circumstances are such that objection could not have been reasonably made at the time, the requirement may be dispensed with.³ The rule governing objections and exceptions applies to all errors generally, and is illustrated, for example, in case of errors in connection with rulings on the competency of witnesses;⁴ in the admission of testimony;⁵ in connection with alleged errors either in giv-

v. State, 141 Ga. 782, 82 S. E. 134; *Milner v. State*, 124 Ga. 86, 52 S. E. 302; *Wynne v. State*, 123 Ga. 566, 51 S. E. 636; *Harris v. State*, 123 Ga. 538, 51 S. E. 596. **Ind.**—*Farman v. Lauman*, 73 Ind. 568. **Ia.**—*Warner v. Trustees of Norwegian C. Assn.*, 139 Iowa 115, 117 N. W. 39. **Ky.**—*Louisville & N. R. Co. v. McCoy*, 81 Ky. 403. **La.**—*State v. Magee*, 48 La. Ann. 901, 19 So. 933. **Mass.**—*Holdsworth v. Tucker*, 147 Mass. 572, 18 N. E. 430. **Minn.**—*Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534. **Miss.**—*Atlantic H. Ins. Co. v. Randolph*, 109 Miss. 302, 68 So. 444; *Ned v. State*, 33 Miss. 364. **Mo.**—*State v. Johnson*, 255 Mo. 281, 164 S. W. 209; *State v. Tetrick*, 199 Mo. 100, 97 S. W. 564; *State v. Fischer*, 124 Mo. 460, 27 S. W. 1109; *State v. Peak*, 85 Mo. 190. **Mont.**—*Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692. **N. Y.**—*Poppenberg v. Owen & Co.*, 84 Misc. 126, 146 N. Y. Supp. 478; *Spatz v. Singer*, 116 N. Y. Supp. 576. **Tenn.** *Stone v. State*, 4 Humph. 27. **Tex.** *Suesberry v. State*, 72 Tex. Crim. 439, 162 S. W. 849; *Reeves v. State*, 47 Tex. Crim. 340, 83 S. W. 803. **Can.**—*Rex v. Davis*, 19 Brit. Col. 50; *Brownell v. Black*, 31 N. Brunsw. 594; *Reg. v. Wilkinson*, 42 U. C. Q. B. 492.

[a] Where, however, the facts, as allowed by the judge and conceded by both parties, show a fatal defect in the title of the plaintiff, now relied upon in defense, and which, if noticed at the trial, could not have been obviated by further proof on the part of the plaintiffs, courts have felt authorized to consider the point as still open, upon such a motion as this, and to dispose of the case in such a manner as justice would seem to require. *Slater v. Rawson*, 1 Mete. (Mass.) 450, 458; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681. See also *Maynard v. Hunt*, 5 Pick. (Mass.) 240.

2. See the statutes and the fol-

lowing cases: **Ark.**—*Carpenter v. Rosenbaum*, 73 Ark. 259, 83 S. W. 1047. **Kan.**—*St. Louis, etc. R. Co. v. Werner*, 70 Kan. 190, 78 Pac. 410. **Mass.** *Whittaker v. West Boylston*, 97 Mass. 273. **Minn.**—*Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534. **Mont.**—*Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692. **Ohio.**—*Kline v. Wynne, Haynes & Co.*, 10 Ohio St. 223.

3. See *infra*, this note.

[a] For example, where the trial court denies counsel the right to see the instructions (as provided by statute) before they are read to the jury, counsel may for the first time object and except to alleged errors in such instructions in a motion for a new trial. *Thomas v. Illinois Cent. Ry. Co.*, 169 Iowa 337, 151 N. W. 387.

4. **Ark.**—*Crump v. Starke*, 23 Ark. 131. **Cal.**—*Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500. **Conn.**—*Steele v. Aylesworth*, 18 Conn. 244. **N. Y.** *Jackson ex dem. Russell v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557. **N. C.** *Tatem v. Paine*, 11 N. C. 64, 15 Am. Dec. 507. **Vt.**—*Dodge v. Kendall*, 4 Vt. 31. **Wis.**—*Dickinson v. Buskie*, 59 Wis. 136, 17 N. W. 685. **Eng.**—*Turner v. Pearte*, 1 T. R. 717, 99 Eng. Reprint 1339. **Can.**—*Doe ex dem. Sullivan v. Read*, 3 U. C. Q. B. 293.

5. **U. S.**—*Russell v. Union Ins. Co.*, 1 Wash. C. C. 440, 21 Fed. Cas. No. 12,147. **Ark.**—*Cheatham v. Roberts*, 23 Ark. 651; *Main v. Gordon*, 12 Ark. 651. **Cal.**—*Clark v. Gridley*, 35 Cal. 398. **Conn.**—*Rathbone v. City F. Ins. Co.*, 31 Conn. 193; *Wilcox v. Green*, 28 Conn. 572; *Nichols v. Alsop*, 10 Conn. 263. **Fla.**—*Greeley v. Percival*, 21 Fla. 535. **Ga.**—*Hill v. Chastain*, 138 Ga. 750, 75 S. E. 1130; *Thompson v. Lanfair*, 127 Ga. 557, 56 S. E. 770; *Evans v. State*, 33 Ga. 4; *Bond v. Baldwin*, 9 Ga. 9. **Ill.**—*Niedner v. Friedrich*, 69 Ill. App. 622. **Ind.**—*Goldsby v. Gentle*, 5 Blackf. 436. **Ky.**—*Outen v. Merrill*, 2 Litt.

ing,⁶ or refusing instructions;⁷ and in connection with the submission of the case to the jury.⁸ Some cases hold, however, that with reference to errors in instructions, motions for new trials may be made thereon, although no exceptions were taken at the time.⁹

19. Harmless Error.—It is well established that in order to entitle one to a new trial, it must appear that the error has worked an

305; *Cannon v. Alsbury*, 1 A. K. Marsh. 76, 10 Am. Dec. 709. **Mass.**—*Rice v. Bancroft*, 11 Pick. 469; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391. **Miss.**—*Henderson v. Cargill*, 31 Miss. 367; *Carter v. Taylor*, 6 Smed. & M. 367. **Mo.**—*Weller v. Wagner*, 181 Mo. 151, 79 S. W. 941. **N. J.**—*Hadley v. Geiger*, 9 N. J. L. 225. **N. Y.**—*Paisley v. Western, etc. Tract. Co.*, 80 Misc. 258, 141 N. Y. Supp. 63; *Maloney v. Silberman*, 115 N. Y. Supp. 1075. **N. C.**—*Codner v. Bizzell*, 82 N. C. 390; *Dowdle v. Stalcup*, 25 N. C. 45. **Pa.**—*Buchanan v. Chester*, 9 Del. Co. 328. **S. C.**—*Wingo v. Inman Mills*, 76 S. C. 550, 57 S. E. 525; *Lloyd v. Monpoev*, 2 Nott & McC. 446. **Tex.**—*Walton v. Payne*, 18 Tex. 60. **Can.**—*Brownell v. Black*, 31 N. Brunsw. 594; *Clark v. Scammell*, 31 N. Brunsw. 265.

6. U. S.—*Root v. Catskill Mt. Ry. Co.*, 33 Fed. 858; *Hamlin v. Pettibone*, 6 Biss. 167, 11 Fed. Cas. No. 5,995. **Cal.**—*Letter v. Putney*, 7 Cal. 423. **Ia.**—*Turley v. Griffin*, 106 Iowa 161, 76 N. W. 660; *Gordon v. Pitt*, 3 Iowa 385. **Minn.**—*McGray v. Cobb*, 130 Minn. 434, 152 N. W. 262, 153 N. W. 736; *Sassen v. Haegle*, 125 Minn. 441, 147 N. W. 445, 52 L. R. A. (N. S.) 1176; *Bergh v. Sloan*, 53 Minn. 116, 54 N. W. 943. **Mo.**—*Dozier v. Jerman*, 30 Mo. 216; *Powers v. Allen*, 14 Mo. 367; *Randolph v. Alsey*, 8 Mo. 656. **N. Y.**—*Varnum v. Taylor*, 10 Bosw. 148. **N. C.**—*Clements v. Rogers*, 95 N. C. 248. **Okla.**—*Berry v. Smith*, 2 Okla. 345, 35 Pac. 576. **Pa.**—*Sloan v. Philadelphia R. Co.*, 21 Pa. Dist. 598; *Sweet v. Lewis*, 4 Lack. Leg. N. 153. **Va.**—*Danville Bank v. Waddill's Admr.*, 31 Gratt. (72 Va.) 469. **W. Va.**—*Core v. Marple*, 24 W. Va. 354. **Can.**—*Lamontagne v. Quebec R. Co.*, 50 Can. Sup. Ct. 423; *Wills v. Carman*, 17 Ont. 223; *Spring v. Cockburn*, 19 U. C. C. P. 63; *Cousins v. Merrill*, 16 U. C. C. P. 114.

7. U. S.—*Edwards v. Southern R. Co.*, 102 Fed. 720; *Root v. Catskill Mt. R. Co.*, 33 Fed. 858. **Ark.**—*International Molasses Co. v. Jones Bros.*

& Co., 110 Ark. 632, 160 S. W. 1083; *Carpenter v. Rosenbaum*, 73 Ark. 259, 83 S. W. 1047. **Ga.**—*McDaniel v. Walker*, 29 Ga. 266. **Me.**—*Barrett v. Delano*, 14 Atl. 288. **N. Y.**—*Raymond v. Howland*, 17 Wend. 389. **N. C.**—*Simmons v. Mann*, 92 N. C. 12. **Vt.**—*Rogers v. Page*, Brayt. 169.

See the title "Instructions."

8. Alaska.—*Banks v. Wilson*, 1 Alaska 241. **Mich.**—*Colwell v. Alpena Power Co.*, 178 Mich. 183, 144 N. W. 516; *Lincoln v. Felt*, 132 Mich. 49, 92 N. W. 780. **Minn.**—*Volmer v. Stagerman*, 24 Minn. 434. **N. Y.**—*Clark v. New York*, 24 How. Pr. 333; *Hendrick v. Biggar*, 66 Misc. 576, 122 N. Y. Supp. 162; *Linitzky v. Gorman*, 146 N. Y. Supp. 313; *Smith v. Simmons*, 21 N. Y. Supp. 47. **N. C.**—*Clements v. Rogers*, 95 N. C. 248. **Pa.**—*Hoffman v. Whalen*, 3 Lanc. Law Rev. 217. **S. D.**—*Nelson v. Jordeth*, 15 S. D. 46, 87 N. W. 140. **Eng.**—*Booth v. Clive*, 10 C. B. 827, 20 L. J. C. P. 151, 2 L. M. & P. 283, 70 E. C. L. 827, 15 Jur. 563, 138 Eng. Reprint 327; *Robinson v. Cook*, 6 Taunt. 336, 16 Rev. Rep. 624, 1 E. C. L. 642, 128 Eng. Reprint 1064. **Can.**—*Fairbanks v. Creighton*, 20 Nova Scotia 83.

9. U. S.—*Allen v. Blunt*, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217. **Ia.**—*Farr v. Fuller*, 8 Iowa 347. **Me.**—*Belmont v. Morrill*, 69 Me. 314. **Minn.**—*Sassen v. Haegle*, 125 Minn. 441, 147 N. W. 445, 52 L. R. A. (N. S.) 1176; *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534. **Miss.**—*Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 190. **Mo.**—*Nulton v. Croskey*, 111 Mo. App. 18, 85 S. W. 644. **N. J.**—See *Otis Elev. Co. v. Headley*, 81 N. J. L. 173, 80 Atl. 109, 36 L. R. A. (N. S.) 240. **N. Y.**—*Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Archer v. Hubbell*, 4 Wend. 514; *Moore v. Batten*, 5 Misc. 20, 25 N. Y. Supp. 141. **Ohio.**—*Kline v. Wynne*, *Haynes & Co.*, 10 Ohio St. 223. **Wis.**—*McCann v. Ullman*, 109 Wis. 574, 85 N. W. 493. **Wash.**—*Moore v. Marsh*, 59 Wash. 151, 109 Pac. 606

injustice, or that by reason of it an aggrieved party has been prejudiced or deprived of some substantial right whereby the verdict was probably affected.¹⁰ In other words, error without prejudice is harmless, and is no ground for a new trial.¹¹ This principle is applied in case of the admission¹² or exclusion¹³ of evidence. The doctrine of harmless error applies, also, to alleged errors in connection with giving,¹⁴ or failing or refusing to give,¹⁵ instructions. No new trial will be granted

10. **U. S.**—*Allen v. Blunt*, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217. **Conn.** *Skidmore v. Clark*, 47 Conn. 20. **Mich.** *People v. Sackett*, 14 Mich. 320. **N. Y.** *Hine v. Cushing*, 53 Hun 519, 6 N. Y. Supp. 850, 24 N. Y. St. 778.

11. **U. S.**—*United States v. Martin*, 1 Hask. 166, 26 Fed. Cas. No. 15,729; *United States v. Hudson*, 1 Hask. 527, 26 Fed. Cas. No. 15,412. **Ark.**—*Ince v. State*, 76 Ark. 615, 88 S. W. 818; *Whit v. State*, 74 Ark. 489, 86 S. W. 284. **Conn.**—*State v. Buxton*, 79 Conn. 477, 65 Atl. 957. **Fla.**—*Coatney v. State*, 61 Fla. 19, 55 So. 285. **Ga.** *Frank v. State*, 141 Ga. 243, 80 S. E. 1016; *Clements v. State*, 123 Ga. 547, 51 S. E. 595; *Daniel v. White*, 11 Ga. App. 799, 76 S. E. 162. **Hawaii.** *Hawaii v. Nakamura*, 20 Hawaii 222. **Ia.**—*State v. Thomas*, 135 Iowa 717, 109 N. W. 900; *State v. Walker*, 133 Iowa 489, 110 N. W. 925. **La.**—*State v. Charles*, 130 La. 683, 58 So. 509; *State v. Jessie*, 30 La. Ann. 1170. **Minn.**—*State v. Williams*, 96 Minn. 351, 105 N. W. 265; *State v. Crawford*, 96 Minn. 95, 104 N. W. 768, 822, 1 L. R. A. (N. S.) 839. **Mo.**—*State v. Coleman*, 264 Mo. 435, 175 S. W. 209. **Neb.** *Taylor v. State*, 86 Neb. 795, 126 N. W. 752. **N. Y.**—*People v. Gallagher*, 174 N. Y. 505, 66 N. E. 1113, *affirming* 75 App. Div. 39, 78 N. Y. Supp. 5, 11 N. Y. Ann. Cas. 348, 17 N. Y. Crim. 18. **N. C.**—*State v. Frank*, 50 N. C. 384. **Pa.**—*Com. v. Clark*, 10 Pa. Dist. 641, 25 Pa. Co. Ct. 349, 7 Lack. Jur. 307. **R. I.**—*State v. Kemp*, 37 R. I. 572, 94 Atl. 429. **Tex.**—*Moreno v. State*, 71 Tex. Crim. 460, 160 S. W. 361.

[a] By force of statute, the error may have to be so prejudicial that the judgment complained of would, if allowed to remain in force, be reversed on appeal. *Smith & Bros. Typewriter Co. v. McGeorge*, 72 Ore. 523, 143 Pac. 905.

12. See *supra*, II, D, 13.

13. See *supra*, II, D, 14.

14. **U. S.**—*Butler v. Barret*, 130 Fed. 944; *Allen v. Blunt*, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217. **Cal.**—*Tompkins v. Mahoney*, 32 Cal. 231. **Conn.** *Rice v. Almy*, 32 Conn. 297; *Branch v. Doane*, 17 Conn. 402. **Ga.**—*Savannah, A. & N. R. Co. v. Williams*, 133 Ga. 679, 66 S. E. 942; *Prescott v. Fletcher*, 133 Ga. 404, 65 S. E. 877; *Chandler v. Griffin*, 132 Ga. 847, 65 S. E. 128; *McGee v. Young*, 132 Ga. 606, 64 S. E. 689; *Booth & Co. v. Mohr*, 122 Ga. 333, 50 S. E. 173; *Heard v. Tappan*, 121 Ga. 437, 49 S. E. 292; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806. **Ill.** *De Clercq v. Mungin*, 46 Ill. 112; *Beifeld v. Pease*, 101 Ill. App. 539. **Ky.**—*Rucker v. Hamilton*, 3 Dana 36; *Dale v. Arnold*, 2 Bibb 605. **Me.**—*Stephenson v. Thayer*, 63 Me. 143. **Mass.**—*Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Train v. Collins*, 2 Pick. 145. **Minn.** *Farnham v. Thompson*, 32 Minn. 22, 18 N. W. 833. **N. H.**—*March v. Portsmouth, etc. R. Co.*, 19 N. H. 372; *Carpenter v. Pierce*, 13 N. H. 403. **N. Y.** *Mansfield v. Wheeler*, 23 Wend. 79. **N. C.**—*Lewis v. Albemarle & R. R. Co.*, 95 N. C. 179. **Ohio.**—*Jordan, Ellis & Co. v. James*, 5 Ohio 88. **Pa.**—*Heffron v. Scranton R. Co.*, 4 Lack. Jur. 307. **S. C.**—*Stoddard & Co. v. Mellwain*, 7 Rich. 525; *Kinloch v. Palmer*, 1 Mill Const. 216. **Vt.**—*Brackett v. Wait*, 6 Vt. 411; *Rogers v. Page*, Brayt. 169. **Wash.**—*Armstrong v. Musser Lumber, etc. Co.*, 43 Wash. 584, 86 Pac. 944. **Eng.**—*Jenkins v. Morris*, 14 Ch. Div. 674, 42 L. T. N. S. 817; *Black v. Jones*, 6 Exch. 213, 20 L. J. Exch. 152; *Norbury v. Kitchin*, 7 L. T. N. S. 685. **Can.** *Barthe v. Huard*, 42 Can. Sup. Ct. 406; *Winnipeg E. R. Co. v. Wald*, 41 Can. Sup. Ct. 431; *Cormier v. Boudreau*, 35 N. Brunsw. 645; *Fitch v. Kelly*, 44 U. C. Q. B. 578.

15. **Fla.**—*Randall v. Parramore*, 1 Fla. 409. **Ga.**—*Tucker v. Central of Georgia R. Co.*, 122 Ga. 387, 50 S. E. 128. **Ill.**—*Toledo, P. & W. Ry. Co. v. Ingraham*, 58 Ill. 120; *Greenup v.*

for such misdirections where the jury were not misled, and the error did not affect the merits of the case.¹⁶ Moreover, instructions even if erroneous as to vital and material questions of law, are not ground for a new trial where the verdict complained of was demanded by the evidence.¹⁷ Likewise, in submitting the case to the jury, no new trial will be given for errors that proved to be harmless upon the result.¹⁸

E. ACCIDENT, SURPRISE, ETC. — 1. In General. — a. Ground for New Trial.—Another general ground for new trial is surprise.¹⁹

Stoker, 8 Ill. 202. **Mass.**—*Wells v. Prince*, 15 Gray 562. **Miss.**—*Wilkinson v. Griswold*, 12 Smed. & M. 669. **Mo.**—*Donaldson Bond & S. Co. v. Houck*, 213 Mo. 416, 112 S. W. 242. **N. J.**—*Cottrell v. Fountain*, 80 N. J. L. 1, 77 Atl. 465; *Penton v. Sinnickson*, 9 N. J. L. 149. **R. I.**—*Newton v. Weaver*, 13 R. I. 616. **Tex.**—*Missouri, K. & T. R. Co. v. Rich*, 51 Tex. Civ. App. 312, 112 S. W. 114.

16. **Conn.**—*Branch v. Doane*, 17 Conn. 402; *Hoyt v. Dimon*, 5 Day 479. **Fla.**—*Randall v. Parramore*, 1 Fla. 409. **Ga.**—*Thomas v. State*, 95 Ga. 484, 22 S. E. 315; *Brunner v. Black*, 92 Ga. 497, 17 S. E. 767; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806; *Central R. Co. v. Smith*, 74 Ga. 112; *Brassell v. State*, 64 Ga. 318. **Ill.**—*Toledo, etc. R. Co. v. Ingraham*, 58 Ill. 120. **Ky.**—*Dale v. Arnold*, 2 Bibb 605. **La.**—*State v. Vickers*, 47 La. Ann. 1574, 18 So. 639. **Me.**—*Thacher v. Jones*, 31 Me. 528; *Copeland v. Copeland*, 28 Me. 525. **Mo.**—*State v. Norman*, 159 Mo. 531, 60 S. W. 1036. **N. H.**—*Wendell v. Moulton*, 26 N. H. 41; *Carpenter v. Pierce*, 13 N. H. 403; *State v. Hascall*, 6 N. H. 352. **N. Y.**—*Horner v. Wood*, 16 Barb. 386; *Woodbeck v. Keller*, 6 Cow. 118. **Ohio.**—*Jordan, Ellis & Co. v. James*, 5 Ohio 88. **R. I.**—*Newton v. Weaver*, 13 R. I. 616. **Tex.**—*Crist v. State*, 21 Tex. App. 561, 17 S. W. 260. **Vt.**—*Brackett v. Wait*, 6 Vt. 411.

17. **U. S.**—*Edwards v. Southern R. Co.*, 102 Fed. 720. **Ala.**—*Shaw v. Wallace*, 2 Stew. & P. 193. **Ark.**—*Sexton v. Brock*, 15 Ark. 345. **Conn.**—*State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98; *Brown v. Keach*, 24 Conn. 73. **Fla.**—*Ballard v. State*, 31 Fla. 266, 12 So. 865. **Ga.**—*Tucker v. State*, 133 Ga. 470, 66 S. E. 250; *Carpenter v. State*, 122 Ga. 171, 50 S. E. 58; *Jones v. State*, 92 Ga. 480, 17 S. E. 859. **Ill.**—*Long v. People*, 102 Ill. 331; *Greenup*

v. Stoker, 8 Ill. 202. **Ind.**—*Harris v. State*, 30 Ind. 131. **Me.**—*Copeland v. Wadleigh*, 7 Me. 141. **Minn.**—*State v. Gut*, 13 Minn. 341. **Mo.**—*Homuth v. Metropolitan St. Ry. Co.*, 129 Mo. 629, 31 S. W. 903. **Mont.**—*State v. Tracey*, 35 Mont. 552, 90 Pac. 791. **N. J.**—*Penton v. Sinnickson*, 9 N. J. L. 149. **N. C.**—*State v. Harris*, 46 N. C. 190. **R. I.**—*Newton v. Weaver*, 13 R. I. 616. **S. C.**—*Woody v. Dean*, 24 S. C. 499. **Vt.**—*Morse v. Weymouth*, 28 Vt. 824. **Can.**—*McLaughlin v. Westell*, 41 N. Brunsw. 193; *Rex v. Clarke*, 38 N. Brunsw. 11; *Schnell v. British Columbia, etc. R. Co.*, 15 Brit. Col. 378.

18. **Ala.**—*Shaw v. Wallace*, 2 Stew. & P. 193. **Ga.**—*Atlanta v. Word*, 7 Ga. 276; *American Life Ins. Co. v. Green*, 57 Ga. 469. **Me.**—*Copeland v. Wadleigh*, 7 Me. 141. **Minn.**—*Harris v. Kerr*, 37 Minn. 537, 35 N. W. 379. **N. Y.**—*Jackson ex dem. Walton v. Leggett*, 7 Wend. 377; *Clason v. Baldwin*, 68 Hun 404, 23 N. Y. Supp. 50, 52 N. Y. St. 748. **N. C.**—*Marshall v. Fisher*, 46 N. C. 111.

19. **U. S.**—*Mulhall v. Keenan*, 18 Wall. 342, 21 L. ed. 808. **Ga.**—*Thomas v. State*, 52 Ga. 509. **Ind.**—*Deyo v. Reynolds*, 15 Ind. 233. **Ia.**—*Richards v. Nuckolls*, 19 Iowa 555. **Ky.**—*McFarland's Admr. v. Clark*, 9 Dana 134; *Guthrie v. Bogart*, 1 A. K. Marsh. 334. **Miss.**—*Dorr & Co. v. Watson*, 28 Miss. 383. **N. J.**—*Searles v. Elizabeth, P. & C. J. Ry. Co.*, 70 N. J. L. 388, 57 Atl. 134; *Moore v. Central R. Co.*, 24 N. J. L. 268, 277. **N. Y.**—*Wehrum v. Kuhn*, 61 N. Y. 623 (*affirming* 2 Jones & S. 336); *Jackson ex dem. Constantine v. Warford*, 7 Wend. 62. **S. C.**—*Blythe v. Sutherland*, 3 McCord 258. **S. D.**—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524. **Vt.**—*State v. Williams*, 27 Vt. 724. **Wash.**—*Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478. **Eng.**—*Anderson v. George*, 1 Burr. 352,

It must, however, be such that against it ordinary prudence could not have guarded,²⁰ and the statutory ground usually so specifically declares.²¹ Other terms, found in some of the statutes, and not infrequently used in the cases, such as "inadvertence," "mistake," "misapprehension," "unforeseen cause," "excusable neglect," and "unavoidable casualty," are either appropriately or conveniently considered in connection with this general ground.²²

97 Eng. Reprint 349; *Dickenson v. Fisher*, 3 T. L. R. 459; *Reg. v. Whitehouse*, Dears. C. C. 1, 6 Cox C. C. 129; *Hartwright v. Badham*, 11 Price 383.

[a] **The only remedy for surprise** is a motion for a new trial. *Mulhall v. Keenan*, 18 Wall. (U. S.) 342, 21 L. ed. 808.

[b] **Whether by Fraud or Accident.** "When a party or his counsel are taken by surprise, whether by fraud or accident, on a material point or circumstance, which could not reasonably have been anticipated, and when want of skill, care, or attention cannot be justly computed, and injustice has been done, a new trial will be granted." *McCall v. Hitchcock*, 9 Bush (Ky.) 66, 71.

[c] **Discretion of Court.**—The court in its sound discretion may exercise its power to grant a new trial, where by reason of mistake or surprise at the trial, it can see that justice has not been done by the verdict. *Hutchinson v. Coleman*, 10 N. J. L. 74.

20. **Ariz.**—*Solomon v. Norton*, 2 Ariz. 100, 11 Pac. 108. **Cal.**—*Schellous v. Ball*, 29 Cal. 605. **Ga.**—*Sheftall's Exrs. v. Clay's Admsrs.*, R. M. Charl. 7. **Ind.**—*Ex parte Walls*, 64 Ind. 461. **Ky.**—See *McFarland's Admsrs. v. Clark*, 9 Dana 134. **Miss.**—*Haber v. Lane*, 45 Miss. 608. **S. C.**—*Barry v. Wilbourne*, 2 Bailey 91. **Vt.**—*Burr v. Palmer*, 23 Vt. 244.

[a] **Surprise by Testimony.**—In a case between landlord and tenant which involved the subletting of premises, the tenant testified on the trial that the landlord's president had consented to such subletting. The president was absent at such time, and the question of consent had not been raised in the trial in the justice's court. It was held that the landlord was entitled to a new trial on the ground of surprise. *Louisville & N. R. Co. v. Bickel*, 97 Ky. 222, 30 S. W. 602.

21. **Ind.**—*Working v. Garn*, 148

Ind. 546, 47 N. E. 951. **Mo.**—*Connally v. Pehle*, 105 Mo. App. 407, 79 S. W. 1006. **Nev.**—*Luke v. Coffee*, 31 Nev. 165, 101 Pac. 555. **Ohio.**—See *Kroger v. Ryan*, 83 Ohio St. 299, 94 N. E. 428. **S. D.**—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524.

22. See the statutes and *infra*, this note.

[a] **Accident, Mistake, Misfortune.** *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800; *Couillard v. Seaver*, 64 N. H. 614, 9 Atl. 724.

[b] **Accident, Mistake, or Unforeseen Cause.**—*McCotter v. New Shoreham*, 23 R. I. 100, 49 Atl. 695.

[c] "If a suit has been discontinued by mistake; or accident or sickness, or other unforeseen cause, has prevented a party or his witness from reaching court, so that a nonsuit or default has followed; or where there has been a trial it has not been a full, fair, and impartial trial by reason of some one of the causes named, a trial or a new trial may be granted." *Dillon v. O'Neal*, 26 R. I. 87, 58 Atl. 455.

[d] **Inadvertence, Mistake, or Slip in Proceedings.**—New trials may be granted for inadvertence, mistake, or slip in proceedings. *Halsbury, Laws of Eng.*, vol. 23, p. 205, *citing* *Neale v. Gordon Lennox* (1902), App. Cas. (Eng.) 465; *Burrows v. London General Omnibus Co.*, 10 T. L. R. (Eng.) 298; *Groom v. Shuker*, 69 L. T. N. S. (Eng.) 293; *Germ Milling Co. v. Robinson*, 3 T. L. R. 71.

[e] **"Inadvertence, Surprise, and Excusable Neglect."**—*Burns' Ann. Sts. (Ind.)*, 1901, §399. See also *Richcreek v. Russell*, 34 Ind. App. 217, 72 N. E. 617. See likewise for same terms in the California statute, *Symons v. Bunell*, 80 Cal. 330, 22 Pac. 193, 550.

[f] **Mistake, Inadvertence, Surprise, or Excusable Neglect.**—§774 of the statutes, authorizing the court, in its discretion, to relieve a party from a judgment taken through his mistake,

b. *Definitions.*— Surprise does not mean that the result of the trial was entirely unexpected,²³ but denotes some condition or situation in which a party is unexpectedly placed to his injury without any default or negligence of his own.²⁴ Surprise is not synonymous with “accident,” yet it has substantially the same meaning. Each term is used to denote some condition or situation in which a party, without fault on his part, is placed unexpectedly, to his injury,²⁵ but, in some

inadvertence, surprise, or excusable neglect, refers to cases where parties have been prevented from having a proper hearing, and are in default. *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.

[g] **Unavoidable casualty or misfortune** preventing the party from appearing or defending. Ky. Civ. Code Prac., §518, subsec. 7. See *Ray v. Arnett*, 32 Ky. L. Rep. 562, 106 S. W. 828.

23. See *Lane v. Brown*, 22 Ind. 239.

24. Cal.—*McGuire v. Drew*, 83 Cal. 225, 229, 23 Pac. 312; *Porter v. Anderson*, 14 Cal. App. 716, 113 Pac. 345; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275. Miss.—*Dorr & Co. v. Watson*, 28 Miss. 383. Ore.—See *Horn v. United Securities Co.*, 47 Ore. 35, 81 Pac. 1009.

[a] “**Surprise, in its legal acceptance**,” it is said, denotes (1) an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection.” *Peers v. Davis’ Admr.*, 29 Mo. 184. (2) “**Surprise** calling for favorable action on a motion for a new trial is that situation in which a party is unexpectedly placed, without any default on his part, and which will work injury to his interests. *Gidionsen v. Union Depot Ry. Co.*, 129 Mo. 392, 31 S. W. 800, 802; *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661, 81 N. W. 849, 850; *Working v. Garn*, 148 Ind. 546, 47 N. E. 951, 953.” *Henderson v. Hazlett*, 75 W. Va. 255, 83 S. E. 907. (3) “**Surprise**” is the act of taking unawares, sudden confusion or perplexity. *Davis v. Steuben School Tp.*, 19 Ind. App. 694, 50 N. E. 1.

[b] **Means a “Reasonable” Surprise.**—*Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118, 119.

25. *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661, 81 N. W. 849; *Ludwig v. Walker*, 59 Misc. 62, 111 N. Y. Supp. 1102.

[a] “**Surprise**” is used interchangeably with “accident” to designate the emergencies giving rise to accidents; both words signifying a detrimental situation wherein a party is placed unexpectedly, and against which ordinary prudence would not have guarded. *State ex rel. Hartley v. Innes*, 137 Mo. App. 420, 118 S. W. 1168.

[b] **Accident Defined.**—*Rowell, J.*, in *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, quotes from 2 Pom. Eq., §823, note 1: “‘**Accident**’ is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding right which it would be a violation of good conscience for the latter person, under the circumstances, to retain.”

[c] The supreme court of Vermont, in *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57, says: “**Webster** defines accident as an event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause, and therefore not expected; chance, casualty, contingency. The word has often received judicial construction. In *Bostwick v. Stiles*, 35 Conn. 198, it is said that it includes not only inevitable casualties, such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons without the fault, neglect or misconduct of the party. *Alexander v. Bailey*, 2 Lea 639; *State v. Lewis*, 107 N. C. 978, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105. . . . In the same line of reasoning are *Webster v. Smith*, 72 Vt. 12, 47 Atl. 101; and *Bradley Fertilizer Co. v. Fuller*, 58 Vt. 315, 2 Atl. 162.”

jurisdictions, it has been said that there is no ground for granting a new trial for mistake or inadvertence as distinguished from accident or surprise.²⁶ What constitutes surprise, or its equivalents, "accident, mistake, or unforeseen cause," is a matter of law, to be determined upon the facts constituting the so called "accident," "mistake," or unforeseen cause.²⁷

c. *Criminal Cases.*—The doctrine of surprise in connection with new trials applies to criminal as well as to civil cases.²⁸ Moreover, a statute allowing a new trial "in any case" where through accident, mistake, or misfortune justice has not been done, applies not alone to civil causes but also to criminal cases.²⁹

d. *Mistakes of Law.*—It is a general rule that as a ground for a new trial a party cannot predicate surprise upon matters of law.³⁰ However, where injustice would otherwise be done, or a party prevented from having a fair trial upon the merits, the courts have, in particular cases, relaxed this rule.³¹

[d] **Mistake, inadvertence, surprise, and excusable neglect defined.** See *Davis v. Steuben School Tp.*, 19 Ind. App. 694, 50 N. E. 1, 5.

[e] **The Casualty or Misfortune That Will Authorize the Granting of a New Trial Must Be "Unavoidable."** A mere ordinary "casualty or misfortune" is not sufficient. It must be such a casualty or misfortune as could not by the exercise of reasonable skill or diligence have been avoided. *Ray v. Arnett*, 32 Ky. L. Rep. 562, 106 S. W. 828; *Louisville & N. R. Co. v. Paynter's Admr.*, 31 Ky. L. Rep. 163, 101 S. W. 935.

26. *Fincher v. Malcolmson*, 96 Cal. 38, 30 Pac. 835.

27. *Bolster v. Bolster*, 35 R. I. 367, 87 Atl. 23.

As ground for opening and vacating judgments, see 15 STANDARD PROC. 169, et seq.

28. **Ark.**—*Shepherd v. State*, 34 Ark. 659; *Coker v. State*, 20 Ark. 53. **Ga.** *Thomas v. State*, 52 Ga. 509. **Ind.** *Hazen v. State*, 58 Ind. 197; *Todd v. State*, 25 Ind. 212. **Ia.**—*State v. Viers*, 82 Iowa 397, 48 N. W. 732. **Mo.**—*State v. Wightman*, 27 Mo. 121. **N. H.** *Buzzell v. State*, 59 N. H. 61. **Pa.** *Com. v. Sminkey*, 7 Del. Co. 353. **Tex.** *Yanez v. State*, 20 Tex. 656; *Hodde v. State*, 8 Tex. App. 382; *Fagan v. State*, 3 Tex. App. 400. **Vt.**—*State v. Williams*, 27 Vt. 724. **Va.**—*Wholford v. Com.*, 4 Gratt. (45 Va.) 553. **Wash.** *State v. Townsend*, 7 Wash. 462, 35 Pac. 367. **Eng.**—*Reg. v. Whitehouse*, *Dears*, C. C. 1, 6 Cox C. C. 129.

29. *Buzzell v. State*, 59 N. H. 61.

30. **Ala.**—*Dothard v. Teague*, 40 Ala. 583. **Cal.**—*Fuller v. Hutchings*, 10 Cal. 253, 70 Am. Dec. 746. **Ga.**—*Carey v. King*, 5 Ga. 75. **Ind.**—*Beals v. Beals*, 27 Ind. 77. **Mo.**—*Hite v. Lenhart*, 7 Mo. 22. **N. H.**—*Handy v. Davis*, 38 N. H. 411, 414. **R. I.**—*Bassett v. Loewenstein*, 23 R. I. 24, 49 Atl. 41; *Howard v. Capron*, 3 R. I. 182. **Tex.**—*Beauchamp v. International & G. N. Ry. Co.*, 56 Tex. 239; *Philips v. Wheeler*, 10 Tex. 536. **Vt.**—*Morgan v. Houston*, 25 Vt. 570. **Va.**—*Law v. Law*, 2 Gratt. (43 Va.) 366. **Wash.**—*Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478. **Wis.** *McLennan v. Prentice*, 79 Wis. 488, 48 N. W. 487.

See also *infra*, II, E, 2, 1.

[a] **The Common Law Rule.**—*Craig v. Fannink*, 6 How. Pr. (N. Y.) 336; *McLennan v. Prentice*, 79 Wis. 488, 48 N. W. 487.

[b] "Obviously this must be so, since otherwise almost any wrong advice or mistake by counsel would entitle his party to a new trial." *Bassett v. Loewenstein*, 23 R. I. 24, 49 Atl. 41.

31. **Mo.**—*Pope v. Mooney*, 40 Mo. 104, counsel's mistaken construction of a statute. **Mont.**—*Porter v. Industrial Printing Co.*, 26 Mont. 170, 66 Pac. 839, 67 Pac. 67, defendant misled by court's ruling on certain counterclaims. **N. Y.**—*Hoppock v. Stone*, 49 Barb. 524; *Simpson v. Hefter*, 43 Misc. 608, 88 N. Y. Supp. 282, case submitted on a misunderstanding as to the court's expressed view of the law.

e. *Fault of Applicant or Counsel.*—The accident or surprise complained of must not be due to the neglect of the applicant,³² and, as a rule, the ignorance, mistake, forgetfulness, inadvertence, or misapprehension of a party, not occasioned by the adverse party, is not, in itself, proper ground for a new trial.³³ This rule includes a party's attorney,³⁴ since the negligence, inattention, or fault of counsel is imputed to the party he represents.³⁵ Thus, errors, mistakes, and oversights in pleadings are not, usually, grounds for new trials,³⁶ and mistakes of counsel in advising a proper line of defense fall under the same rule.³⁷ Likewise neglect and forgetfulness in preparing and presenting evidence,³⁸ or in the examination of witnesses,³⁹ are further illustrations of mistake for which no new trial can be granted.⁴⁰ There may be occasions, however, where the error, mistake or neglect on the part of client or attorney may be excusable, and in such cases relief can properly be given for such fault.⁴¹

[a] *Law in Doubt.*—In *Wellborn v. Younger*, 10 N. C. 205, Chief Justice Taylor said: "My opinion consequently is that there ought to be a new trial, . . . on the ground of surprise, which, although it might be in matter of law, is not therefore an insufficient reason; for in enumerating the reasons for a new trial, Mr. Justice Blackstone states as one, 'that either party may be puzzled by a legal doubt which a little recollection would have solved.' (3 Blk. Com. 390.)" See also *Chinn v. Taylor*, 64 Tex. 385; *State v. Williams*, 27 Vt. 724.

32. *U. S.*—*United States v. Smith*, 1 Sawy. 277, 27 Fed. Cas. No. 16,341. *Ark.*—*Petty v. State*, 76 Ark. 515, 89 S. W. 465. *Cal.*—*Dewey v. Frank Bros. & Co.*, 62 Cal. 343; *Schellhous v. Ball*, 29 Cal. 605; *Patterson v. Ely*, 19 Cal. 28. *Ga.*—*Saylors v. State*, 9 Ga. App. 227, 70 S. E. 975. *Ky.*—*Smith v. Morrison*, 3 A. K. Marsh. 81. *La.*—*Union Bank v. Robert*, 9 Rob. 177. *Mo.*—*Hanley v. Blanton*, 1 Mo. 49. *N. Y.*—*People v. Pindar*, 148 N. Y. Supp. 937. *Tex.*—*Sellman v. State*, 56 Tex. Crim. 280, 119 S. W. 682. *Vt.*—*Burr v. Palmer*, 23 Vt. 244.

33. *Ga.*—*Ferguson v. Beck & Gregg Hdw. Co.*, 92 Ga. 531, 17 S. E. 914; *Brown v. Autrey*, 78 Ga. 753, 3 S. E. 669. *Kan.*—*Holderman v. Jones*, 52 Kan. 743, 34 Pac. 352. *La.*—*Doat v. Maltby*, 2 La. Ann. 583. *Mo.*—*Fretwell v. Laffoon*, 77 Mo. 26; *Patchin v. Wegman*, 19 Mo. 151.

34. *Ala.*—*Wheeler v. Morgan*, 51 Ala. 573. *Ga.*—*Southwestern R. Co. v. Craig*, 92 Ga. 361; *Cannon v. Bullock*,

26 Ga. 431. *N. H.*—*Heath v. Marshall*, 46 N. H. 40. *N. C.*—*Aston v. Craig-miles*, 70 N. C. 316.

35. *Ala.*—*Wheeler v. Morgan*, 51 Ala. 573. *Ill.*—*Yates v. Monroe*, 13 Ill. 212. *Kan.*—*Holderman v. Jones*, 52 Kan. 743, 34 Pac. 352. *Mo.*—*Patchin v. Wegman*, 19 Mo. 151. *N. H.*—*Heath v. Marshall*, 46 N. H. 40; *Handy v. Davis*, 38 N. H. 411. *W. Va.*—*Walker v. May*, 67 W. Va. 316, 67 S. E. 786. 36. *Stevens v. Bachelder*, 28 Me. 218; *McNeish v. Stewart*, 7 Cow. (N. Y.) 474.

37. *Winchester v. Grosvenor*, 48 Ill. 517; *Carroll v. McCullough*, 63 N. H. 95.

38. *Dickson v. Mathers, Hempst.* 65, 7 Fed. Cas. No. 3,898a; *Crowell v. Harvey*, 30 Neb. 570, 46 N. W. 709.

39. *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 Am. Dec. 556.

40. See *infra*, II, E, 2, k.

41. *Cal.*—*Symons v. Bunnell*, 80 Cal. 330, 22 Pac. 193, 550. *Ga.*—*Rolfe v. Rolfe*, 10 Ga. 143. *Ind.*—See *Burton v. Harris*, 76 Ind. 429. *Ky.*—*Vittetow v. Ames*, 21 Ky. L. Rep. 225, 51 S. W. 1. *Tex.*—*Buford v. Bostick*, 50 Tex. 371; *McCorkle v. Everett*, 16 Tex. Civ. App. 552, 41 S. W. 136. *R. I.*—*Burrough v. Hill*, 15 R. I. 190, 2 Atl. 382. *Wis.*—*W. W. Kimball Co. v. Huntington*, 80 Wis. 270, 50 N. W. 177.

[a] Where a party employs counsel of good reputation and large experience, the neglect of such counsel in the ordinary steps of a case prejudicial to the rights of the party is "surprise" that justifies a new trial. *Citizens' Nat. Bank of Sisseton v. Branden*, 19

f. *Diligence in Avoiding Surprise.*—Diligence and prudence to avoid the matter complained of must have been exercised,⁴² and to entitle a party to protection against surprise he must have been diligent at every stage of the proceeding,⁴³ unless, in rare cases, to prevent great injustice.⁴⁴

g. *Averting Consequences.*—In order to obtain a new trial it must appear, in addition to the fact that the accident or surprise complained of was not due to the neglect or fault of the applicant, that the movant used all reasonable means to avert the consequences of the surprise.⁴⁵ It is the duty of a party to prepare for trial, but if one by unexpected happening has a legal excuse for not being ready to proceed, he should apply for a postponement or continuance.⁴⁶ Like-

N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 858.

[b] Under a statute permitting a new trial for the "excusable neglect," where a party employed an attorney to enter a plea and the attorney neglected to do so a new trial was granted. *Griel v. Vernon*, 65 N. C. 76, 78.

42. *Ga.*—*Seifert v. Holt*, 82 *Ga.* 757, 9 S. E. 843. *Ill.*—*Bruson v. Clark*, 151 *Ill.* 495, 38 N. E. 252. *Ind.*—*Working v. Garn*, 148 *Ind.* 546, 47 N. E. 951; *Lockwood v. Rose*, 125 *Ind.* 588, 25 N. E. 710; *State v. Botorff*, 82 *Ind.* 538. *Kan.*—*Beachley v. McCormick*, 41 *Kan.* 485, 21 *Pac.* 646. *Ky.*—*Landrum v. Farmer*, 7 *Bush* 46; *Donallen v. Lennox*, 6 *Dana* 89; *Owings v. Gibson*, 2 *A. K. Marsh.* 515; *Mussin v. Collins*, 1 *A. K. Marsh.* 350. *Minn.*—*Otterness v. Botten*, 80 *Minn.* 430, 83 N. W. 382; *Cheney v. Dry Wood Lumber Co.*, 34 *Minn.* 440, 26 N. W. 236. *Miss.*—*Moody v. Harper*, 33 *Miss.* 465; *Thompson v. Williams*, 7 *Smed. & M.* 270. *Mo.*—*Fretwell v. Laffoon*, 77 *Mo.* 26; *Richardson v. Farmer*, 36 *Mo.* 35, 88 *Am. Dec.* 129; *Frick Co. v. Caffery*, 48 *Mo. App.* 120. *N. H.*—*Handy v. Davis*, 38 *N. H.* 411. *N. Y.*—*Hatfield v. Macy*, 52 *How. Pr.* 193. *R. I.*—*Roberts v. Roberts*, 19 *R. I.* 349, 33 *Atl.* 872; *Denison v. Foster*, 18 *R. I.* 735, 31 *Atl.* 894. *S. D.*—*Gaines v. White*, 1 *S. D.* 434, 47 N. W. 524. *Tex.*—*International & G. N. R. Co. v. Miller*, 9 *Tex. Civ. App.* 104, 28 *S. W.* 233. *W. Va.*—*Sayre v. King*, 17 *W. Va.* 562; *Tefft v. Marsh*, 1 *W. Va.* 38.

[a] *Defendant Confined in Jail.* That defendant was too poor to give bail for his appearance, and had been confined in jail since the commission of the alleged offense, is no ground for

a new trial, although proper to be considered, on a motion for a continuance in connection with other circumstances, in excuse of defendant's failure to be prepared for trial. *Yanez v. State*, 20 *Tex.* 656.

[b] If a party is unable to procure the attendance of witnesses at the trial, he can, knowing the nature of their evidence, protect his rights by motion and affidavit under rule 30 of the 1906 Common Law Rules of the Superior Court. *Herrick v. Waitt*, 224 *Mass.* 415, 113 N. E. 205.

43. *Henderson v. Hazlett*, 75 *W. Va.* 255, 83 S. E. 907; *Walker v. May*, 67 *W. Va.* 316, 67 S. E. 786.

[a] *Lack of Diligence in Preparing for Trial.*—*Yanez v. State*, 20 *Tex.* 656.

44. *Buford v. Bostick*, 50 *Tex.* 371.

45. *Ala.*—*Renfro Bros. v. Merryman & Co.*, 71 *Ala.* 195. *Ariz.*—*Solomon v. Norton*, 2 *Ariz.* 100, 11 *Pac.* 108. *Ark.*—*St. Louis & S. F. R. Co. v. Kilpatrick*, 67 *Ark.* 47, 54 *S. W.* 971; *Overton v. State*, 57 *Ark.* 60, 20 *S. W.* 590; *Nickens v. State*, 55 *Ark.* 567, 18 *S. W.* 1045. *Cal.*—*Schellhous v. Ball*, 29 *Cal.* 605; *Patterson v. Ely*, 19 *Cal.* 28. *Ga.*—*Sheftall's Exrs. v. Clay's Admrs.*, R. M. Charl't. 7. *Ill.*—*Chicago & G. E. Ry. Co. v. Vosburgh*, 45 *Ill.* 311. *Ind.*—*Ex parte Walls*, 64 *Ind.* 461. *Kan.*—*Beachley v. McCormick*, 41 *Kan.* 485, 21 *Pac.* 646. *Ky.*—*Landrum v. Farmer*, 7 *Bush* 46. *Minn.*—*Eich v. Taylor*, 17 *Minn.* 172. *Miss.*—*Haber v. Lane*, 45 *Miss.* 608. *S. C.*—*Barry v. Wilbourne*, 2 *Bailey* 91. *Vt.*—*Burr v. Palmer*, 23 *Vt.* 244.

46. *U. S.*—*Carr v. Gale*, 1 *Curt.* 384, 5 *Fed. Cas. No.* 2,433. *Ala.*—*Hoskins v. Hight*, 95 *Ala.* 284, 11 *So.* 253. *Cal.*

wise, where the accident or surprise occurs during the trial, the party must make complaint or objection at the time,⁴⁷ as, for example, where a party is surprised at certain evidence.⁴⁸ Usually, a failure to ask for a postponement or a continuance in cases where such relief would

Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910. **Ind.**—Stewart v. Smith, 111 Ind. 526, 13 N. E. 48. **Ky.**—Hatcher v. Reed, Hard. 515. **R. I.**—Potter v. Padelford & Co., 3 R. I. 162. **Tex.**—Loonie v. Burt, 80 Tex. 582, 16 S. W. 439.

47. **Alaska.**—Bruner v. Knickerbocker, 4 Alaska 387. **Ark.**—Nickens v. State, 55 Ark. 567, 18 S. W. 1045. **Ga.**—Bowers v. State, 135 Ga. 310, 69 S. E. 536; Hope v. State, 124 Ga. 438, 52 S. E. 747. **La.**—State v. Sloan, 120 La. 170, 45 So. 50; State v. McQueen, 108 La. 410, 32 So. 412.

48. **U. S.**—Flint, etc. R. Co. v. Marine Ins. Co., 71 Fed. 210; Carr v. Gale, 1 Curt. 384, 5 Fed. Cas. No. 2,433. **Ala.**—Central of Ga. R. Co. v. Ashley, 160 Ala. 580, 49 So. 388; Simpson v. Golden, 114 Ala. 336, 21 So. 990. **Ariz.**—Walker v. Gray, 6 Ariz. 359, 57 Pac. 614. **Ark.**—St. Louis & S. F. R. Co. v. Kilpatrick, 67 Ark. 47, 54 S. W. 971; Merrick v. Britton, 26 Ark. 496. **Cal.**—Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Heath v. Scott, 65 Cal. 548, 4 Pac. 557; Dewey v. Frank Bros. Co., 62 Cal. 343; Miller v. Seoble, 8 Cal. App. 344, 97 Pac. 93. **Colo.**—Outcault v. Johnston, 9 Colo. App. 519, 49 Pac. 1058. **Ga.**—Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466; Beckford v. Chipman, 44 Ga. 543. **Ill.**—S. K. Martin Lumb. Co. v. Walsh Bros., 81 Ill. App. 403. **Ind.**—Ellis v. Hammond, 157 Ind. 267, 61 N. E. 565; Working v. Garn, 148 Ind. 546, 47 N. E. 951; Scheible v. Slagle, 89 Ind. 323. **Ia.**—Hopper v. Moore & Co., 42 Iowa 563; Dunlavey v. Watson, 38 Iowa 398. **Kan.**—Hanson v. Kendt, 94 Kan. 310, 146 Pac. 1190; Argentine v. Simmons, 59 Kan. 164, 52 Pac. 424. **Ky.**—Howard v. Strawbridge, 165 Ky. 88, 176 S. W. 977; Remley v. Illinois Cent. R. Co., 151 Ky. 796, 152 S. W. 973; Travelers' Ins. Co. v. McInerney, 119 S. W. 171. **Me.**—Maynell v. Sullivan, 67 Me. 314. **Mo.**—Thiele v. Citizens' R. Co., 140 Mo. 319, 41 S. W. 800; Byrd v. Vanderburgh, 168 Mo. App. 112, 151 S. W. 184; Schoen Plumbing Co. v. Hugunin, 156 Mo. App. 68, 135 S. W. 967. **Neb.**

Remington Typewriter Co. v. Simpson, 83 Neb. 848, 120 N. W. 428; Pennington County Bank v. Bauman, 81 Neb. 782, 116 N. W. 669. **N. H.**—Willard v. Wethersbee, 4 N. H. 118. **N. M.**—Romero v. Lopez, 21 Pac. 679. **N. Y.**—Peck v. Hiler, 30 Barb. 655; Dixon v. Brooklyn Heights R. Co., 68 App. Div. 302, 74 N. Y. Supp. 49, reversing 35 Misc. 422, 71 N. Y. Supp. 969. **Ohio.**—Kroger v. Ryan, 83 Ohio St. 299, 94 N. E. 428. **Pa.**—Martin v. Marvine, 1 Phila. 280, 9 Leg. Int. 2. **R. I.**—Riley v. Shannon, 19 R. I. 503, 34 Atl. 989. **Tenn.**—Nellums v. Nashville, 106 Tenn. 222, 61 S. W. 88. **Tex.**—Love v. Breedlove, 75 Tex. 649, 13 S. W. 222; Dotson v. Moss, 58 Tex. 152; Kilgore v. Jordan, 17 Tex. 341; Tripp Bros. v. McCormack (Tex. Civ. App.), 157 S. W. 443. **Vt.**—Hemmenway v. Lincoln, 82 Vt. 465, 73 Atl. 1073; Haskins v. Smith, 17 Vt. 263. **Wash.**—Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461. **Eng.**—Caldwell v. Johnston, Jr. R. 6 C. L. 233. **Can.**—Gilbert v. Stockton, 12 N. Brunsw. 58; City Bank v. Strong, 7 U. C. C. P. 96.

[a] **Surprise at Evidence.**—"After he had heard the evidence of the witnesses, it was clearly the duty of plaintiff to have made known to the court the fact of his surprise, and applied to the court for a continuance or have taken a nonsuit. Thereby he would have shown the diligence required, and furnished a basis for favorable action by the court below, and for correction of error therein in this court." Henderson v. Hazlett, 75 W. Va. 255, 83 S. E. 907.

[b] **Must Apply for Relief.**—"It is well settled that, if a party claiming to be surprised by the introduction of testimony, fails to apply at the time for a continuance of the cause, or to resort to other testimony, or to ask for any relief to which he might be entitled under the circumstances, his failure is attributable to his own fault, and constitutes no ground of surprise upon which a new trial will be granted." Heath v. Scott, 65 Cal. 548, 4 Pac. 557, 560.

enable a party to avert the consequences of accident or surprise, will cause a waiver of rights,⁴⁹ while a wrongful refusal on the part of the court to grant a postponement or continuance is proper ground for new trial.⁵⁰ Moreover, if the time originally granted be not sufficient, further postponement or continuance should be requested.⁵¹ A plaintiff surprised at the character of the evidence may also, if he desires, avert an adverse verdict by taking a nonsuit, without prejudice to a subsequent action;⁵² and a client knowing of the illness of counsel and his inability to appear, should take reasonable measures to procure other counsel.⁵³

h. *Must Affect Result.*—The surprise complained of must be connected with a matter material to the issue,⁵⁴ and the effect must be to deprive one of a fair trial.⁵⁵ Unless the result was affected, the fact that some misfortune or surprise arose will not warrant a new trial,⁵⁶ since it must appear that a new trial would probably secure a different result.⁵⁷ Consequently, one asking for a new trial on the

49. **Cal.**—See *Fisher v. Western Fuse & E. Co.*, 12 Cal. App. 299, 107 Pac. 332. **Kan.**—*Argentine v. Simmons*, 59 Kan. 164, 52 Pac. 424; *Knauber v. Watson*, 50 Kan. 702, 32 Pac. 349. **Okla.** See *Ripey v. Art Wall P. Mill*, 27 Okla. 600, 112 Pac. 1119. **E. I.**—*Hannan v. Caproni*, 71 Atl. 593. **Va.** *Southall v. Exchange Bank*, 12 Gratt. (53 Va.) 312. **W. Va.**—*Walker v. May*, 67 W. Va. 316, 67 S. E. 786.

50. **Ark.**—*Nickens v. State*, 55 Ark. 567, 18 S. W. 1045. **Ill.**—*Price v. People*, 131 Ill. 223, 23 N. E. 639. **Ia.** *State v. Benton*, 65 Iowa 482, 22 N. W. 639. **Tex.**—*Jackson v. State*, 18 Tex. App. 586.

51. *Couillard v. Seaver*, 64 N. H. 614, 9 Atl. 724.

52. **U. S.**—*Flint, etc. R. Co. v. Marine Ins. Co.*, 71 Fed. 210. **Cal.**—*Schellhous v. Ball*, 29 Cal. 605. **Ill.**—*Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372. **Ind.**—*Helm v. First Nat. Bank*, 91 Ind. 44. **Ia.**—*Hopper v. Moore & Co.*, 42 Iowa 563. **Kan.** *Argentine v. Simmons*, 59 Kan. 164, 52 Pac. 424. **Mo.**—*Savoni v. Brashear*, 46 Mo. 345; *Byrd v. Vanderburgh*, 168 Mo. App. 112, 151 S. W. 184. **N. Y.**—*Messenger v. Fourth Nat. Bank*, 48 How. Pr. 542. **Pa.**—*Withers v. Ralston*, 3 Phila. 412; *Hansell v. Lutz*, 1 Phila. 340. **Tex.**—*Dotson v. Moss*, 58 Tex. 152; *Kilgore v. Jordan*, 17 Tex. 341. **Eng.**—*Turquand v. Dawson*, 1 C. M. & R. 709, 5 Tyrw. 488. **Can.**—*Rankin v. Weldon*, 11 N. Brunsw. 220; *Hooper v. Christoe*, 14 U. C. C. P. 117.

See generally the title "Dismissal,

Discontinuance and Nonsuit."

53. *International & G. N. R. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233. See also *infra*, II, E, 2, f.

54. *Chicago & G. E. R. Co. v. Vosburgh*, 45 Ill. 311.

55. *Sommers v. Carbon Hill Coal Co.*, 91 Fed. 337.

56. **U. S.**—*Van Dyke v. Tinker*, 28 Fed. Cas. No. 16,849. **Cal.**—*Patterson v. Ely*, 19 Cal. 28; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275. **Mont.** *Hill v. McKay*, 36 Mont. 440, 93 Pac. 345. **S. D.**—*Huntimer v. South Dakota C. Ry. Co.*, 31 S. D. 487, 141 N. W. 472. **Utah.**—*Martin v. Hill*, 3 Utah 157, 2 Pac. 62.

[a] *Illness of Accused.*—Where the accused moved for a new trial on the ground that when he gave his testimony he was suffering from a nervous headache which affected his mind and memory, the motion was denied for the reason that his alleged illness did not apparently affect his testimony which was intelligent and coherent. The record, moreover, showed no evidence of want of memory, or of the full powers of the mind. *State v. Montgomery*, 71 Iowa 630, 33 N. W. 143.

57. **Miss.**—*Haber v. Lane*, 45 Miss. 608. **Mo.**—*Howell v. Howell*, 37 Mo. 124. **Nev.**—*McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512. **N. Y.** *Hueser v. New York Transp. Co.*, 143 App. Div. 494, 128 N. Y. Supp. 415. **Can.**—*Molson's Bank v. Bates*, 7 U. C. C. P. 312; *Shipman v. Stevens*, 6 U. C. C. P. 17.

ground of surprise must show not only surprise but resulting injury.⁵⁸

i. *Discretion of Court.*—New trials on the grounds of surprise rest largely in the sound discretion of the court.⁵⁹ There can, necessarily, be no fixed rule laid down as to what will constitute an abuse of discretion of the trial court in refusing a new trial for accident and surprise,⁶⁰ but it is said that a new trial should be granted with great caution.⁶¹

2. *In Particular Matters.*—a. *Want of Due Notice.*—If a party has no due notice of the trial or hearing this may constitute surprise for which a new trial may be awarded,⁶² and this ground is some-

58. **Cal.**—*Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275. **Mass.**—*Com. v. Armstrong*, 158 Mass. 78, 32 N. E. 1032. **N. J.**—*Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495. **N. C.**—*Roberts v. Roberts*, 85 N. C. 9. **Ohio.**—*McCracken v. West*, 17 Ohio 16. **Vt.**—*Dow v. Town of Hinesburgh*, 1 Aik. 35; *Blake v. Howe*, 1 Aik. 306, 15 Am. Dec. 681.

59. **U. S.**—*Manning v. German Ins. Co.*, 107 Fed. 52, 46 C. C. A. 144 (*reversing* 100 Fed. 581); *Albright v. McTighe*, 49 Fed. 817. **Ark.**—*Meadows v. Hudson*, 90 Ark. 294, 119 S. W. 269; *Anderson v. State*, 41 Ark. 229; *Coker v. State*, 20 Ark. 53. **Colo.**—*Rice v. People*, 40 Colo. 377, 90 Pac. 1031. **Ga.**—*Massey v. Allen*, 48 Ga. 21; *Smith v. Brand*, 44 Ga. 588. **Ind.**—*Todd v. State*, 25 Ind. 212. **Ia.**—*Tegeler v. Jones*, 33 Iowa 234. **Kan.**—*Turner v. Elbing State Bank*, 91 Kan. 123, 136 Pac. 917; *Green v. Bulkley*, 23 Kan. 130. **Ky.**—*Donallen v. Lennox*, 6 Dana 89; *Jackson v. Shapard*, 24 Ky. L. Rep. 713, 69 S. W. 954. **La.**—*Marchand v. Noyez*, 33 La. Ann. 882. **Mich.**—*Chicago, etc. R. Co. v. Newton*, 89 Mich. 549, 50 N. W. 879. **Minn.**—*Dobrowoloske v. Parpala*, 121 Minn. 455, 141 N. W. 503; *Wingen v. May*, 92 Minn. 255, 99 N. W. 809; *Miller v. Layne*, 84 Minn. 221, 87 N. W. 605. **Miss.**—*Dorr & Co. v. Watson*, 28 Miss. 383. **Mo.**—*Moreland v. McDermott*, 10 Mo. 605. **Neb.**—*Matoushek v. Dutcher*, 67 Neb. 627, 93 N. W. 1049. **N. Y.**—*Tyler v. Hoornheck*, 48 Barb. 197; *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842. **Ohio.**—*Heisel v. Heisel*, 8 Ohio Dec. (Reprint) 653, 9 Wkly. L. Bul. 110. **Ore.**—*Barclay v. Oregon-Wash. R., etc. Co.*, 75 Ore. 559, 147 Pac. 541. **P. I.**—*Rivero v. Hernandez*, 17 Porto Rico 868. **S. C.**—*Blythe v. Sutherland*, 3

McCord 258. **Tex.**—*Dotson v. Moss*, 58 Tex. 152; *Delmas v. Margo*, 25 Tex. 1, 78 Am. Dec. 516. **Wash.**—*See State v. Miller*, 80 Wash. 75, 141 Pac. 293. **W. Va.**—*Tefft v. Marsh*, 1 W. Va. 38. **Wis.**—*Kayser v. Hartnett*, 67 Wis. 250, 30 N. W. 363.

60. *Nolen v. McCue*, 92 Kan. 870, 142 Pac. 958, 93 Kan. 306, 144 Pac. 255.

61. *Kroger v. Ryan*, 83 Ohio St. 299, 94 N. E. 428.

[a] "The general doctrine governing the granting of a new trial on the ground of surprise is well stated by Judge Sanderson in delivering the opinion in *Schellhaus v. Ball*, 29 Cal. 606. He says: 'Upon this ground, new trials should be granted with great caution; for in many cases it is used as a pretext and a cover for carelessness and inattention, rather than as a meritorious ground for relief. . . . It is the duty of the courts to look upon applications for new trials upon the ground of surprise with suspicion, for the reason that from the nature of the case surprise may be often feigned and pretended, and the opposite party may not be able to show that such is the case. Hence the party alleging surprise should be required to show it conclusively, and by the most satisfactory evidence within his reach.' " *Gaines v. White*, 1 S. D. 434, 47 N. W. 524, 527.

62. **Conn.**—*Winchell v. Sanger*, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935. **Ill.**—*Stumer v. Pitchman*, 124 Ill. 250, 15 N. E. 757. **Ia.**—*Galvin v. Dailey*, 109 Iowa 332, 80 N. W. 420. **Eng.**—*Beale v. Martin*, 12 Wkly. Rep. 135. **Can.**—*Kitchen v. Murray*, 16 U. C. C. P. 69.

[a] Where a party was misled by the court as to the time his case would

times expressly designated by statute.⁶³ Changing the time or place of the trial without sufficient notice,⁶⁴ or calling a cause prematurely in the absence of a party,⁶⁵ may, likewise, justify a new trial. If, however, the defendant appears and, without objection, makes a defense, the omission of notice will be waived.⁶⁶ Mere forgetfulness or misapprehension as to the time or place of the trial will not, however, be sufficient,⁶⁷ nor, ordinarily, will the fact that the party was mistaken in the day when the case was set for trial,⁶⁸ or that the attorney failed to notify the client,⁶⁹ or that the clerk failed to docket the cause at the time a party expected.⁷⁰ But where the docket was irregularly called and a party thereby unreasonably forced to trial,⁷¹ or there was an honest misunderstanding between the attorneys as to the day set for trial, a new trial may be granted.⁷²

b. *Cause of Action*.—A new trial will not be granted because one alleges surprise at the nature of the cause of the action,⁷³ or to permit a plaintiff to bring his action upon a different ground or theory.⁷⁴

c. *Matters of Defense*.—That counsel mistakenly advised a particular defense,⁷⁵ or that a proper and available defense was over-

be called, and was, therefore, not ready when his case was called before the understood time, a new trial should be granted to him. *Clark v. Jarrett*, 2 Baxt. (Tenn.) 467.

[b] A corporation is entitled to a new trial on the ground of surprise where the only service of the summons was on its business agent, who under the advice of an attorney, paid no attention to it, and the corporation had no notice of the service until after the entry of its default. *Roberts v. Wilson*, 3 Cal. App. 32, 84 Pac. 216.

63. *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226.

64. *Leighton v. Dixon*, 42 Kan. 616, 22 Pac. 732.

65. *Bostwick v. Blair*, 2 Kan. App. 89, 43 Pac. 297; *Donallen v. Lennox*, 6 Dana (Ky.) 89.

[a] *Neglect of Party*.—Where one was absent when his case was called because he presumed it would be called at a later hour, a new trial was refused. *Green v. Bulkley*, 23 Kan. 130.

66. *Seymour v. Miller*, 32 Conn. 402; *Lisher v. Parmelee*, 1 Wend. (N. Y.) 22.

67. *Cal.*—*Ekel v. Swift*, 47 Cal. 619; *Mulholland v. Heyneman*, 19 Cal. 605; *Haight v. Green*, 19 Cal. 113. III. *Hartford Fire Ins. Co. v. Vanduzor*, 49 Ill. 489. *Ind.*—*Yater v. Mullen*, 23 Ind. 562. *Ky.*—*Legrand v. Baker*, 6 T. B. Mon. 235; *Brevard v. Graham*, 2 Bibb 177. *Minn.*—*Desnoyer v. McDon-*

ald, 4 Minn. 515. *Tex.*—*Bolls v. Gallo-way*, 1 White & W. Civ. Cas., §724.

68. *Cotton v. Brashiers*, 2 A. K. Marsh. (Ky.) 153; *Stout v. Calver*, 6 Mo. 254, 35 Am. Dec. 438.

69. *Hass v. Levertton*, 128 Iowa 79, 102 N. W. 811; *Overstreet v. Brown*, 23 Ky. L. Rep. 317, 62 S. W. 885.

70. *Renfro Bros. v. Merryman & Co.*, 71 Ala. 195.

71. *Donallen v. Lennox*, 6 Dana (Ky.) 89.

72. *Symons v. Bunnell*, 80 Cal. 330, 22 Pac. 193, 550.

73. *Robbins v. Alton Marine & Fire Ins. Co.*, 12 Mo. 380. See *Dodge v. Kendall*, 4 Vt. 31, surprise at testimony to prove what is put in issue by pleadings. But see *Bitting v. Mowry*, 1 Miles (Pa.) 216, where defendant is surprised by plaintiff's case.

74. *Cal.*—*Bates v. Bates*, 71 Cal. 307, 12 Pac. 223. *La.*—*Parker v. Ricks*, 114 La. 942, 38 So. 687. *Minn.*—*Engler v. Schneider*, 66 Minn. 388, 69 N. W. 139; *Bullis v. Cheadle*, 36 Minn. 164, 30 N. W. 549. *N. C.*—*Simmons v. Mann*, 92 N. C. 12. *Pa.*—*Beaver v. Sandham*, 3 Del. Co. 163. *S. C.*—*Leonard v. Brockman*, 46 S. C. 128, 24 S. E. 96. *Can.*—*Hosking v. Le Roi*, 9 Brit. Col. 551; *Doe ex dem. McVey v. Daniel*, 15 N. Brunsw. 372; *Moor v. Boyd*, 23 U. C. Q. B. 459; *Tyrrel v. Myers*, 6 U. C. Q. B. (O. S.) 433.

75. *Winchester v. Grosvenor*, 48 Ill. 517.

looked,⁷⁶ or that owing to negligence, a certain defense was not presented,⁷⁷ are not sufficient grounds for new trials. One may have a good defense, however, of which by fraud or accident, unmixed with any negligence on his part, he was prevented from availing himself;⁷⁸ but a new trial will not be granted to admit a defense which could have been presented at the trial.⁷⁹

d. *Matters of Pleading.*—It is the duty of litigants to prepare for trial, and to file pleadings, and, as a general rule, mistakes or neglect on the part of counsel in matters of pleading do not constitute accident, surprise, or misfortune for which new trials should be granted.⁸⁰ Where, however, there is genuine misapprehension as to the issues presented in the pleadings, a new trial may be granted.⁸¹ The filing of an amended petition is not, in itself, "surprise" warranting even a continuance,⁸² but where an amendment to a complaint

76. *Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655.

[a] *Prior Knowledge of a Defense.* The court will not grant a new trial to let a party take advantage of a defense of which he was apprised at the first trial. *Vernon v. Hankey*, 2 T. R. 113, 100 Eng. Reprint 62.

77. *Colo.*—*Sun Ins. Office v. Heiderer*, 44 Colo. 293, 99 Pac. 39. *Conn.*—*Lester v. State*, 11 Conn. 415. *Ind.*—*Nashville, C. & St. L. R. Co. v. Johnson* (Ind. App.), 106 N. E. 414. *Kan.*—*Mallows v. Mallows*, 93 Kan. 551, 144 Pac. 829. *Ky.*—*Stamper v. Forman-Earle Co.*, 158 Ky. 324, 164 S. W. 937; *Louisville & N. R. Co. v. Woodford*, 153 Ky. 185, 154 S. W. 1083. *La.*—*State v. Miller*, 107 La. 796, 32 So. 191. *N. H.*—*Carroll v. McCullough*, 63 N. H. 95. *Tenn.*—*Railroad, etc. Co. v. Deakins*, 3 Tenn. Ch. App. 28. *Tex.*—*Loonie v. Burt*, 80 Tex. 582, 16 S. W. 439. *Can.*—*Kennedy Island Mill Co. v. McInerney*, 36 N. Brunsw. 612.

78. See *Walker v. Robbins*, 14 How. (U. S.) 584, 14 L. ed. 552; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332, 3 L. ed. 362.

79. *U. S.*—*Kenney v. Knight*, 127 Fed. 403. *Ill.*—*Devine v. L. Fish Furniture Co.*, 258 Ill. 389, 101 N. E. 539. *Eng.*—*Martin v. Great Northern R. Co.*, 16 C. B. 179, 3 C. L. R. 817, 1 Jur. N. S. 613, 24 L. J. C. P. 209, 3 Wkly. Rep. 477, 81 E. C. L. 179, 139 Eng. Reprint 724.

80. *Ala.*—*Wheeler v. Morgan*, 51 Ala. 573. See *Southern R. Co. v. Cleveland*, 163 Ala. 470, 50 So. 122. *Ia.*—*Church v. Lacy*, 102 Iowa 235, 71 N. W.

338; *Jones v. Leech*, 46 Iowa 186. *Ky.*—*Callahan Const. Co. v. Williams*, 160 Ky. 814, 170 S. W. 203; *Patterson v. Matthews*, 3 Bibb 80. *Miss.*—*Thompson v. Williams*, 7 Smed. & M. 270. *Mo.*—*Fretwell v. Laffoon*, 77 Mo. 26; *Parker v. Britton*, 133 Mo. App. 270, 113 S. W. 259. *N. H.*—*Carroll v. McCullough*, 63 N. H. 95. *N. Y.*—*Broas v. Mersereau*, 18 Wend. 653; *McNeish v. Stewart*, 7 Cow. 474. *Tex.*—*Dathe v. Ohnsteadt* (Tex. Civ. App.), 56 S. W. 685. *Eng.*—*Breach v. Casterton*, 7 Bing. 224, 9 L. J. C. P. (O. S.) 48, 4 M. & P. 867, 20 E. C. L. 107, 131 Eng. Reprint 87.

[a] *Result Not Affected.*—A new trial will not be granted where the verdict could not be supported according to the pleadings or the form of action, but the same effect might be had upon other proceedings in law or equity. *Goodtitle v. Bailey*, 2 Cowp. 597, 601, 98 Eng. Reprint 1260; *Foxcroft v. Devonshire*, 2 Bur. 931, 97 Eng. Reprint 638; *Aylett v. Lowe*, 2 W. Bl. 1221, 96 Eng. Reprint 719; *Sampson v. Appleyard*, 3 Wils. 272, 95 Eng. Reprint 1051; *Goslin v. Wilcock*, 2 Wils. 302, 95 Eng. Reprint 824.

[b] *To Plead Judgment as Offset.* A new trial will not be given to enable a defendant to plead in offset a judgment which he failed to plead at the trial. *Carver v. J. S. Mayfield Lumber Co.*, 29 Tex. Civ. App. 434, 68 S. W. 711.

81. *Tannenbaum v. Armeny*, 81 Hun 581, 31 N. Y. Supp. 55, 63 N. Y. St. 348.

82. *Houston & T. C. R. Co. v. Cluck* (Tex.), 84 S. W. 852. See also *Pollock*

surprises the defendant by setting up a new cause of action, the case should be withdrawn from the jury or, if not, a new trial should be granted.⁸³ And a new trial may be proper where plaintiff was taken by surprise at the filing of an amended answer shortly before the trial.⁸⁴

e. Absence of Party.—The absence of a party from the trial does not, in itself, constitute a ground for new trial,⁸⁵ but unavoidable absence arising from accident, misfortune, or other good excuse may be sufficient ground.⁸⁶ Where, for example, a party is unable to appear

v. Jordon, 22 N. D. 132, 132 N. W. 1000, Ann. Cas. 1914A, 1264.

[a] **But where plaintiff inserted, without notice**, in his amended complaint, an allegation of additional injuries, a new trial may be granted. *Barclay v. Oregon-Wash. R. & Nav. Co.*, 75 Ore. 559, 147 Pac. 541.

83. *Scott v. Atlantic Coast Line R. Co.*, 105 S. C. 385, 89 S. E. 1038.

84. *Illinois Cent. R. Co. v. Beauchamp*, 25 Ky. L. Rep. 1429, 77 S. W. 1096.

85. *Ala.*—*Renfro Bros. v. Merryman & Co.*, 71 Ala. 195; *White v. Ryan*, 31 Ala. 400. *Ark.*—*Meadows v. Hudson*, 90 Ark. 294, 119 S. W. 269. *Ga.*—*Newman v. Malsby*, 108 Ga. 339, 33 S. E. 997; *Ferrill v. Marks*, 76 Ga. 21. *Ill.*—*Koon v. Nichols*, 85 Ill. 155; *Thompson v. Anthony*, 48 Ill. 468. *Ind.*—*Elmore v. McCrary*, 80 Ind. 544; *Yater v. Mullen*, 23 Ind. 562. *Kan.*—*Mehnert v. Thieme*, 15 Kan. 368. *Ky.*—*Burric v. Burns*, 2 Ky. Op. 62. *La.*—*Adams v. Ryder*, 5 La. 261; *Erwin's Exrs. v. Trion*, 2 La. 305. *Minn.*—*Johns-Manville Co. v. Great Northern Hotel Co.*, 128 Minn. 311, 150 N. W. 907. *Miss.*—*Haber v. Lane*, 45 Miss. 608. *Okla.*—*Walker v. Love*, 161 Pac. 787. *Pa.*—*Ranck v. Morton*, 5 L. T. N. S. 111. *Tex.*—*Freeman v. Neyland*, 23 Tex. 529; *Reid v. Clarkson* (Tex. Civ. App.), 138 S. W. 216. *Can.*—*Archibald v. Goldstein*, 1 Manitoba 146.

[a] **Must Affect Result.**—In accord with the general rule, the absence of the party, in order to warrant a new trial, must have been prejudicial to a fair trial. His presence must have been a material matter, either for the purpose of testifying, or consulting, or advising with counsel, or directing the case. If his absence has no effect upon the result, a new trial will not be

granted for such ground. *Ga.*—*Ferrill v. Marks*, 76 Ga. 21; *Peacock v. Ustry*, 52 Ga. 353. *Ill.*—*Poznanski v. Szezech*, 71 Ill. App. 670. *Ind.*—*Cox v. Harvey*, 53 Ind. 174. *Ky.*—*Prentice v. Oliver*, 25 Ky. L. Rep. 1576, 78 S. W. 469; *Duff v. Rose*, 6 Ky. Op. 27. *Mich.*—*Johnson v. Doon*, 131 Mich. 452, 91 N. W. 742; *Stahl v. Dayton*, 126 Mich. 70, 85 N. W. 249. *Mo.*—*Frick Co. v. Caffery*, 48 Mo. App. 120. *Pa.*—*Matthews v. Warren*, 1 Phila. 133. *R. I.*—*Roberts v. Roberts*, 19 R. I. 349, 33 Atl. 872. *Tex.*—*Nocona Nat. Bank of Southwestern Ga.*, 13 Ga. App. S. W. 189. *W. Va.*—*Tefft v. Marsh*, 1 W. Va. 38. *Can.*—*Proudfoot v. Harley*, 11 U. C. C. P. 389; *Reg. v. Baker*, 6 U. C. C. P. 68; *Moore v. Hicks*, 6 U. C. C. B. 27.

86. *Ga.*—*Goodrich v. Handy*, 91 Ga. 29, 16 S. E. 108; *Cleveland Nat. Bank v. Reynolds*, 76 Ga. 834; *Wright v. Bank of Southwestern Ga.*, 13 Ga. App. 347, 79 S. E. 184. *Ky.*—*Kentucky Journal Pub. Co. v. Brock*, 140 Ky. 373, 131 S. W. 1; *Gill v. Fugate*, 117 Ky. 257, 78 S. W. 188. *Minn.*—*Miller v. Layne*, 84 Minn. 221, 87 N. W. 605. *Miss.*—*Vannerson v. Pendleton's Admrs.*, 8 Smed. & M. 452. *N. J.*—*Sherrard v. Olden*, 6 N. J. L. 344. *S. D.*—*Sluman v. Dolan*, 24 S. D. 32, 123 N. W. 72. *Tex.*—*Spencer v. Kinnard*, 12 Tex. 180; *Dinwiddie v. Tims*, 52 Tex. Civ. App. 72, 114 S. W. 400. *Can.*—*Farley v. Glassford*, 7 U. C. C. P. 285.

[a] **Excusable Absence.**—Where the evidence shows the default of petitioner was by accident, and he intended to appear but did not do so, he was entitled to a new trial. *Rigney v. Hutchins*, 9 N. H. 257. And see *Hinman v. C. H. Hamilton Paper Co.*, 53 Wis. 169, 10 N. W. 160, where absence of counsel was excusably due to the oversight of the judge.

by reason of his own illness,⁸⁷ or the illness of a member of his family,⁸⁸ or because he was unexpectedly detained as a witness,⁸⁹ or as a juror,⁹⁰ in another court, a new trial is properly granted.

Likewise, a new trial was granted where a party failed to be present in court by delay of trains.⁹¹ It is, also, a sufficient cause for a new trial where, in the absence of a party, or of his counsel, the trial is held at an earlier time than previously announced by the court.⁹² Where, however, a party fails to attend by reason of his own, or counsel's, error, or mistake, or negligence,⁹³ a new trial will not be granted, negligence on the part of his attorney being attributed, in such cases, to the party.⁹⁴ For example, where the defeated party was not present at the trial by reason of his intoxication,⁹⁵ or because he was detained by bad roads, no evidence being offered to show any unexpected condition of the roads,⁹⁶ or by reason of a misunderstanding with his counsel,⁹⁷ no new trial will be allowed.

f. *Absence of Counsel*.—The absence of counsel is not in itself a cause for a new trial,⁹⁸ although special circumstances may make

87. *Ga.*—*White v. Martin*, 63 *Ga.* 659. *Ky.*—*Ray v. Arnett*, 32 *Ky. L. Rep.* 562, 106 *S. W.* 828; *Stewart v. Durrett*, 3 *Mon.* 113. *N. J.*—*Sherrard v. Olden*, 6 *N. J. L.* 344. *S. D.*—*Sluman v. Dolan*, 24 *S. D.* 32, 123 *N. W.* 72. *Tex.*—*Dinwiddie v. Tims*, 52 *Tex. Civ. App.* 72, 114 *S. W.* 400; *Low, Hudson & Gray Water Co. v. Hickson*, 32 *Tex. Civ. App.* 457, 74 *S. W.* 781. *Can.*—*Walker v. Stewart*, 19 *Nova Scotia* 182; *Farley v. Glassford*, 7 *U. C. C. P.* 285.

[a] **Examination Not Completed**. Where plaintiff was unable by reason of his physical condition to complete his cross-examination, and his testimony, for such reason, was stricken out, and the trial proceeded without him, counsel not believing his testimony would ever be available, a new trial was later granted on affidavits of physicians that plaintiff would be able to testify. *Chicago, etc. Ry. Co. v. Genesee Circ. Judge*, 89 *Mich.* 549, 50 *N. W.* 879.

88. *Ga.*—*Cleveland Nat. Bank v. Reynolds*, 76 *Ga.* 834. *Ky.*—*Peebles v. Ralls*, 1 *Litt.* 24. *Minn.*—*Miller v. Layne*, 84 *Minn.* 221, 87 *N. W.* 605. *S. D.*—*Sluman v. Dolan*, 24 *S. D.* 32, 123 *N. W.* 72.

89. *South v. Thomas' Heirs*, 7 *Mon. (Ky.)* 59.

90. *Grimes v. Com.*, 4 *Litt. (Ky.)* 1.

91. *Tex.*—*Hornbuckle v. Luther*, 47 *Tex. Civ. App.* 352, 105 *S. W.* 995. *Utah.*—*McCormick Harvesting Mach.*

Co. v. Marchant, 11 *Utah* 68, 39 *Pac.* 483. *Va.*—*Smith v. Rawlings' Admr.*, 83 *Va.* 674, 3 *S. E.* 238.

92. *Ga.*—*Smith v. Brand*, 44 *Ga.* 588. *Ind.*—*Edsall v. Ayres*, 15 *Ind.* 286. *Ia.*—*Tegeler & Co. v. Jones*, 33 *Iowa* 234. *Ky.*—*Goff v. Wilburn*, 25 *Ky. L. Rep.* 1963, 79 *S. W.* 232. *Tenn.*—*Clark v. Jarrett*, 2 *Baxt.* 467. *Tex.*—*Lanius v. Shuler*, 77 *Tex.* 24, 13 *S. W.* 614; *Davis v. Terry*, 33 *Tex.* 426. *W. Va.*—*Simpkins v. White*, 43 *W. Va.* 200, 27 *S. E.* 241.

93. See *supra*, II, E, 1, e.

94. *Minn.*—*Desnoyer v. McDonald*, 4 *Minn.* 515. *N. J.*—*Winants v. Davis*, 18 *N. J. L.* 306. *Ohio.*—*Backus v. Fire & Marine Ins. Co.*, 4 *Ohio Dec. (Reprint)* 518, 2 *Cleve. L. Rep.* 299. *Tenn.*—*Simonton v. Buchanan*, 2 *Baxt.* 279. *Tex.*—*Rice v. Scottish-American Mtg. Co. (Tex. Civ. App.)*, 30 *S. W.* 75.

[a] **The failure of a telegraph agent** to deliver promptly a message from a lawyer to his client living in the country, after agreeing so to do, is not such an accident as calls for a new trial, there being nothing to prevent the delivery of the message except the delay of the agent. *Griffin v. O'Neil*, 47 *Kan.* 116, 27 *Pac.* 826.

95. *Burriek v. Burns*, 2 *Ky. Op.* 62.

96. *Mohnert v. Thieme*, 15 *Kan.* 368.

97. *Byrne v. O'Neill*, 35 *Ill. App.* 361.

[a] **Misinformed by Counsel**.—*Dorflinger v. Coil*, 2 *Ohio* 311.

98. *Ala.*—*Western Union Tel. Co. v.*

such absence good cause,⁹⁹ as, for example, the illness of counsel.¹ However, in case of sickness or disability of counsel, a client knowing of such fact, should take reasonable measures to procure other counsel,² and the application for the new trial must show, in such a case, that the result of the new trial would probably be different.³ No new

Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89; *Wheeler v. Morgan*, 51 Ala. 573. **Ariz.**—*Solomon v. Norton*, 2 Ariz. 100, 11 Pac. 108. **Cal.**—*Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932. **Ga.**—*Warren v. Purtell*, 63 Ga. 428. **Ill.**—*Staunton Coal Co. v. Menk*, 197 Ill. 369, 64 N. E. 278; *Koon v. Nichols*, 85 Ill. 155. **Ind.**—*Blacketer v. House*, 67 Ind. 414. **Ia.**—*Grove v. Bush*, 86 Iowa 94, 53 N. W. 88. **Ky.**—*White v. Com.*, 140 Ky. 9, 130 S. W. 796; *Alexander v. Lewis*, 1 Mete. 407. **La.**—*Dwight v. Richard*, 4 La. Ann. 240; *Union Bank v. Robert*, 9 Rob. 177. **Minn.**—*Caughey v. Northern Pac. Elevator Co.*, 51 Minn. 324, 53 N. W. 545. **Miss.**—*Green v. Robinson*, 3 How. 105. **N. J.**—*Morris & C. Dredging Co. v. Williams*, 79 N. J. L. 137, 74 Atl. 271. **N. Y.**—*Bodle v. Chenango County Mut. Ins. Co.*, 1 How. Pr. 20. **N. D.**—*Josephson v. Sigfusson*, 13 N. D. 312, 100 N. W. 703. **Pa.**—*Ranck v. Morton*, 5 L. T. N. S. 111; *Field v. Sergeant*, 1 Phila. 72. **S. C.**—*Allen v. Donnelly*, 1 McCord 113. **Tex.**—*Browning v. Pumphrey*, 81 Tex. 163, 16 S. W. 870; *Freeman v. Neyland*, 23 Tex. 529; *Drummond v. Lewis* (Tex. Civ. App.), 157 S. W. 266. **Eng.**—*Blogg v. Bousquet*, 6 C. B. 75, 60 E. C. L. 75, 136 Eng. Reprint 1180. **Can.**—*Doherty v. Hogan*, 4 N. Brunsw. 492; *Gibbs v. Steadman*, 4 N. Brunsw. 406. 99. **Ga.**—*Ayer v. James*, 120 Ga. 578, 48 S. E. 154; *Thrasher v. Anderson*, 45 Ga. 538; *Smith v. Brand*, 44 Ga. 588. **Ill.**—*Walker v. Armour*, 22 Ill. 658. **Ind.**—*Sturgeon v. Hitchens*, 22 Ind. 107. **Ia.**—*Peterson v. Koch*, 110 Iowa 19, 81 N. W. 160, 80 Am. St. Rep. 261; *White v. Gray*, 92 Iowa 525, 61 N. W. 173. **Kan.**—*Turner v. Elbing State Bank*, 91 Kan. 123, 136 Pac. 917. **Ky.**—*Triplett v. Scott*, 5 Bush 81. **La.**—*Union Bank v. Robert*, 9 Rob. 177. **N. Y.**—*Bodle v. Chenango County Mut. Ins. Co.*, 1 How. Pr. 20. **Tex.**—*Fitzgerald v. Wygal*, 24 Tex. Civ. App. 372, 59 S. W. 621. **Wis.**—*Kayser v. Hartnett*, 67 Wis. 250, 30 N. W. 363. **Eng.**—*Wolff v. Goldring*,

44 L. J. C. P. 214, 32 L. T. N. S. 161, 23 Wkly. Rep. 473; *Townley v. Jones*, 29 L. J. C. P. 299, 6 Jur. (N. S.) 1158.

[a] Where the absence of counsel is excusable, a new trial should be granted after a default judgment. *Hovey v. Halsell-Arlidge Cattle Co.* (Tex. Civ. App.), 176 S. W. 897; *Kansas City, M. & O. Ry. Co. v. Imboden* (Tex. Civ. App.), 176 S. W. 900. Compare 15 STANDARD PROC. 177.

1. **Ill.**—*Porter v. Triola*, 84 Ill. 325. **Ia.**—*White v. Gray*, 92 Iowa 525, 61 N. W. 173. **La.**—*Flower v. Micken*, 2 Mart. (N. S.) 132.

[a] Justice may require a new trial where a party's rights were prejudiced by the illness of counsel during the trial. *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253.

[b] **Sickness in Counsel's Family.** In the case of *Cutler v. Rice*, 14 Pick. (Mass.) 494, a motion for a new trial was made on the ground of surprise and perturbation on the part of the applicant's counsel, arising from sudden and dangerous sickness in his family, and coming to his knowledge during the trial. Chief Justice Shaw, in delivering the opinion of the court, said the application was a novel one, but the court knew no limit to its power to interpose where the plain and manifest dictates of justice required. The court decided to grant a new trial, or to suspend judgment in order that the parties might effect a compromise.

2. **Ala.**—*Brock v. South & N. A. R. Co.*, 65 Ala. 79. **Cal.**—*Goldstone v. Sperling*, 39 Cal. 447. **Ia.**—*Grove v. Bush*, 86 Iowa 94, 53 N. W. 88. **Ky.**—*Landrum v. Farmer*, 7 Bush 46. **La.**—*Dwight v. Richard*, 4 La. Ann. 240. **Tex.**—*Strippelmann v. Clark*, 11 Tex. 296; *Drummond v. Lewis* (Tex. Civ. App.), 157 S. W. 266; *Bridgeport & D. Coal Co. v. Wise County Coal Co.* (Tex. Civ. App.), 39 S. W. 965. See *Hovey v. Halsell*, etc. *Cattle Co.* (Tex. Civ. App.), 176 S. W. 897.

3. *Porter v. Triola*, 84 Ill. 325.

trial will be granted, however, where counsel's absence is due to his own or his client's negligence,⁴ or to matters within their control.⁵ Thus, the excuse that counsel had other professional engagements is usually insufficient,⁶ or that he had not received his fees,⁷ or that he missed his railroad train.⁸ Moreover, where counsel was absent, but the party voluntarily proceeded without counsel, a new trial was refused.⁹

g. Withdrawal of Counsel.—Likewise, the withdrawal of counsel, or his refusal to proceed, will not, of itself, warrant a new trial,¹⁰ and, a fortiori, no new trial will be granted because counsel withdraws, when the withdrawal was caused by his client's refusal to attend the trial.¹¹ Where, however, the withdrawal of counsel leaves no opportunity to engage other counsel, or the time is too short for new counsel to acquaint himself with the case, sufficient surprise may be occasioned thereby as to warrant a new trial.¹²

h. Incompetency of Counsel.—As a general proposition, the doctrine of surprise does not include ignorance or mistakes of counsel, or the mismanagement of a case through his incompetence or neglect.¹³

4. *Ala.*—*Renfro Bros. v. Merryman & Co.*, 71 *Ala.* 195. *Cal.*—*Boehm v. Gibson*, 101 *Cal.* xvii, 35 *Pac.* 1014. *Ill.*—*Walsh v. Walsh*, 114 *Ill.* 655, 3 *N. E.* 437; *Koon v. Nichols*, 85 *Ill.* 155; *Keeley v. O'Brien*, 66 *Ill.* 358. *Tenn.*—*Simonton v. Buchanan*, 2 *Baxt.* 279.

5. *Ga.*—*Warren v. Purtell*, 63 *Ga.* 428, counsel absent because the progress of the court's business was such that it did not seem his case would be reached. *Ind.*—*Blacketer v. House*, 67 *Ind.* 414. *Mo.*—*Holloway v. Holloway*, 97 *Mo.* 628, 11 *S. W.* 233, 10 *Am. St. Rep.* 339 (mistake of counsel as to time case would be called); *Steigers v. Darby*, 8 *Mo.* 679.

6. *Ala.*—*Western Union Tel. Co. v. Chamblee*, 122 *Ala.* 428, 25 *So.* 232, 82 *Am. St. Rep.* 89. *Cal.*—*Boehm v. Gibson*, 101 *Cal.* xvii, 35 *Pac.* 1014. *Ga.*—*Cotton State Life Ins. Co. v. Edwards*, 74 *Ga.* 220. *Ill.*—*Funk v. Fire Assn. of Philadelphia*, 157 *Ill.* App. 602. *Ia.*—*Grover v. Bush*, 86 *Iowa* 94, 53 *N. W.* 88. *La.*—*Shields v. Lanna*, 10 *La. Ann.* 193. *Mo.*—*Jacob v. McLean*, 24 *Mo.* 40. *Neb.*—*Zimmerer v. Fremont Nat. Bank*, 59 *Neb.* 661, 81 *N. W.* 849. *Tex.*—*Power v. Gillespie*, 27 *Tex.* 370.

7. *Cobb v. State*, 78 *Ga.* 801, 3 *S. E.* 628; *Mullens v. State*, 35 *Tex. Crim.* 149, 32 *S. W.* 691.

[a] *Nonpayment of Fees Is Lack of Diligence.*—*Stewart Mining Co. v.*

Coulter, 3 *Utah* 174, 5 *Pac.* 557, 563.

8. *Walker v. Armour*, 22 *Ill.* 658. See, however: *Ala.*—*McLeod v. Shelly Mfg. & Imp. Co.*, 108 *Ala.* 81, 19 *So.* 326. *Ia.*—*First Nat. Bank v. Harwick*, 74 *Iowa* 227, 37 *N. W.* 171. *Wis.*—*Stoppelfeldt v. Milwaukee, etc. R. Co.*, 29 *Wis.* 688.

9. *Beal v. Coddling*, 32 *Kan.* 107, 4 *Pac.* 180.

10. *Cal.*—*Goldstone v. Sperling*, 39 *Cal.* 447. *Ill.*—*Winchester v. Grosvenor*, 48 *Ill.* 517. *Ind.*—*Moulder v. Kempff*, 115 *Ind.* 459, 17 *N. E.* 906. *Ky.*—*Alexander v. Lewis*, 1 *Mete.* 407. *La.*—*Flower v. McMicken*, 2 *Mart. N. S.* 132. *S. D.*—*Gaines v. White*, 1 *S. D.* 434, 47 *N. W.* 524. *Tex.*—*Western Union Tel. Co. v. Brooks*, 78 *Tex.* 331, 14 *S. W.* 699. *Utah.*—*Stewart Min. Co. v. Coulter*, 3 *Utah* 174, 5 *Pac.* 557.

11. *Kelly v. Cummins*, 143 *Iowa* 148, 122 *N. W.* 540.

12. *Donnelly v. McArdle*, 14 *App. Div.* 217, 43 *N. Y. Supp.* 560; *Adams v. Rathbun*, 14 *S. D.* 552, 86 *N. W.* 629. See *Balfour v. Tuck* (*Tex. Civ. App.*), 115 *S. W.* 841.

13. *Ga.*—*Jinks v. Lewis*, 89 *Ga.* 787, 15 *S. E.* 685; *Rolfe v. Rolfe*, 10 *Ga.* 143. *Minn.*—*Barrows v. Fox*, 39 *Minn.* 61, 38 *N. W.* 777. *Mo.*—*Parker v. Britton*, 133 *Mo. App.* 270, 113 *S. W.* 259. *Neb.*—*Crowell v. Harvey*, 30 *Neb.* 570, 46 *N. W.* 709. *N. H.*—*Bergeron v. Dartmouth Sav. Bank*, 62 *N. H.* 655.

The same principle applies to the lack of ability or experience on the part of counsel.¹⁴ Moreover, mere errors of judgment or misapprehension on the part of counsel do not constitute "mistake or misfortune" in connection with grounds for a new trial,¹⁵ and the neglect of counsel to take the necessary steps in a cause does not entitle a party to relief on the ground of "accident, mistake, or unforeseen cause."¹⁶ Yet, in an early English case, where defendant's attorney neglected to deliver his briefs to the barrister, the court granted a new trial,¹⁷ and other cases hold that where the rights of parties have been injuriously affected by the gross neglect or incompetency of counsel, a new trial may, in a clear case, be awarded,¹⁸ especially in criminal cases.¹⁹

i. *Acts of Prevailing Party.*—(I.) *In General.*—The acts of the prevailing party may cause such surprise²⁰ to the unsuccessful party

N. Y.—McNeish *v.* Stewart, 7 Cow. 474. **Ohio.**—How *v.* Bodman, 1 Disn. 115, 12 Ohio Dec. 521. **W. Va.**—Smith *v.* Parkersburg Co.-Op. Assn., 48 W. Va. 232, 37 S. E. 645. **Eng.**—Queen *v.* Corporation of Helston, 10 Mod. 202 (A. D. 1714), 88 Eng. Reprint 693.

14. De Florez *v.* Reynolds, 16 Blatch. (U. S.) 397, 7 Fed. Cas. No. 3,743, where the court says that the reason for denying new trials in such cases is that "there would never be an end of a suit so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent, or experienced, or learned." See Alamo Fire Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126.

15. Heath *v.* Marshall, 46 N. H. 40; Hess *v.* Harrah, 28 Okla. 627, 115 Pac. 790.

[a] **Mistake of judgment**, or want of attention or capacity of counsel, afford no just or proper grounds for granting a motion to reopen a case. Walker *v.* May, 67 W. Va. 316, 67 S. E. 786; Smith *v.* Parkersburg Co-operative Assn., 48 W. Va. 232, 37 S. E. 645.

16. Allen *v.* Russell, 33 R. I. 422, 82 Atl. 129; Haggelund *v.* Oakdale Mfg. Co., 26 R. I. 520, 60 Atl. 106.

17. De Rouigny *v.* Peale, 3 Taunt. 484, 128 Eng. Reprint 192, and required the attorney to pay the costs.

18. Weidersum *v.* Naumann, 10 Abb. N. C. 149, 62 How. Pr. (N. Y.) 369, rights of infants prejudiced by neglect of attorneys.

[a] **Neglect of Counsel May Be Surprise.**—In a case in which a party

to an action employs counsel of good reputation and wide experience, the neglect by such counsel of matters necessary to the ordinary procedure of the case is a "surprise" to the party, within the meaning of the statute entitling him to relief in such case. Citizens' Nat. Bank of Sisseton *v.* Branden, 19 N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 858.

[b] **Attorney Failing To Enter Plea.**—"That an attorney should fail to fulfill an engagement to perform such an act as that, we think may fairly be considered a surprise on the client; and that the omission of the client to examine the records to see that it had been done was an excusable neglect." Griel *v.* Vernon, 65 N. C. 76, 78.

19. **Ill.**—Wray *v.* People, 78 Ill. 212, attorney abandoning case. **Tex.** Augustine *v.* State, 20 Tex. 450. **Vt.** State *v.* Williams, 27 Vt. 724.

[a] **Must Affect Result.**—Hudson *v.* State, 76 Ga. 727.

[b] **Missouri.**—A new trial was granted in a murder case (State *v.* Jones, 12 Mo. App. 93), for gross incompetency of defendant's counsel, but subsequently, in State *v.* Dreher, 137 Mo. 11, 38 S. W. 567, the court refused to grant a new trial upon such ground, and disapproved the decision in the Jones case.

20. Taylor *v.* Moore, 3 Harr. (Del.) 6; Chamberlain *v.* Lindsay, 1 Hun (N. Y.) 231, 4 Thomp. & C. 23.

[a] **Fraudulent Trick.**—Where a verdict has been obtained by a fraudulent trick, the court will grant a new trial. Chitty, Gen. Pr., vol. IV,

as to warrant a new trial, and statutes sometimes so provide.²¹ New trials may be granted, for example, where the prevailing party by procurement or connivance keeps witnesses from being subpoenaed,²² or causes witnesses to be absent,²³ or with intent to injure the unsuccessful party's cause suppresses evidence,²⁴ or gains an unfair advantage by intentionally misleading the unsuccessful party as to a course of action.²⁵

(II.) **Violation of Stipulations.**—New trials may be granted on the ground of surprise where stipulations,²⁶ or other agreements,²⁷ entered into by the parties have been violated by the prevailing party.

j. *Caused by Third Persons.*—Surprise, accidents, misfortunes, or mistakes may be caused by third persons, without fault or neglect on the part of litigants, and if injustice is done thereby, a proper ground for new trial exists.²⁸ Thus, new trials have been granted because documents intended for evidence were, by third persons, mislaid or confused too late for correction,²⁹ because material and important pleadings were not filed through the mistake of the clerk of the court,³⁰ and because the files of a case had been lost.³¹

k. *Witnesses and Evidence.*—(I.) **General Rule as to Precaution and Avoidance of Injury.**—Surprise, accident, casualty, or misfortune, in connection with witnesses and evidence, must, as in connection with other matters, be prudently guarded against, and, if occurring, must also be avoided, if possible, in every reasonable way, in order to justify a new trial.³²

59; *Anderson v. George*, 1 Burr. 352, 97 Eng. Reprint 349.

Misconduct.—Matters of this nature may, however, be also considered under the general ground of misconduct. See *supra*, II, C, 2.

21. See Kan. Gen. St., 1915, §7205; Mo. Rev. St., 1909, §2022.

22. *Barron v. Jackson*, 40 N. H. 365; *Crafts v. Union Mut. Fire Ins. Co.*, 36 N. H. 44.

23. *Carey v. King*, 5 Ga. 75.

24. *Inhabitants of Warren v. Inhabitants of Hope*, 6 Me. 479.

25. *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231, 4 Thomp. & C. 23.

26. **Ill.**—*Putnam v. Murphy*, 53 Ill. 404. **Ohio.**—*Mitchell & Co. v. Knight & Son*, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729. **S. C.**—*Comply's Admr. v. Browne's Exrs.*, 3 Brev. 240.

27. **Ill.**—*Hankins v. Mutual Ben. Life Ins. Co.*, 4 Ill. App. 130. **Neb.**—*Mordhorst v. Reynolds*, 23 Neb. 485, 37 N. W. 80. **S. C.**—*Price v. McIlvain*, 3 Brev. 419, 2 Tread. Const. 503.

[a] **A judgment** taken against a party in violation of an agreement to the contrary is surprise. *Voorhees v.*

Geiser-Hendryx Inv. Co., 52 Ore. 602 98 Pac. 324, 326.

28. **Ky.**—*Price's Admr. v. Thompson*, 84 Ky. 219, 1 S. W. 408. **Minn.**—*Huntress-Brown Lumber Co. v. Wyman*, 55 Minn. 262, 56 N. W. 896. **N. H.**—*National State Capital Bank v. Noyes*, 62 N. H. 35. **Tex.**—*Davis v. Terry*, 33 Tex. 426.

29. *Floyd v. Hamilton*, 10 Iowa 552. 30. *Barnes v. McDaniels*, 35 Iowa 381.

31. *Sanders v. Norris*, 82 N. C. 243.

[a] **Stenographer's Notes Lost.** Where on the hearing of the application for a new trial it appeared that the stenographer's notes of the evidence had been lost, a new trial was granted regardless of the merits of the case. *James v. French*, 5 Pa. Co. Ct. 270.

32. **Ala.**—*Baker v. Boon*, 100 Ala. 622, 13 So. 481. **Ark.**—*St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971. **Cal.**—*Heath v. Scott*, 65 Cal. 548, 4 Pac. 557; *Dewey v. Frank*, 62 Cal. 343; *Miller v. Scoble*, 8 Cal. App. 344, 97 Pac. 93. **Colo.**—*Temple v. Teller Lumber Co.*, 46 Colo. 497, 106 Pac. 8. **Del.**—*McCrone v.*

The proper preparation for trial includes reasonable precaution and diligence in compelling the attendance of witnesses,³³ and in having ready such documentary evidence as may be material for one's case.³⁴ Consequently, the absence of a witness who was not subpoenaed is not a cause for granting a new trial,³⁵ and if it is known, or believed, that

Eves, 3 Houst. 76. **Ga.**—Brinson v. Faircloth, 82 Ga. 185, 7 S. E. 923; Beckford v. Chipman, 44 Ga. 543. **Haw.** Walker v. Grimes, 1 Hawaii 54. **Ill.** Rockford, R. I. & St. L. Ry. Co. v. Rose, 72 Ill. 183; Yates v. Monroe, 13 Ill. 212. **Ind.**—Working v. Garn, 148 Ind. 546, 47 N. E. 951; Louisville, N. A. & C. Ry. Co. v. Hendricks, 128 Ind. 462, 28 N. E. 58; State v. Bottorff, 82 Ind. 538; Smith v. Harris, 76 Ind. 104. **Ia.**—Mehan v. Chicago, R. I. & P. R. Co., 55 Iowa 305, 7 N. W. 613; Keys v. Francis, 28 Iowa 321. **Kan.** Beachley v. McCormick, 41 Kan. 485, 21 Pac. 646; Beal v. Codding, 32 Kan. 107, 4 Pac. 180. **Ky.**—Babbitt v. Woolley, 3 Bush 703; Bell v. Howard, 4 Litt. 117. **Me.**—Atkinson v. Conner, 56 Me. 546. **Minn.**—Scott, etc. Lumber Co. v. Sharvey, 62 Minn. 528, 64 N. W. 1132. **Miss.**—Dorsey v. Maury, 10 Smed. & M. 298. **Mo.**—Fretwell v. Gaffoon, 77 Mo. 26; John Schoen Plumbing Co. v. Hugunin, 156 Mo. App. 68, 135 S. W. 967. **Mont.**—Rand v. Kipp, 27 Mont. 138, 69 Pac. 714. **N. J.**—Matthews v. Allaire, 11 N. J. L. 242. **N. Y.** Randall v. Packard, 142 N. Y. 47, 36 N. E. 823; Peck v. Hiler, 30 Barb. 655. **Ohio.**—Kroger v. Ryan, 83 Ohio St. 299, 94 N. E. 428. **P. R.**—Rivero v. Hernandez, 17 Porto Rico 868. **Tenn.** Nellums v. Nashville, 106 Tenn. 222, 61 S. W. 88. **Tex.**—Balfour v. Tuck (Tex. Civ. App.), 115 S. W. 841; Moore v. Loggins (Tex. Civ. App.), 114 S. W. 183; Daugherty v. Templeton, 50 Tex. Civ. App. 304, 110 S. W. 553. **Vt.** Burr v. Palmer, 23 Vt. 244. **Wash.** Jensen v. Spokane Falls & N. R. Co., 51 Wash. 448, 98 Pac. 1124. **W. Va.** Henderson v. Hazlett, 75 W. Va. 255, 83 S. E. 907. **Wis.**—Befay v. Wheeler, 84 Wis. 135, 53 N. W. 1121. **Wyo.** Harden v. Card, 15 Wyo. 217, 88 Pac. 217. **Eng.**—Bell v. Thompson, 2 Chit. 194, 18 E. C. L. 586; Roberts v. Holmes, 2 C. L. R. 726; White v. South Eastern R. Co., 10 Wkly. Rep. 564. **Can.**—McMillan v. Grand Trunk, etc. R. Co., 12 Ont. 103; White v. McKay, 43 U. C. Q. B. 226.

See *supra*, II, E, 1, f and g.

33. **Ala.**—Elliott v. Cook, 33 Ala. 490. **Conn.**—Norwich & W. R. Co. v. Cahill, 18 Conn. 484. **Ga.**—Carey v. King, 5 Ga. 75. **Ill.**—Chicago & G. E. R. Co. v. Vosburgh, 45 Ill. 311. **Ind.** Nordman v. Stough, 50 Ind. 280; Washer v. White, 16 Ind. 136. **Kan.**—Washington v. Byers, 7 Kan. App. 812, 53 Pac. 150. **Ky.**—Mussin v. Collins, 1 A. K. Marsh. 350. **Minn.**—Otterness v. Botten, 80 Minn. 430, 83 N. W. 382. **N. J.**—Quagliana v. Jersey City, etc. R. Co., 77 N. J. L. 101, 103, 71 Atl. 43. **N. Y.**—Gawthrop v. Leary, 9 Daly 353. **Tex.**—Milwaukee M. Ins. Co. v. Frosch (Tex. Civ. App.), 130 S. W. 600. **W. Va.**—Henderson v. Hazlett, 75 W. Va. 255, 83 S. E. 907. **Eng.**—Dunn v. Edwards, 19 L. T. N. S. 394.

[a] **Diligence in Discovering Facts as to Residence.**—Under a statute authorizing depositions in cases where witnesses resided more than forty miles from the place of trial, appellants claimed to have been taken by surprise by the exclusion of depositions presented by them, having procured them in the supposition that the witnesses did in fact reside beyond the forty mile limit. The court said: "Surprise, in its legal acceptation, it is said, denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection." The fact that witnesses, whose depositions are taken, reside within forty miles of the place, is a fact of which the party taking such depositions can inform himself by ordinary diligence; if it be not known, the want of knowledge is to be attributed to his own laches, and surprise thus produced cannot be ground for a new trial. *Peers v. Davis' Admsr.*, 29 Mo. 184.

34. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.* (Ind. App.), 62 N. E. 649; *Linard v. Crossland*, 10 Tex. 462, 60 Am. Dec. 213.

35. **Ala.**—Hoskins v. Hight, 95 Ala.

witnesses cannot be present, proper arrangements for depositions, where allowable, should be made.³⁶ Moreover, if at the trial, a needed witness is not present, or the evidence is not ready, one should ask for a postponement or a continuance,³⁷ because the absence of a subpoenaed witness is not in itself sufficient for a new trial where no delay or continuance is asked,³⁸ since by voluntarily taking the hazard of trial in the absence of witnesses or evidence, the question of a new trial, with respect to that particular matter, is waived.³⁹ Moreover,

284, 11 So. 253. **Ky.**—*Stewart v. Durrett*, 2 Mon. 122. **Mich.**—*Johnson v. Doon*, 131 Mich. 452, 91 N. W. 742. **Minn.**—*Eich v. Taylor*, 17 Minn. 172. **N. Y.**—*Tigue v. Annowski*, 7 N. Y. Supp. 9, 24 N. Y. St. 931. **Pa.**—*Kelly v. Holdship*, 1 Browne 36. **Tex.**—*Love v. Breedlove*, 75 Tex. 649, 13 S. W. 122. **Wash.**—*Clemans v. Western*, 39 Wash. 290, 81 Pac. 824. **W. Va.**—*Davis v. Walker*, 7 W. Va. 447. **Wis.**—*Kellogg v. Ballard*, 10 Wis. 440.

36. **Ala.**—*Allington v. Tucker*, 38 Ala. 655. **Ga.**—*Atlantic & P. R. Co. v. Johnson*, 127 Ga. 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119. **Ind.**—*Conwell v. Anderson*, 2 Ind. 122. **Tex.**—*Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565.

37. **Ala.**—*Baker v. Boon*, 100 Ala. 622, 13 So. 481; *Hoskins v. Hight*, 95 Ala. 284, 11 So. 253. **Cal.**—*Champagne v. Hamburger & Sons*, 169 Cal. 683, 147 Pac. 954; *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557. **Ga.**—*Crawford v. Georgia P. R. Co.*, 86 Ga. 5, 12 S. E. 176. **Ill.**—*Kunkel v. Chicago*, 64 Ill. App. 354. **Ind.**—*Schlotter v. State*, 127 Ind. 493, 27 N. E. 149; *Myers v. Conway*, 62 Ind. 474. **Ia.**—*Gee v. Moss*, 68 Iowa 318, 27 N. W. 268. **Kan.**—*Hanson v. Kendt*, 94 Kan. 310, 146 Pac. 1190. **Ky.**—*Gill v. Warren's Admr.*, 1 J. J. Marsh. 590; *Hatcher v. Reed*, Hard. 515; *Burriek v. Burns*, 2 Ky. Op. 62. **La.**—*McClure v. King*, 15 La. Ann. 220. **Me.**—*Atkins v. Field*, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424. **Mich.**—*Bosek v. Detroit United R. Co.*, 175 Mich. 8, 140 N. W. 978. **Minn.**—*Otterness v. Botten*, 80 Minn. 430, 83 N. W. 382; *Eich v. Taylor*, 17 Minn. 172. **Neb.**—*Kreamer v. Irwin*, 46 Neb. 827, 65 N. W. 885; *Van Etten v. Butt*, 32 Neb. 285, 49 N. W. 365; *Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887. **N. Y.**—*Erichson v. Sidlo*, 76 App. Div. 347, 78 N. Y. Supp. 487; *Messenger v. Fourth Nat. Bank*, 48 How. Pr. 521; *Jackson ex dem. Malin*

v. Malin, 15 Johns. 293. **N. D.**—*Josephson v. Sigfusson*, 13 N. D. 312, 100 N. W. 703. **Pa.**—*Filbert v. Howard Express Co.*, 1 Woodw. Dec. 304. **R. I.**—*Potter v. Padelford & Co.*, 3 R. I. 162. **S. C.**—*Graham v. Atlantic C. L. R. Co.*, 89 S. C. 1, 71 S. E. 235. **Tex.**—*Love v. Breedlove*, 75 Tex. 649, 13 S. W. 222; *Strippelman v. Clark*, 11 Tex. 296; *St. Louis S. W. R. Co. v. Williams* (Tex. Civ. App.), 170 S. W. 1069. **Wash.**—*Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184; *Mueller v. Washington W. Power Co.*, 56 Wash. 556, 106 Pac. 476. **Eng.**—*Turquand v. Dawson*, 1 C. M. & R. 709, 5 Tyrw. 488; *Edwards v. Dignam*, 2 Dowl. P. C. 642. **Can.**—*Morice v. Baird*, 6 Manitoba 241.

38. *State v. McCool*, 34 Kan. 617, 9 Pac. 618.

39. **Ga.**—*Crawford v. Georgia P. R. Co.*, 86 Ga. 5, 12 S. E. 176. **Ind.**—*Myers v. Conway*, 62 Ind. 474. **Ia.**—*Gee v. Moss*, 68 Iowa 318, 27 N. W. 268. **Ky.**—*Gill v. Warren's Admr.*, 1 J. J. Marsh. 590. **Neb.**—*Kreamer v. Irwin*, 46 Neb. 827, 65 N. W. 885. **N. Y.**—*Leonard v. Germania Fire Ins. Co.*, 2 Misc. 548, 23 N. Y. Supp. 684, 23 Civ. Proc. 155. **Tex.**—*Love v. Breedlove*, 75 Tex. 649, 13 S. W. 222.

[a] **Unable To Procure Witness.** That a party could not procure a particular witness in time for the trial is not ground for a new trial. *Atkins v. Field*, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424.

[b] **Absence of Expert Witness.** Where, in an action against a railway company to recover damages, a physician, who was desired as an expert witness for the defendant and who was expected to testify as to an examination of the plaintiff and the extent of his injuries, agreed with the counsel for the defendant that he would be present at the trial upon notice, but, though notified, was called upon to treat an emergency case, and did not arrive until after the evidence

where no effort has been made to ascertain and meet testimony when circumstances would presume the offering of it, surprise cannot be predicated upon it,⁴⁰ unless, possibly, by reason of his illness, one was unable to prepare.⁴¹ Moreover, if counsel is surprised by evidence introduced, he should inform the court, and effort should be made during the trial, if possible, to meet it.⁴²

If the surprise consists in the unexpected testimony of one's own witness, it should, if possible, be avoided by the calling of other witnesses,⁴³ and if time is needed, either by reason of surprise at the testimony of his own witness, or because surprised by unexpected opposing evidence, a party should ask for a postponement or continuance.⁴⁴

had closed and the argument had begun, and where it does not appear that counsel for the defendant moved the court to grant a continuance or postponement before closing the evidence and proceeding to the argument, the absence of such witness furnished no ground for the grant of a new trial. *Seaboard Air Line Ry. v. Johnson*, 139 Ga. 471, 77 S. E. 632.

40. *Race v. Malony*, 21 Kan. 31.

41. *Ragan v. James*, 7 Kan. 354.

42. *Boot & Shoe Co. v. Martin*, 45 Kan. 765, 26 Pac. 424.

43. *Adamant Mfg. Co. v. Pete*, 61 Minn. 464, 63 N. W. 1027; *Walcott v. Stolicker*, 16 U. C. C. P. 555.

44. **U. S.**—*Flint, etc. R. Co. v. Marine Ins. Co.*, 71 Fed. 210. **Ala.**—*Central of Georgia R. Co. v. Ashley*, 160 Ala. 580, 49 So. 388; *Simpson v. Golden*, 114 Ala. 336, 21 So. 990. **Ariz.**—*Walker v. Gray*, 6 Ariz. 359, 57 Pac. 614. **Ark.**—*St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Hill v. State*, 37 Ark. 395. **Cal.**—*Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Dewey v. Frank Bros. & Co.*, 62 Cal. 343; *Miller v. Scoble*, 8 Cal. App. 344, 97 Pac. 93. **Colo.**—*Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058. **Ga.**—*Boston Merc. Co. v. Ould-Carter Co.*, 123 Ga. 458, 51 S. E. 466; *Beckford v. Chipman*, 44 Ga. 543; *Clark v. Carter*, 12 Ga. 500, 58 Am. Dec. 485. **Ill.**—*Martin Lumber Co. v. Walsh Bros.*, 81 Ill. App. 403. **Ind.**—*Ellis v. Hammond*, 157 Ind. 267, 61 N. E. 565; *Working v. Garn*, 148 Ind. 546, 47 N. E. 951; *State v. Bottorff*, 82 Ind. 538. **Ia.**—*Hopper v. Moore & Co.*, 42 Iowa 563; *Dunlavey v. Watson*, 38 Iowa 398. **Kan.**—*Hanson v. Kendt*, 94 Kan. 310, 146 Pac. 1190; *Argentine v. Simmons*, 59 Kan. 164, 52 Pac. 424. **Ky.**—*Howard v. Strawbridge*, 165 Ky.

88, 176 S. W. 977; *Remley v. Illinois Cent. R. Co.*, 151 Ky. 796, 152 S. W. 973; *Travelers' Ins. Co. v. McInerney*, 119 S. W. 171; *Monarch v. Cowherd*, 114 S. W. 276. **Me.**—*Maynell v. Sullivan*, 67 Me. 314. **Mo.**—*James v. Mutual Reserve Fund Life Assn.*, 148 Mo. 1, 49 S. W. 978; *Byrd v. Vanderburgh*, 168 Mo. App. 112, 151 S. W. 184; *John Schoen Plumbing Co. v. Hugunin*, 156 Mo. App. 68, 135 S. W. 967. **Neb.**—*Remington Typewriter Co. v. Simpson*, 83 Neb. 848, 120 N. W. 428; *Pennington County Bank v. Bauman*, 81 Neb. 782, 116 N. W. 669. **N. H.**—*Willard v. Wetherbee*, 4 N. H. 118. **N. M.**—*Romero v. Lopez*, 21 Pac. 679. **N. Y.**—*Peck v. Hiler*, 30 Barb. 655; *Dixon v. Brooklyn H. R. Co.*, 68 App. Div. 302, 74 N. Y. Supp. 49; *Cole v. Fall Brook Coal Co.*, 10 N. Y. Supp. 417; *Seaman v. Koehler*, 12 N. Y. St. 582. **Ohio.**—*Kroger v. Ryan*, 83 Ohio St. 299, 94 N. E. 428. **Pa.**—*Martin v. Marvine*, 1 Phila. 280, 9 Leg. Int. 2. **R. I.**—*Riley v. Shannon*, 19 R. I. 503, 34 Atl. 989; *Davidson v. Wheeler*, 17 R. I. 433, 22 Atl. 1022. **S. D.**—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524. **Tenn.**—*Nellums v. Nashville*, 106 Tenn. 222, 61 S. W. 88. **Tex.**—*Pickett v. Martin*, 16 S. W. 1007; *Dotson v. Moss*, 58 Tex. 152; *Tripp Bros. v. McCormack (Tex. Civ. App.)*, 157 S. W. 443; *Cunningham v. State*, 20 Tex. App. 162; *Burton v. State*, 9 Tex. App. 605. **Vt.**—*Hemmenway v. Lincoln*, 82 Vt. 465, 73 Atl. 1073; *Briggs v. Gleason*, 27 Vt. 114. **Wash.**—*Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461. **Eng.**—*Reg. v. Flannagan*, 15 Cox C. C. 403. **Can.**—*Gilbert v. Stockton*, 12 N. Brunsw. 58; *City Bank v. Strong*, 7 U. C. C. P. 96.

See generally the title "Continuances."

Consequently, a party who needed further time for preparation, but who omitted to move for a continuance, cannot later urge that he was pressed to trial by accident or misfortune.⁴⁵ Moreover, if plaintiff does not wish to venture the chance of an adverse verdict or finding, he may have his action dismissed, renewing it later.⁴⁶

(II.) **Absence of Witness.**—Where there has been no neglect in prior diligence or in subsequent efforts to avoid the consequences, the unavoidable absence of a material witness may be sufficient surprise to entitle a defeated party to a new trial.⁴⁷ This, for example, may happen through the illness,⁴⁸ death,⁴⁹ or misconduct of a witness,⁵⁰ or where, for other causes, witnesses are not present,⁵¹ or where the court refuses to allow reasonable time to secure their presence.⁵² But in any case, unless the result would be affected, the absence of a witness will not warrant a new trial.⁵³

(III.) **Incompetency of Witness.**—The fact that the testimony of an incompetent witness is excluded is not surprise. Such a ruling is to

45. *Parker v. State*, 81 Ga. 332, 6 S. E. 600; *Couillard v. Seaver*, 64 N. H. 614, 9 Atl. 724.

46. **U. S.**—*Flint, etc. R. Co. v. Marine Ins. Co.*, 71 Fed. 210. **Cal.**—*Schellhaus v. Ball*, 29 Cal. 605. **Ill.**—*Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372. **Ind.**—*Working v. Garn*, 148 Ind. 546, 47 N. E. 951; *Helm v. First Nat. Bank*, 91 Ind. 44; *Cummins v. Walden*, 4 Blackf. 307. **Ia.**—*Hopper v. Moore & Co.*, 42 Iowa 563. **Kan.**—*Argentine v. Simmons*, 59 Kan. 164, 52 Pac. 424. **Mo.**—*Savoni v. Brashear*, 46 Mo. 345; *Byrd v. Vanderburgh*, 168 Mo. App. 112, 151 S. W. 184. **N. Y.**—*People v. Marks*, 10 How. Pr. 261, 2 Park. Crim. 673; *Oakley v. Sears*, 7 Robt. 111; *Brady v. Valentine*, 3 Mise. 19, 21 N. Y. Supp. 776, 50 N. Y. St. 570. **Pa.**—*Withers v. Ralston*, 3 Phila. 412; *Hansell v. Lutz*, 1 Phila. 340. **Tex.**—*Pickett v. Martin*, 16 S. W. 1007; *Dutton v. Moss*, 58 Tex. 152. **Eng.**—*Turquand v. Dawson*, 1 C. M. & R. 709, 5 Tyrw. 488. **Can.**—*Rankin v. Weldon*, 11 N. Brunsw. 220; *Hooper v. Christoe*, 14 U. C. C. P. 117.

See the title "Dismissal, Discontinuance and Nonsuit."

47. **La.**—*Leckie v. Crain*, 12 La. 432. **N. J.**—*Quagliana v. Jersey City, etc. R. Co.*, 77 N. J. L. 101, 71 Atl. 43. **N. Y.**—*Continental Nat. Bank v. Adams*, 67 Barb. 318; *Tilden v. Gardiner*, 25 Wend. 663; *Cahill v. Hilton*, 31 Hun 114. **N. C.**—*Quincey v. Perkins*, 76 N. C. 295. **S. D.**—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524. **Tex.**—*Chil-*

son v. Reeves, 29 Tex. 275. **Can.**—*Lockhart v. Milne*, 1 U. C. Q. B. 444.

48. *Ainsworth v. Sessions*, 1 Root (Conn.) 175 (where a material witness was suddenly stricken with a paralytic stroke); *Watterson v. Watterson*, 1 Head (Tenn.) 1.

49. *South v. Thomas' Heirs*, 7 Mon. (Ky.) 59.

50. **Ind.**—*McQueen v. Stewart*, 7 Ind. 535. **Ky.**—*Shipp's Admr. v. Suggett's Admr.*, 9 B. Mon. 5. **La.**—*Leckie v. Crain*, 12 La. 432. **Tex.**—*Land v. Miller*, 7 Tex. 463. **Wis.**—*Dickinson v. Buskie*, 59 Wis. 136, 17 N. W. 685.

Conduct of witness as surprise, see *infra*, II, E, 2, k, (V).

51. See *infra*, this note.

[a] **If a material witness starts in due time to attend a trial, and is delayed purely by an accident, and is prevented thereby from reaching the place of trial until the trial has been concluded, and the party for whom the witness expected to testify is unsuccessful, and was not in fault in going to trial without the witness, we think that ordinarily such party is entitled to a new trial.** *Smith v. State Ins. Co.*, 58 Iowa 487, 12 N. W. 542.

52. *Smith v. Lidgerwood Mfg. Co.*, 60 App. Div. 467, 69 N. Y. Supp. 975.

53. *Andrist v. Union Pac. R. Co.*, 30 Fed. 345. See *Rees v. Blackwell*, 6 Ind. App. 506, 33 N. E. 988.

[a] **Illness of Unnecessary Witness.** The absence by reason of illness of an unnecessary witness is not cause for

be expected.⁵⁴ Moreover, that a party was mistaken as to the competency of a witness offered by him but excluded,⁵⁵ or that he was wholly ignorant of his incompetency, is no ground for a new trial.⁵⁶ But ignorance of the incompetency of a witness for the adverse party, known to the latter, may be ground for new trial.⁵⁷

(IV.) **Impeachment of Witness.**—That a witness' character is unexpectedly attacked is not, as a rule, sufficient surprise to warrant a new trial,⁵⁸ although special circumstances may give rise to exceptions to the rule.⁵⁹

(V.) **Conduct of Witness.**—It is seldom that the conduct, or manner, of a witness will amount to such "legal surprise" that a new trial will be awarded. For example, that a witness was forgetful,⁶⁰ or that he inadvertently omitted important matters in his testimony,⁶¹ or that he was unwilling or reluctant to testify,⁶² or that, in a criminal case, a witness for the state refused to testify,⁶³ or that the witness was nervous, confused, or agitated,⁶⁴ or was intoxicated,⁶⁵ or was sud-

a new trial. *Young v. Com.*, 4 Gratt. (45 Va.) 550.

54. *Cal.*—*Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; *Packer v. Heaton*, 9 Cal. 568. *Mo.*—*Morrison v. Murphy*, 36 Mo. App. 36. *N. J.*—*Matthews v. Allaire*, 11 N. J. L. 242. *N. C.*—*Arrington's Admr. v. Coleman*, 3 N. C. 300. *Ohio.*—*How v. Bodman*, 1 Disn. 115, 12 Ohio Dec. 521. *P. R.*—*Fajardo v. Tio*, 17 Porto Rico 321. *Vt.*—*Haskins v. Smith*, 17 Vt. 263.

[a] But where the witness is incompetent because his name was endorsed on the original writ as attorney for plaintiff, and through this mistake, or oversight, a verdict goes against the plaintiff, a new trial may be granted upon terms. *Riley v. Emerson*, 5 N. H. 531.

55. *Packer v. Heaton*, 9 Cal. 568.

56. *Matthews v. Allaire*, 11 N. J. L. 242.

57. *Niles v. Brackett*, 15 Mass. 378. *Contra*, *McCrone v. Eves*, 3 Houst. (Del.) 76.

58. *Ill.*—*Frorer v. Rowley*, 84 Ill. App. 446. *Ind.*—*Jennings v. Howard*, 80 Ind. 214. *Ky.*—*Bell v. Howard*, 4 Litt. 117. *N. J.*—*Hadley v. Geiger*, 9 N. J. L. 225. *N. Y.*—*Shumway v. Fowler*, 4 Johns. 425.

59. *Miss.*—*Wilson v. Clarke*, 27 Miss. 270. *N. Y.*—*People v. Lane*, 31 Hun 13, 1 N. Y. Crim. 548, new trial granted to enable defendant to rebut evidence attacking his character. *Pa.*—*Bishop v. Lehman*, 9 Phila. 112.

60. *U. S.*—*Martin v. Clark*, Hempst. 259, 16 Fed. Cas. No. 9,158a. *Cal.*

Hendy v. Desmond, 62 Cal. 260. *Ind.*—*McQueen v. Stewart*, 7 Ind. 535; *Duignan v. Wyatt*, 3 Blackf. 385. *Mass.*—*Bond v. Cutler*, 7 Mass. 205. *Miss.*—*Davis v. Presler*, 5 Smed. & M. 459. *Tex.*—*King v. Gray*, 17 Tex. 62; *Cochrane v. Middleton*, 13 Tex. 275. *Wis.*—*Sawyer v. La Flesh*, 65 Wis. 659, 27 N. W. 407.

61. *Watts v. Johnson*, 4 Tex. 311. See also *King v. Gray*, 17 Tex. 62, distinguishing between an inadvertent and a wilful omission of a material fact. Where the witness purposely withholds information of a material fact, the verdict will be set aside.

62. *Martin v. Clark*, Hempst. 259, 16 Fed. Cas. No. 9,158a; *Hinds v. Terry*, Walk. (Miss.) 80.

63. *State v. Howerton*, 58 Mo. 581.

64. *Korte v. Hoffman*, 97 Mo. 284, 10 S. W. 390; *Ritenour v. Barger*, 21 Pa. Dist. 628.

[a] **Witness Incapable of Testifying.**—Where a witness became so ill while testifying that his replies were incoherent, disconcerted, and not to be understood, a new trial should be granted to the unsuccessful party who had been, thereby, deprived of his testimony. *Ainsworth v. Sessions*, 1 Root (Conn.) 175.

65. *Ind.*—*McQueen v. Stewart*, 7 Ind. 535. *La.*—*Leekie v. Crain*, 12 La. 432. *Wis.*—*Dickinson v. Buskie*, 59 Wis. 136, 17 N. W. 685.

[a] **Intoxicated Witness.**—Where an important witness was intoxicated when giving her testimony, and it appeared that the liquor was furnished

denly taken ill,⁶⁶ do not necessarily justify new trials.

(VI.) **Testimony of Witnesses.** — (A.) **MISTAKE.** — That a witness was mistaken in his testimony does not usually constitute a cause for a new trial.⁶⁷ It is only under extraordinary circumstances that a new trial will be granted on such ground,⁶⁸ as where the testimony was very material and probably largely influenced the verdict.⁶⁹

(B.) **PERJURY.** — Even the perjury of a witness is not, in itself, sufficient surprise to require a new trial, because it may not have affected

by the deputy sheriff, a sufficient ground for a new trial exists. *Moore's Admr. v. Cross*, 86 Vt. 148, 84 Atl. 22. See *Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739.

[b] **But where a party makes no objection to the examination** on account of intoxication, but cross-examines the witness and permits the evidence to go to the jury, speculating on the chances that the jury will give little or no weight to the testimony of the drunken witness, he cannot afterward move for a new trial. *Dickinson v. Buskie*, 59 Wis. 136, 17 N. W. 685.

66. **Ind.**—*Rees v. Blackwell*, 6 Ind. App. 506, 33 N. E. 988. **N. Y.**—*Depeyster v. Columbian Ins. Co.*, 2 Caines 85. **Tex.**—*King v. Gray*, 17 Tex. 62; *Watts v. Johnson*, 4 Tex. 311.

[a] **Witness Insane.** — Where surprise was caused by the failure of a witness to testify in accord with his previous statements, and after the trial it was discovered that the witness had become insane just before the trial, the granting of a new trial was right. *Helwig v. Second Ave. R. Co.*, 9 Misc. 61, 29 N. Y. Supp. 9, 59 N. Y. St. 540.

67. **U. S.**—*Carr v. Gale*, 1 Curt. 384, 5 Fed. Cas. No. 2,433. **Cal.**—*Howe v. Briggs*, 17 Cal. 385. **Ga.**—*Johnson v. A. Lefler Co.*, 122 Ga. 670, 50 S. E. 488; *Maddox v. Oxford*, 70 Ga. 179; *Jossey v. Stapleton*, 57 Ga. 144. **Ill.**—*Cooke v. Murphy*, 70 Ill. 96. **Minn.**—*Webb v. Barnard*, 36 Minn. 336, 31 N. W. 214; *Sheffield v. Mullin*, 28 Minn. 251, 9 N. W. 756. **N. Y.**—*Pasinsky v. Metropolitan News Co.*, 89 Misc. 444, 152 N. Y. Supp. 232. **Eng.**—*Magnay v. Knight*, 1 M. & G. 944, 39 E. C. L. 1111, 133 Eng. Reprint 615. See *Richards v. Hammond*, M'Clelland (Exch.) 179, witness ill and confused.

68. *O'Kelly v. Felker*, 71 Ga. 775.

69. **Ark.**—*Cooper v. Vaughan*, 107

Ark. 498, 155 S. W. 912. **Ga.**—*Scofield Rolling Mill Co. v. State*, 54 Ga. 635; *Wilson v. Brandon*, 8 Ga. 136. **Ill.**—*Beveridge v. Chetlain*, 1 Ill. App. 231. **Ia.**—*Pickering v. Kirkpatrick*, 32 Iowa 163. **Me.**—*Hewey v. Nourse*, 54 Me. 256. **N. Y.**—*Mersereau v. Pearsall*, 6 How. Pr. 293; *Randall v. Packard*, 1 Misc. 347, 20 N. Y. Supp. 718, 48 N. Y. St. 789 (*affirmed*, 142 N. Y. 47, 36 N. E. 823); *Huson v. Egan*, 6 N. Y. Supp. 661, 25 N. Y. St. 906. **Pa.**—*Hause v. Sloyer*, 3 Pa. Dist. 320, honest mistake in material matter. **Eng.**—*Dudley v. Robins*, 3 Car. & P. 26, 14 E. C. L. 432; *Richardson v. Fisher*, 7 Moore 546, 1 Bing. 145, 8 E. C. L. 444, 130 Eng. Reprint 59; *Truebody v. Brain*, 9 Price 77.

[a] **Particular Circumstances.** — If the testimony on which a verdict has proceeded is founded on and derives its credit from particular circumstances, and these circumstances are afterwards clearly falsified, the court will grant a new trial. *Lister v. Mundell*, 1 Bos. & P. 427, 126 Eng. Reprint 991.

[b] **Party Misled by Witness.** — Where on the trial of a cause, a witness, from mistake, fails to prove a necessary fact to make out defendant's defense, the witness having previously assured the defendant that he could and would do so, whereby defendant was prevented from procuring other testimony to prove the same fact, which he could have done, a new trial should be granted. *Wilson v. Brandon*, 8 Ga. 136.

[c] **In a criminal prosecution**, the material mistake of an important witness, such mistake discovered after the trial, has likewise been held ground for a new trial. *Scofield Rolling Mill Co. v. State*, 54 Ga. 635; *Mann v. State*, 44 Tex. 642. Such facts, however, properly fall under newly discovered evidence. See *infra*, II, H.

the result.⁷⁰ Where, however, a party has been surprised by perjury of such a nature that it had a material influence upon the verdict, a new trial should be awarded,⁷¹ and a statute may authorize a new trial upon the ground of perjury regardless of the question of surprise.⁷² In criminal cases, where after conviction it has been ascertained that the conviction was secured by means of perjured testimony, a new trial will be ordered.⁷³ According to the common law rule, the fact of the perjury must first have been established by the

70. Cal.—*Guy v. Hanly*, 21 Cal. 397. *Id.*—*Kelly v. Cummins*, 143 Iowa 148, 121 N. W. 540; *Graves v. Graves*, 132 Iowa 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216. Wash.—*Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740. Wis.—*Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121. Eng.—*Baker v. Wadsworth*, 67 L. J. Q. B. 301.

See *supra*, II, C, 4 and 9.

71. Cal.—*Guy v. Hanly*, 21 Cal. 297. Ill.—*Seward v. Cease*, 50 Ill. 228; *Hewitt v. Hexter*, 39 Ill. App. 585. Ind.—*Miller v. State*, 174 Ind. 255, 91 N. E. 930, 933. Ia.—*Grinnell Brick & T. Co. v. Booknau*, 167 Iowa 279, 149 N. W. 239; *Key v. Des Moines Ins. Co.*, 77 Iowa 174, 41 N. W. 614; *Shenandoah First Nat. Bank v. Wabash, etc. R. Co.*, 61 Iowa 700, 17 S. W. 48. Kan.—*Laithe v. McDonald*, 7 Kan. 254, holding that where a party obtains judgment by his own wilful perjury, or the use of false testimony, which he knows at the time to be false, he practices a fraud for which the judgment may be vacated. Minn.—*Nudd v. Home Ins. Co.*, 25 Minn. 100. Mo.—*Scott v. St. Joseph, etc. Power Co.*, 168 Mo. App. 527, 153 S. W. 1058. See *Thiele v. Citizens R. Co.*, 140 Mo. 319, 41 S. W. 800; *Noble v. Kansas City*, 95 Mo. App. 167, 68 S. W. 969; *Powers v. Pennsylvania Mut. L. Ins. Co.*, 91 Mo. App. 55; *Bragg v. Moberly*, 17 Mo. App. 221. N. Y.—*McCarthy v. Christopher & Tenth St. R. Co.*, 10 Daly 540; *Wehrkamp v. Willet*, 1 Daly 4; *Hansen v. Vogelsang*, 139 App. Div. 759, 124 N. Y. Supp. 437; *Zettel v. Taylor*, 129 App. Div. 642, 114 N. Y. Supp. 467; *Bennett v. Riley*, 82 App. Div. 639, 81 N. Y. Supp. 882; *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842; *Ross v. Wood*, 8 Hun 185, *affirmed* in 70 N. Y. S. Ohio.—*Stites v. McKibben's Admr.*, 2 Ohio St. 588. Pa.—*Struthers v. Wagner*, 6 Phila. 262. Wis.—*Birdsall v. Fraenzel*, 154 Wis. 48, 142 N. W. 274; *Schlag v. Chicago,*

M. & St. P. R. Co., 152 Wis. 165, 139 N. W. 756. Eng.—*Magnay v. Knight*, *Drinkw.* 13, 1 M. & G. 944, 39 E. C. L. 1111, 4 Jur. 1088, 133 Eng. Reprint 615; *Fabrilus v. Cock*, 3 Burr. 1771, 97 Eng. Reprint 1090; *Coddington v. Webb*, 2 Vern. 240, 23 Eng. Reprint 755; *Proctor v. Simmons*, 9 Moore J. B. 581, 17 E. C. L. 560. Can.—*Chadd v. Meagher*, 24 U. C. C. P. 54; *Seely v. Purdy*, 3 Nova Scotia 414; *Talbot v. McDougall*, 3 U. C. Q. B. (O. S.) 644.

[a] Where the trial judge believes that some of the witnesses have committed perjury, and that the false testimony in all probability lessened the chances of recovery by the defeated party, and likewise misled him, it is not only his right, but his duty, to grant a new trial. *Schlag v. Chicago, M. & St. P. Ry. Co.*, 152 Wis. 165, 139 N. W. 756.

[b] False Testimony.—Where, at the trial, an issue is raised by false testimony (whether wilfully or mistakenly), and the opposite party is taken by surprise thereby, and has no opportunity to move for delay because of his necessary absence from court without fault on his part, a new trial will be granted when it appears that the verdict was influenced by such false testimony. *Ricker v. Horn*, 74 Me. 289.

72. *Rickroad v. Martin*, 43 Mo. App. 597.

[a] Georgia Statute.—See *Gant v. State*, 115 Ga. 205, 41 S. E. 698; *Brown v. State*, 60 Ga. 210.

73. Ark.—*Bussey v. State*, 69 Ark. 545, 64 S. W. 268. Ind.—*Dennis v. State*, 103 Ind. 142, 2 N. E. 349. Mo.—*State v. Moberly*, 121 Mo. 604, 26 S. W. 364. Tex.—*Mann v. State*, 44 Tex. 642.

Newly Discovered Evidence.—The ground, however, for a new trial in such a case is more properly newly discovered evidence. See *infra*, II, H.

conviction of the perjured witness,⁷⁴ or by his confession,⁷⁵ before a new trial will be ordered.

A new trial will not usually be granted, however, on the mere affidavit of one party contradicting the witnesses on the other side,⁷⁶ or in a case, it is said, where the conviction was procured mainly on the testimony of the applicant for the new trial,⁷⁷ or upon the testimony of those interested in the case.⁷⁸ Moreover, the fact that a witness has been indicted for perjury is no ground for a new trial,⁷⁹ and a new trial ought not to be granted, on the ground of surprise, to enable a party against whom the verdict is rendered to impeach the credit of a witness examined at the trial, on the claim that he swore falsely.⁸⁰

(VII.) **Unexpected Testimony.**—(A.) **PARTY'S OWN WITNESS.**—It was at one time doubted whether a new trial on the ground of surprise would be given, at all, unless in case of trickery or fraud, when a party's own witness had given different testimony from that expected,⁸¹ and, as a general rule, the mere fact that a party is sur-

74. **Ga.**—*Gant v. State*, 115 Ga. 205, 41 S. E. 698. **N. H.**—*Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574. **N. Y.**—*Holtz v. Schmidt*, 12 Jones & S. 327. **N. C.**—*Dyche v. Patton*, 56 N. C. 332. **R. I.**—*Dexter v. Handy*, 13 R. I. 474. **Eng.**—*Benfield v. Petrie*, 3 Dougl. 24, 26 E. C. L. 27, 99 Eng. Reprint 519.

[a] **Common Law Rule.**—If the witnesses on whose testimony the verdict was obtained have since been convicted of perjury in giving their evidence, the courts will grant a new trial. *Tidd's Pr.*, 907; *Benfield v. Petrie*, 3 Dougl. 24, 26 E. C. L. 27, 99 Eng. Reprint 519; *Petrie v. Milles*, 3 Dougl. 27, 26 E. C. L. 29, 99 Eng. Reprint 521; *Wheatly v. Edwards*, Lofft. 87, 98 Eng. Reprint 547.

[b] **Conviction of Perjury Sufficient.** In the case of *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574, a new trial was granted for the reason that one of the witnesses of the party in whose favor the verdict had been rendered had been convicted of perjury in the case. The court said: "We think the conviction of one of the defendant's witnesses, of perjury, in this cause, furnishes a good reason why the verdict should not be permitted to stand." See, however, *Baker v. Wadsworth*, 67 L. J. Q. B. (Eng.) 301, holding that conviction of perjury does not, in itself, warrant a new trial.

75. *Seward v. Cease*, 50 Ill. 228 (false witness making affidavit of his perjury); *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574, witness con-

victed on his own confession. See, however, *Holtz v. Schmidt*, 12 Jones & S. (N. Y.) 327. Compare *O'Hara v. Brooklyn Heights Ry. Co.*, 102 App. Div. 398, 92 N. Y. Supp. 777, 16 N. Y. Ann. Cas. 116, holding that where the affidavit of the perjured witness confessing his guilt is corroborated by other evidence, the proof is sufficient to warrant a new trial.

76. *Feise v. Parkinson*, 4 Taunt. 640, 128 Eng. Reprint 482; *Proctor v. Simmons*, 9 Moore J. B. 581, 17 E. C. L. 560. See *People v. Tallmadge*, 114 Cal. 427, 46 Pac. 282, holding power discretionary in the court.

77. *Horne v. Horne*, 75 N. C. 101.

78. *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574.

79. *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574; *Seeley v. Mayhew*, 4 Bing. 561, 13 E. C. L. 636, 130 Eng. Reprint 885; *Thurtell v. Beaumont*, 1 Bing. 339, 8 E. C. L. 538, 2 L. J. C. P. (O. S.) 4, 130 Eng. Reprint 136; *Benfields v. Petrie*, 3 Dougl. 24, 26 E. C. L. 27, 99 Eng. Reprint 519; *Proctor v. Simmons*, 9 J. B. Moore 581, 17 E. C. L. 560; *Hampshire v. Harris*, 3 Jur. 980.

80. **Mass.**—*Hammond v. Wadhams*, 5 Mass. 353. **Va.**—*Brugh v. Shanks*, 5 Leigh (32 Va.) 598. **W. Va.**—*Henderson v. Hazlett*, 75 W. Va. 255, 83 S. E. 907.

81. *Hewlett v. Cruchley*, 5 Taunt. 277, 1 E. C. L. 149, 128 Eng. Reprint 696. See *Todd v. State*, 25 Ind. 212, 218.

prised by the testimony of one or of all his witnesses is not a ground for new trial.⁸² There are, however, recognized exceptions to this general rule.⁸³ When, for instance, fraud has been practiced, or where witnesses have been tampered with by the other party;⁸⁴ or where a party misled by his witness as to the facts within his knowledge has, thereby, been induced to go to trial without other evidence, and has been surprised by the unexpected testimony given;⁸⁵ or where a material witness whom a party was obliged to call did not testify as expected,⁸⁶ or where it was discovered, after the trial, that a witness who changed his testimony became suddenly insane before the trial,⁸⁷ new trials have been granted.

(B.) ADVERSARY'S WITNESS. — In the absence of any misleading statements as to what the testimony would be, surprise as a ground for a new trial cannot usually be predicated upon the testimony of an adverse party or any of his witnesses.⁸⁸ Likewise, a party cannot claim

82. Ark.—*Merrick v. Britton*, 26 Ark. 496. Del.—*Green v. Wilmington Trust Co.*, 4 Boyce 232, 87 Atl. 885. Ind.—*Pittsburgh, C. & St. L. R. Co. v. Sponier*, 85 Ind. 165; *Guard v. Risk*, 11 Ind. 156; *Ruger v. Bungan*, 10 Ind. 451; *Graeter v. Fowler*, 7 Blackf. 554. Mo.—*Shotwell v. McElhinney*, 101 Mo. 677, 14 S. W. 754; *O'Conner v. Duff*, 30 Mo. 595. N. Y.—*Cunningham v. Mutual Reserve Life Ins. Co.*, 125 App. Div. 688, 109 N. Y. Supp. 1070; *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 312, 20 N. Y. Supp. 715, affirmed, 142 N. Y. 634, 37 N. E. 566. Tex.—*Mayfield v. State*, 44 Tex. 59; *Leslie v. State* (Tex. Crim.), 49 S. W. 73; *Webb v. State*, 9 Tex. App. 490.

[a] Where a party called a witness of the adverse party, thereby making such witness his own, his surprise at his testimony was held not ground for a new trial. *Higden v. Higden*, 2 A. K. Marsh. (Ky.) 42.

83. See *Todd v. State*, 25 Ind. 212; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524.

84. *Peterson v. Barry*, 4 Bin. (Pa.) 481.

85. Cal.—*In re Cartery's Estate*, 56 Cal. 470. Ga.—*Wilson v. Brandon*, 8 Ga. 136. Ind.—*Bissot v. State*, 53 Ind. 408. Ia.—*State v. Viers*, 82 Iowa 397, 48 N. W. 732. P. R.—*Fajardo v. Tio*, 17 Porto Rico 321. Tex.—*Delmas v. Margo*, 25 Tex. 1, 70 Am. Dec. 516.

[a] Misled by Witness. — "What difference is there in principle, whether the party has lost a verdict by a mistake of his witness in a material matter, or by being misled by his wit-

ness as to the facts within his knowledge, and thereby induced to go to trial in the absence of other witnesses by whom the facts could have been established? In the one case, the witness knows the facts and fails to testify to them, and in the other he induces the party to rely on his knowledge of them, and then fails him on the trial. The effect upon the interests of the party is the same." *Todd v. State*, 25 Ind. 212, 221.

[b] Must Affect Result.—Although the defeated party was misled by what the witness said he would testify to, yet if the unexpected evidence as given by such witness had the same legal effect as the anticipated testimony, no new trial is justified. *Wolf v. Brass*, 72 Tex. 133, 12 S. W. 159.

[c] Mistake of Counsel.—The fact that counsel misunderstood what the witness said he would testify to, where the witness practiced no deception, is not ground for a new trial. *Fears v. Albea*, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

86. *Guard v. Risk*, 11 Ind. 156, witness to a deed.

87. *Helwig v. Second Ave. R. Co.*, 9 Misc. 61, 29 N. Y. Supp. 9, 59 N. Y. St. 540.

88. Cal.—*Moore v. Los Angeles Infirmary*, 49 Cal. 669; *Taylor v. California Stage Co.*, 6 Cal. 228. Haw.—*Harh Hak Sae v. Pak Sung Kwon*, 18 Hawaii 577. Ill.—*Blair v. Blair*, 125 Ill. App. 341. Ind.—*Working v. Garn*, 148 Ind. 546, 47 N. E. 951; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483; *Helm v. First Nat. Bank*, 91 Ind. 44;

surprise because the adverse party failed to produce a certain witness,⁸⁹ or to make use of any other expected evidence.⁹⁰ Where, however, a party has been misled by the other side so that he has excusably failed to prepare counter evidence, he may justifiably plead surprise at the presentation of the unanticipated evidence.⁹¹

(VIII.) Evidence. — (A.) IN GENERAL. — Although, as a general rule, a new trial will not be granted on the ground that the defeated party was surprised at the evidence,⁹² yet, a party, without fault on his

Humphreys v. State, 75 Ind. 469; *Cox v. Hutchings*, 21 Ind. 219. **Kan.**—*Taylor v. Thomas & Co.*, 17 Kan. 598. **Ky.**—*Mulloy v. Louisville*, 161 Ky. 596, 171 S. W. 190; *Soper v. Crutcher*, 29 Ky. L. Rep. 1080, 96 S. W. 907. **Minn.**—*Strand v. Great Northern R. Co.*, 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; *Hull v. Minneapolis St. Ry. Co.*, 64 Minn. 402, 67 N. W. 218. **Neb.**—*Hinckley v. Jewett*, 86 Neb. 464, 125 N. W. 1086. **Mo.**—*Shotwell v. McElhinney*, 101 Mo. 677, 14 S. W. 754; *Savoni v. Brashear*, 46 Mo. 345; *Pace v. American Cent. Ins. Co.*, 173 Mo. App. 485, 158 S. W. 892; *Harrison v. White*, 56 Mo. App. 175. **N. Y.**—*Sproul v. Resolute Fire Ins. Co.*, 1 Lans. 71; *Pospisil v. Kane*, 73 App. Div. 457, 77 N. Y. Supp. 307; *Schwartz v. Copeland*, 136 N. Y. Supp. 41. **Ohio.**—*Heisel v. Heisel*, 8 Ohio Dec. 653. **Wash.**—*Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832. **W. Va.**—*Henderson v. Hazlett*, 75 W. Va. 255, 83 S. E. 907. **Wis.**—*Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121; *Delaney v. Brunette*, 62 Wis. 615, 23 N. W. 22. **Wyo.**—*Demple v. Carroll*, 21 Wyo. 447, 133 Pac. 137, 135 Pac. 117. **Eng.**—*Bell v. Thompson*, 2 Chit. 194, 18 E. C. L. 586; *Magnay v. Knight*, 1 Drink. 20.

[a] **Testimony Not Anticipated.** That the opposite side produces evidence not anticipated is no such surprise as is contemplated by the statute. *Working v. Garn*, 148 Ind. 546, 47 N. E. 951.

[b] **New Issue Introduced.**—Where, however, on rebuttal, testimony is introduced which brings an entirely new issue into the case which the opposite side, under the circumstances, was not prepared to meet, such testimony being an important factor in the result, a new trial must be ordered. *Rafferty v. Public Service Ry. Co.*, 78 N. J. L. 203, 73 Atl. 41.

[c] If a party has been taken by surprise by evidence introduced, and

shows upon the motion for a new trial that he was not negligent in being so taken by surprise, and, likewise, shows prima facie ability to meet and refute the evidence which so took him by surprise, a new trial should be awarded—the evidence in question being vital to the issues. *Mitchell v. Nelson*, 142 Ill. App. 534.

89. Ky.—*Gentry's Admr. v. McKehen*, 5 Dana 34. **Mo.**—*Patrick v. Boonville Gas-Light Co.*, 17 Mo. App. 462. **Vt.**—*Shepherd v. Hayes*, 16 Vt. 486.

[a] **Party Expecting To Be Called by Adversary.**—It is no ground for a new trial that complainant did not take the stand as a witness because he thought his opponent would introduce him. *Clardy v. Wilson*, 27 Tex. Civ. App. 49, 64 S. W. 489.

90. Seybold v. Morgan, 43 Ill. App. 39 (failure to introduce a letter in evidence); *Briggs v. Gleason*, 27 Vt. 114, failure to make use of a deposition.

91. Cal.—*Coghill v. Marks*, 29 Cal. 673. **Ky.**—*Citizens' Fire Ins. Co. v. Wright*, 158 Ky. 290, 164 S. W. 952; *McFarland's Admr. v. Clark*, 9 Dana 134. See, however, *Lorts & Frey P. Mill Co. v. Weil*, 113 S. W. 474. **Miss.**—*Arthur v. Mitchell*, 10 Smed. & M. 326. **P. R.**—*Rivero v. Hernandez*, 17 Porto Rico 868. **Vt.**—*Webster v. Smith*, 72 Vt. 12, 47 Atl. 101. **Wis.**—*Schlag v. Chicago, M. & St. P. Ry. Co.*, 152 Wis. 165, 139 N. W. 756. **Can.**—*McIlroy v. Hall*, 25 U. C. Q. B. 303.

[a] **Misled by Assurances.**—Where a party tells his adversary that certain matters in issue by the pleadings will not be controverted, the former has a right to rely upon such assurance, and if, contrary to such understanding, testimony is prejudicially introduced, a new trial may be properly awarded. *Haynes v. State*, 45 Ind. 424.

92. Ill.—*Rockford, R. I. & St. L. R.*

part, may be met with such surprise in the evidence presented that he is wholly unprepared to counteract it, and may, therefore, after an adverse verdict, be entitled to a new trial.⁹³ The fact that the evidence produced was not anticipated does not, however, constitute surprise,⁹⁴ or because the complaining party thought the evidence inadmissible.⁹⁵ Moreover, the fact that the evidence of his adversary outweighs or preponderates against his own, is not the kind of surprise that justifies a new trial.⁹⁶ Where, however, evidence not relevant,⁹⁷ or evidence of which through no neglect of a complaining party he had no notice or knowledge,⁹⁸ is presented and admitted, one may

Co. v. Rose, 72 Ill. 183. **Ind.**—Helm v. First Nat. Bank, 91 Ind. 44; Travis v. Barkhurst, 4 Ind. 171. **La.**—Donnell v. Parrott, 12 La. Ann. 690. **Me.** Blake v. Madigan, 65 Me. 522. **Mo.** Savoni v. Brashear, 46 Mo. 345. **N. Y.** Sproul v. Resolute Fire Ins. Co., 1 Lans. 71; Smith v. Rentz, 73 Hun 195, 25 N. Y. Supp. 914, 56 N. Y. St. 128; Seaman v. Koehler, 46 Hun 681, 12 N. Y. St. 582.

See preceding section.

93. **Cal.**—Delmas v. Martin, 39 Cal. 555; Smith v. Richmond, 15 Cal. 501. **Colo.**—Colorado M. Ry. Co. v. Bowles, 14 Colo. 85, 23 Pac. 467. *Compare* Denver Consol. Electric Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566. **Ill.**—Goldstein v. Lowther, 81 Ill. 399 (verbal contract substituted for a written, without notice in the pleadings); Holbrook v. Nichol, 36 Ill. 161. **N. H.**—Sanford Mfg. Co. v. Wiggin, 14 N. H. 441, 40 Am. Dec. 198. **Eng.**—Edie v. East India Co., 1 W. Black. 295, 298, 2 Burr. 1216, 96 Eng. Reprint 166.

See preceding section.

[a] **Wholly Surprised.**—A party must be wholly surprised by the evidence to be entitled to a new trial on this ground; it is not enough that the fact which caused the surprise was not attempted to be elicited on cross-examination of his witness, but came upon him by way of defense. Roberts v. Holmes, 2 C. L. Rep. (Eng.) 726.

94. Working v. Garn, 148 Ind. 546, 47 N. E. 951.

95. Curry v. Kurtz, 33 Miss. 24.

[a] **Previously Held Inadmissible.** Surprise may arise, however, when evidence at a previous trial of the same case was held inadmissible, but on the trial in question was held admissible. The Steamboat Violet, 23 Ark. 543;

Morrow v. Hatfield, 6 Humph. (Tenn.) 108.

96. Henderson v. Hazlett, 75 W. Va. 255, 83 S. E. 907.

97. **Cal.**—Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225; Eagan v. Delaney, 16 Cal. 85. **Ia.**—German v. Maquoketa Sav. Bank, 38 Iowa 368. **Kan.** Barrackman v. Girard, 26 Kan. 284. **N. Y.**—Oats v. New York Dock Co., 99 App. Div. 487, 90 N. Y. Supp. 878; Merritt v. Mayfield, 89 App. Div. 470, 85 N. Y. Supp. 801. **Wash.**—Holt Mfg. Co. v. Odenrider, 61 Wash. 555, 112 Pac. 670. **Can.**—Ferguson v. Veitch, 45 U. C. Q. B. 160.

98. **Cal.**—Delmas v. Martin, 39 Cal. 555. **Colo.**—Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698. **Ill.** Goldstein v. Lowther, 81 Ill. 399; Holbrook v. Nichol, 36 Ill. 161. **Minn.** Miller v. Layne, 84 Minn. 221, 87 N. W. 605; Farnham v. Jones, 32 Minn. 7, 19 N. W. 83; Russell v. Reed, 32 Minn. 45, 19 N. W. 86. **N. Y.**—Croner v. Farmers' Fire Ins. Co., 18 App. Div. 263, 46 N. Y. Supp. 108.

[a] **Misled by Court.**—When a party in the midst of a trial, is taken un-awares, and without fault of his own, is placed in a situation greatly injurious to his interests, as by the unexpected admission of evidence upon an issue which, by reason of an order of the court made before the trial, he was not prepared to meet, a case of surprise is presented which may be made the ground for a new trial. Colorado M. Ry. Co. v. Bowles, 14 Colo. 85, 23 Pac. 467.

[b] **Where in an action on a note judgment was taken by default, but the note filed with the judgment differed materially from the one sued upon, a new trial should be granted.** Nolen v. McCue, 92 Kan. 870, 142 Pac. 958, 93 Kan. 306, 144 Pac. 255.

aver surprise, since if an unfair trial is caused thereby the verdict should be set aside.

(B.) **WITHIN THE ISSUES.**—A party generally has no right to claim surprise at evidence clearly within the issues,⁹⁹ even though such testimony be false.¹ Litigants are presumed to know what evidence may be given under the issues, and should be prepared to meet it,² and where the pleading discloses the facts which the evidence tends to prove, one cannot claim surprise at evidence within such lines.³ In a criminal case, defendant cannot be said to be surprised at any proper evidence introduced by the state in support of the specific charge against him.⁴

(C.) **EXCLUSION OF EVIDENCE.**—When admissible evidence, or evidence which one believed admissible and had a right so to believe, has been unexpectedly denied admission, a new trial may be granted.⁵ One cannot justify surprise, however, upon the rejection⁶ of incom-

[c] **Deposition on File.**—A party cannot claim to be surprised by evidence where the evidence complained of was in the form of a deposition, and already on file in the court, in connection with the papers in the case. *Gentry's Admr. v. McKehen*, 5 Dana (Ky.) 34.

[d] **If the evidence was introduced at a former trial**, a party cannot claim that he was taken by surprise when the same evidence is presented at a subsequent trial. *Rabun v. Cage*, 23 La. Ann. 675.

99. **Ark.**—*Arkansas Cent. R. Co. v. Fain*, 85 Ark. 532, 109 S. W. 514. **Ind.**—*Sullivan v. O'Conner*, 77 Ind. 149. **Mont.**—*Orton v. Bender*, 43 Mont. 263, 115 Pac. 406; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637. **S. D.**—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524. **Tex.**—*Bond v. International & G. N. R. Co.*, 55 Tex. Civ. App. 119, 118 S. W. 867; *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133. **Wash.**—*Hardman's Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059; *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740.

[a] **The reading of a letter of a party**, if relevant to the suit, is not a ground of surprise. *Henckley v. Hendrickson*, 5 McLean 170, 11 Fed. Cas. No. 6,348; *Donnell v. Parrott*, 12 La. Ann. 690.

1. *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60; *Thiele v. Citizens' Ry. Co.*, 140 Mo. 319, 41 S. W. 800.

2. **Cal.**—*Armstrong v. Davis*, 41 Cal. 494, 499. **Ind.**—*Gardner v. State*, 94

Ind. 489; *Chamberlain v. Reid*, 49 Ind. 332. **Mo.**—*Bragg v. Moberly*, 17 Mo. App. 221. **N. Y.**—*Foster v. Easton*, 50 Hun 603, 2 N. Y. Supp. 772, 19 N. Y. St. 447.

3. *Tiger Drill Mfg. Co. v. Rice*, 95 Kan. 816, 149 Pac. 742.

[a] **Where defendant's answer or plea clearly indicates his defense**, and the testimony is clearly within the issues so tendered, plaintiff cannot rely on surprise at the evidence, as a ground for a new trial. *Tripp Bros. v. McCormack* (Tex. Civ. App.), 157 S. W. 443; *Henderson v. Hazlett*, 75 W. Va. 255, 83 S. E. 907.

4. **Cal.**—*People v. Jocelyn*, 29 Cal. 562. **Ind.**—*Morel v. State*, 89 Ind. 275. **Wash.**—*State v. Hunter*, 18 Wash. 670, 52 Pac. 247.

5. **Ill.**—*Sanders v. Hutchinson*, 26 Ill. App. 633. **Ky.**—*Helm's Exrs. v. Jones' Admx.*, 9 Dana 26; *Boyce v. Yoder*, 2 J. J. Marsh. 515. **Neb.**—*Tomer v. Densmore*, 8 Neb. 384, 1 N. W. 315. **Vt.**—*Starkweather v. Loomis*, 2 Vt. 573.

6. **U. S.**—*United States v. Humason*, 8 Fed. 71. **Ark.**—*Dunnahoe v. Williams*, 24 Ark. 264. **Cal.**—*Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137; *Lawrence v. Fulton*, 19 Cal. 683. **Ga.**—*Sheftall v. Clay*, R. M. Charl. 7. **Ky.**—*Morgan's Heirs v. Marshall*, 7 J. J. Marsh. 316; *Lee v. Banks*, 4 Litt. 11. **Miss.**—*Curry v. Kurtz*, 33 Miss. 24. **Mo.**—*Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; *Morrison v. Murphy*, 36 Mo. App. 36. **N. C.**—*Thompson v. Thompson*, 3 N. C.

petent or irrelevant evidence, but surprise may result when testimony admitted in a former trial, is rejected.⁷

(D.) EVIDENCE NOT INTRODUCED.—Where a party, or his counsel, refrains from introducing evidence, he is not usually entitled to a new trial for the purpose of presenting it.⁸ Thus where evidence was not introduced because the complainant relied upon another theory of the case,⁹ or because counsel thought it unnecessary,¹⁰ is no excuse.

Moreover, failure to cross-examine a witness when there was opportunity to do so, is not ground for a new trial.¹¹ Where, however, material evidence was not introduced because the party was misled by the stipulations or agreements,¹² or conduct¹³ of the adverse party, or where by mistake, or error, of the court it was ruled unnecessary,¹⁴ a new trial should be granted.

405; *Arrington's Admr. v. Coleman*, 3 N. C. 300. **Tenn.**—*Turnley v. Evans*, 3 Humph. 222. **Tex.**—*Beauchamp v. International & G. N. Ry. Co.*, 56 Tex. 239. **Vt.**—*Haskins v. Smith*, 17 Vt. 263.

7. *Helm's Exrs. v. Jones' Admx.*, 9 Dana (Ky.) 26; *Balcorn v. Woodruff*, 7 Barb. (N. Y.) 13.

8. **U. S.**—*Dickson v. Mathers*, Hempst. 65, 7 Fed. Cas. No. 3,898a. **Ala.**—*Allington v. Tucker*, 38 Ala. 655. **Cal.**—*Berry v. Metzler*, 7 Cal. 418. **Ga.**—*Jinks v. Lewis*, 89 Ga. 787, 15 S. E. 685. See, however, *Rolfe v. Rolfe*, 10 Ga. 143, where important evidence was overlooked through honest mistake, and new trial granted. **Neb.** *Crowell v. Harvey*, 30 Neb. 570, 46 N. W. 709. **N. Y.**—*Roediger v. Kraft*, 152 N. Y. Supp. 327. **N. C.**—*Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122; *Reed v. Moore*, 25 N. C. 310.

9. *Roediger v. Kraft*, 152 N. Y. Supp. 327.

10. **Cal.**—*Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746. **N. H.** *Sanford Mfg. Co. v. Wiggins*, 14 N. H. 441, 40 Am. Dec. 198. **N. Y.**—*Roediger v. Kraft*, 152 N. Y. Supp. 327. **N. C.** *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122. **Va.**—*Pleasants v. Clements*, 2 Leigh (29 Va.) 474. **W. Va.**—*Henderson v. Hazlett*, 75 W. Va. 255, 83 S. E. 907; *Ruffner v. Love*, 24 W. Va. 181, 185; *Shrewsbury v. Miller*, 10 W. Va. 115, 125. **Can.**—*Young v. Moodie*, 6 U. C. C. P. 244. See *Corby v. Grand Trunk R. Co.*, 6 Ont. W. R. 492.

[a] **Mistake.**—New trials are not grantable for the reason that a party failed to give other evidence through his own or counsel's mistake. *Gorgerat v. McCarty*, 1 Yeates (Pa.) 253.

[b] **No New Trial for Misjudgment.** *Price v. Price*, 33 Hun (N. Y.) 432, 1 How. Pr. (N. S.) 142.

11. *Hapgoods v. Lusch*, 123 App. Div. 27, 167 N. Y. Supp. 334.

12. **Ind.**—*Haynes v. State*, 45 Ind. 424. **Mo.**—*Smith, etc. Implement Co. v. Wheeler*, 27 Mo. App. 16. **N. Y.** *Taylor v. Harlow*, 11 How. Pr. 285; *Merritt v. Mayfield*, 89 App. Div. 470, 85 N. Y. Supp. 801. **Wis.**—*Bradley v. Dells Lumber Co.*, 105 Wis. 245, 81 N. W. 394.

13. See *infra*, this note.

[a] **Failure To Produce Evidence Upon Subpoena Duces Tecum.**—A new trial will be granted on the ground of surprise, where the attorney of one of the parties had in his possession a deed important to the rights of the other party and, before the trial, delivered it to a third person, without apprising his adversary, who subpoenaed the attorney and also gave notice to him to produce the deed, and on the trial first learned that it was not in his possession. *Jackson ex dem. Constantine v. Warford*, 7 Wend. (N. Y.) 62.

14. **Mont.**—*Porter v. Industrial Printing Co.*, 26 Mont. 170, 66 Pac. 839, 67 Pac. 67. **N. Y.**—*Simpson v. Hefter*, 43 Misc. 608, 88 N. Y. Supp. 282. **Wis.**—*McLennan v. Prentice*, 79 Wis. 488, 48 N. W. 487; *Helms v. Chadbourne*, 48 Wis. 690, 4 N. W. 1065.

[a] **Reliance Upon Supreme Court Ruling.**—(1) A party who submits his case without introducing certain evidence, relying upon a decision of the supreme court that the evidence was unnecessary, and where, after submission, the supreme court changes its de-

A mere expression of opinion on the part of the judge that evidence is not necessary, is not, however, sufficient ground.¹⁵ Surprise, as a ground for a new trial, cannot be predicated upon the failure of the opposite party to offer certain evidence,¹⁶ and it is not legal surprise that on a second trial evidence was introduced that was not presented on a former trial, especially where such evidence was merely corroborative.¹⁷

(E.) INSUFFICIENT EVIDENCE. — That the evidence presented was held insufficient does not warrant a new trial on the ground of surprise.¹⁸ Where, however, through accident or misfortune, a party having a meritorious cause of action or defense has failed in his proof, a new trial may be granted.¹⁹

1. *Rulings.* — It is the general rule that a party cannot plead surprise upon a correct ruling on a matter of law,²⁰ including instructions,²¹ because, as previously stated, surprise cannot, as a rule, be

cision which vitally affects the case and requires the evidence previously held unnecessary, which evidence the complaining party possessed, a new trial will be granted. *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478. (2) Reliance of counsel upon a dictum of the supreme court of the United States, whereby counsel did not submit certain evidence because therein said to be unnecessary, is, likewise, held sufficient cause for a new trial. *Bowden v. Morris*, 1 Hughes 378, 3 Fed. Cas. No. 1,715.

15. Cal.—*Hageman v. O'Brien*, 24 Cal. App. 270, 141 Pac. 33. N. Y. *Feiber v. Manhattan Dist. Tel. Co.*, 3 N. Y. Supp. 116, 4 N. Y. Supp. 555, 22 Abb. N. C. 121, 15 Daly 62. *Contra*, *Merritt v. Mayfield*, 89 App. Div. 470, 85 N. Y. Supp. 801. N. C.—*Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122.

[a] *Mere Suggestions of the Court.* The fact that a judge presiding at a trial gives out some expression of opinion for the guidance of counsel during the progress of the case, and suggests the shortening or condensing of the testimony to be given does not constitute a denial of any right to offer evidence, and is not error. *Hageman v. O'Brien*, 24 Cal. App. 270, 141 Pac. 33.

16. Ill.—*Seybold v. Morgan*, 43 Ill. App. 39. Ky.—*Gentry's Admr. v. McKehen*, 5 Dana 34; *Chiles v. Dedman*, 3 A. K. Marsh. 463. Mo.—*Patrick v. Boonville Gas-Light Co.*, 17 Mo. App. 462. Vt.—*Briggs v. Gleason*, 27 Vt. 114; *Shepherd v. Hayes*, 16 Vt. 486.

Failure To Call Certain Witnesses. See *supra*, II, E, 2, k, (VII), (B).

17. Ill.—*Rockford, R. I. & St. L. R. Co. v. Rose*, 72 Ill. 183. Kan.—*Taylor v. Thomas & Co.*, 17 Kan. 598. Mo. *National Stamping & E. Works v. Wicks*, 144 Mo. App. 249, 128 S. W. 775. N. Y.—*Pospisil v. Kane*, 73 App. Div. 457, 77 N. Y. Supp. 307.

18. *Murray v. Marsh*, 17 Fed. Cas. No. 9,965; *Smith v. Rentz*, 73 Hun 195, 25 N. Y. Supp. 914, 56 N. Y. St. 128. *Compare Rowan v. Sussdorff*, 147 App. Div. 457, 77 N. Y. Supp. 307.

19. Mo. Rev. Sts., 1909, §2021.

20. Cal.—*Klockenbaum v. Pierson*, 22 Cal. 160; *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746. Ind.—*Beals v. Beals*, 27 Ind. 77. Mo.—*Hilliker v. Francisco*, 65 Mo. 598. N. Y.—*Waite v. New York Cent., etc. R. Co.*, 110 N. Y. 635, 17 N. E. 730; *Hapgoods v. Lusch*, 123 App. Div. 27, 107 N. Y. Supp. 334; *Perkins v. Brainard Quarry Co.*, 11 Misc. 328, 32 N. Y. Supp. 230, 65 N. Y. St. 410. Pa.—*Johnson v. Watson*, 157 Pa. 454, 27 Atl. 772. Vt.—*Morgan v. Houston*, 25 Vt. 570.

Rulings as to witnesses and evidence, see *supra*, II, E, 2, k, (III); II, E, 2, k, (VIII), (A) and (C).

21. *Hilliker v. Francisco*, 65 Mo. 598; *State to use of Lechter v. Schar*, 50 Mo. 393.

[a] *Misled by Court.*—Where, before argument, counsel for plaintiff was told by the court that the instructions upon the measure of damages would be to a certain effect, and counsel, relying thereon, argued his case upon the assumption that the instructions

predicated upon matters of law.²² Circumstances may, however, be such that the surprise occasioned by the court's ruling will justify granting a new trial.²³

m. *Verdict*.—It is seldom that surprise at the verdict can be considered as a cause for a new trial,²⁴ although it has been said that if, through misapprehension, a verdict be found either against the law of the case or the weight of testimony, the injury can be remedied by a new trial.²⁵

n. *Matters Occurring After Trial*.—(I.) *Generally*.—It has been said that surprise arising after the verdict is not ground for a new trial.²⁶ However, it is recognized, in some cases, that there may be accidents or misfortunes in connection with the preparation of a case for review that may justify a new trial.²⁷ New trials have been

would be given as indicated, but the court failed so to charge, but charged differently, and correctly, yet by reason of the circumstances the plaintiff by the surprise was prevented from having a fair trial, a new trial was granted. *Nelson v. Gjestrum*, 118 Minn. 284, 136 N. W. 858.

22. See *supra*, II, E, 1, d.

[a] *Surprise that follows a ruling on a motion for a nonsuit* is not legal "surprise" that warrants a new trial, or even a continuance. *Vulcan Iron Works v. Burrell Const. Co.*, 39 Wash. 319, 81 Pac. 836. Compare *Pope v. Mooney*, 40 Mo. App. 104; *People v. Barnes*, 12 Wend. (N. Y.) 492.

23. See *supra*, II, E, 2, k, (VIII), (A) and (C).

[a] *Mistaken Construction of Statute and Decisions*.—Though plaintiff was properly nonsuited, yet the court may grant a new trial where it appears that counsel had excusably given a mistaken construction to a statute governing the case and the decisions of the court thereupon. See *Pope v. Mooney*, 40 Mo. 104; *People v. Barnes*, 12 Wend. (N. Y.) 492.

[b] *Where counsel mistook the effect of a ruling*, understanding that it disposed of his case and said so, and the complaint was in consequence dismissed, a new trial was granted upon the ground of surprise. *Breakstone v. Buffalo Foundry & Mach. Co.*, 79 Misc. 496, 141 N. Y. Supp. 159.

24. *Dewey v. Frank Bros. & Co.*, 62 Cal. 343.

[a] *Surprise at Result*.—Mere surprise at the result of a trial cannot entitle the party so surprised to a new trial. *Lane v. Brown*, 22 Ind. 239.

[b] *Agreed Verdict Not Expressing Real Agreement*.—Where the parties agreed to a verdict but the legal effect of the verdict as taken failed, by mistake, to carry out their intention, the verdict will be set aside. Moreover, a motion to set aside a verdict and reinstate the case, is equivalent to a motion for a new trial, and is a proper remedy for a mistake in the verdict. *Lucas v. Lucas*, 30 Ga. 191, 76 Am. Dec. 642.

25. *Roller v. Bachman*, 5 Lea (Tenn.) 153. See *Searles v. Elizabeth, P. & C. J. R. Co.*, 70 N. J. L. 388, 57 Atl. 134, excessive verdict through misapprehension of permanency of injuries, trial having taken place before results of surgical operation could be definitely determined. See also in general, *infra*, II, F and G.

[a] *A verdict will not be set aside on account of an after-thought of the jurors*, for that would be a most dangerous precedent. *R. v. Simons, Sayer* 34, 96 Eng. Reprint 794.

26. See *People v. Mack*, 2 Park. Crim. (N. Y.) 673.

27. *Choate v. Alabama G. S. R. Co.*, 170 Ala. 590, 595, 54 So. 507. *Ia.*—*Dumbarton Realty Co. v. Erickson*, 143 Iowa 677, 120 N. W. 1025, 136 Am. St. Rep. 778. *Neb.*—*Ritchey v. Seeley*, 73 Neb. 164, 102 N. W. 256. *N. H.*—*Bates St. Shirt Co. v. Place*, 76 N. H. 569, 78 Atl. 928. *Okla.*—*Tegler v. State*, 3 Okla. Crim. 595, 107 Pac. 949. *R. I.*—*Pezzucco v. Gautieri*, 74 Atl. 626; *McCotter v. New Shoreham*, 21 R. I. 425, 44 Atl. 473, 23 R. I. 100, 49 Atl. 695. *Vt.*—*Hotel Vermont Co. v. Cosgriff*, 94 Atl. 496 (failure of clerk of court to give seasonable no-

granted where the expiration of the term of office,²⁸ or the death,²⁹ of the trial judge, or the court stenographer's failure to prepare a transcript of the proceedings,³⁰ has prevented the preparation of a bill of exceptions, or of a statement of the case, for review.

(II.) **Loss of Records, Files, or Stenographer's Notes.**—The mere loss of a material part of the records or files in the case, or the court stenographer's notes of the evidence and proceedings, does not require a new trial, at least where no effort has been made to make a substitution or otherwise supply the deficiency in the manner provided by law.³¹ Where, however, without fault of the moving party, such files, records, or notes have been lost, to prevent injustice resulting from inability to prepare and present the case for review, a new trial may be granted.³²

tice of entry of judgment in vacation); *Nelson v. Marshall*, 77 Vt. 44, 58 Atl. 793.

28. *Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. ed. 163; *Borrowscale v. Bosworth*, 98 Mass. 34.

29. **U. S.**—*Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. ed. 438. **Mich.**—*People v. Judge of Superior Court*, 41 Mich. 726, 49 N. W. 925. **N. C.**—*Parker v. Coggins*, 116 N. C. 71, 20 S. E. 962; *Shelton v. Shelton*, 89 N. C. 185, 91 N. C. 329; *Isler v. Had-dock*, 72 N. C. 119. **Okla.**—*Ripey & Son v. Art Wall Paper Mill*, 27 Okla. 600, 112 Pac. 1119.

[a] **Party Must Have Exercised Diligence.**—The mere fact of the death of the judge is not, in itself, sufficient to warrant a new trial on the assumption that the applicant was prevented thereby from obtaining a bill of exceptions. Due diligence must be shown to the effect that effort was made to present the bill to the judge before his death. *Alley v. McCabe*, 147 Ill. 410, 35 N. E. 615.

30. *Ferber v. Leise*, 97 Neb. 795, 151 N. W. 307; *Zweibel v. Caldwell*, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84; *Mathews v. Mulford*, 53 Neb. 252, 73 N. W. 661; *Curran v. Wilcox*, 10 Neb. 449, 6 N. W. 762; *Owens v. Paxton*, 106 N. C. 480, 11 S. E. 375.

[a] **Contra.**—The failure or inability (1) of a court reporter to furnish the defeated party with a transcript of the evidence is no ground for a new trial. *Peterson v. Lundquist*, 106 Minn. 339, 119 N. W. 50. (2) The various errors sought to be presented by such a motion may be reviewed, without such motion, on appeal from

the judgment. *Higgins v. Rued*, 30 N. D. 551, 153 N. W. 389.

[b] **Where Bill Could Have Been Prepared From Memory.**—But where the court extended the time, and counsel with the aid of the court could have prepared the bill sufficiently for the purpose of appeal, but no effort was made to do so, the refusal to grant a new trial is not an abuse of discretion. *Crouch v. O'Banion*, 163 Ky. 581, 174 S. W. 3.

[c] **In Oklahoma** the rule in criminal cases is apparently different from that in civil cases. See *Tegler v. State*, 3 Okla. Crim. 595, 107 Pac. 949; *Butts v. Anderson*, 19 Okla. 367, 91 Pac. 906.

31. **Ala.**—*Choate v. Alabama G. S. R. Co.*, 170 Ala. 590, 54 So. 507, loss of requests for charges to the jury. **Dak.**—*Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98, records and stenographer's notes destroyed by fire, before the decision. **Haw.**—*Territory v. Masagi*, 16 Hawaii 196. **Ill.**—*Ad-dems v. Suver*, 89 Ill. 482, loss of instructions requested. **Neb.**—*Saxton v. Harrington*, 68 Neb. 446, 94 N. W. 605. **N. Y.**—*People v. Strollo*, 191 N. Y. 42, 83 N. E. 573. **S. C.**—See *Mathews v. West*, 2 Nott & McC. 415. **W. Va.**—*Sanders v. Wise*, 74 W. Va. 797, 83 S. E. 77, L. R. A. 1915D, 353.

32. **La.**—*Barton v. Burbank*, 119 La. 224, 43 So. 1014; *Nichols v. Harris*, 32 La. Ann. 646, where stenographer's notes had been stolen. **Miss.**—*Quarles v. Hiern*, 70 Miss. 259, 12 So. 145. **Mo.**—*State v. McCarver*, 113 Mo. 602, 20 S. W. 1058; *State v. Reed*, 67 Mo. 36. **Neb.**—*Zweibel v. Caldwell*, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84. **N. C.**—*State v. Huggins*, 126 N. C. 1055, 35

F. VERDICT OR FINDING CONTRARY TO LAW. — 1. In General. — Both at common law and under the statutes, another of the causes for a new trial is that the verdict is contrary to law,³³ and, it has been held, notwithstanding that the jury may be judges both of the law and of the facts,³⁴ or that there have been successive and concurrent verdicts.³⁵ By the phrase, "contrary to law," it is not meant that a

S. E. 606; *Sanders v. Norris*, 82 N. C. 243, files of the case and notes of the trial lost. **Pa.**—*James v. French*, 5 Pa. Co. Ct. 270, stenographer's notes of the evidence lost. **P. I.**—*Cuyugan v. Aguas*, 19 Phil. Isl. 379, 389; *United States v. Tan-Bauco*, 5 Phil. Isl. 606. **Wyo.**—*Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Am. & Eng. Ann. Cas. 1048.

[a] It is provided by statute in **Alabama** (1) that where a release upon which a defendant relied was lost or mislaid at the trial, and the same could not be proved by secondary evidence, upon judgment against defendant a new trial may be granted within two years after judgment if the release be found within such time. Code of Ala., 1907, §5371. (2) Under this statute, defendant is entitled to a new trial as a matter of right. *Reeves v. Skipper*, 94 Ala. 407, 10 So. 309.

[b] **The California statute** providing (1) for new trial where "bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity" (see *Bassford v. Earl*, 172 Cal. 653, 158 Pac. 124), (2) does not apply to a case where all the papers and records were preserved or where official copies had been made of them by the reporter and were available. *Fisher v. Western Fuse & Explosives Co.*, 12 Cal. App. 299, 107 Pac. 332.

[c] **In Oklahoma** (1) this is a ground for new trial in criminal cases. *Elliott v. State*, 5 Okla. Crim. 63, 113 Pac. 213; *Tegler v. State*, 3 Okla. Crim. 595, 107 Pac. 949; *Bailey v. United States*, 3 Okla. Crim. 175, 104 Pac. 917, 25 L. R. A. (N. S.) 860. (2) But in civil cases a contrary rule prevails. *Farmers' & Merchants' Bank v. Wellborn*, 32 Okla. 1, 121 Pac. 620.

33. **U. S.**—*Walker v. Smith*, 1 Wash. C. C. 202, 29 Fed. Cas. No. 17,087; *United States v. Duval*, 25 Fed. Cas. No. 15,015; *Thomas v. Hatch*, 3 Sumn. 170, 23 Fed. Cas. No. 13,899. **Ala.**

Fleming v. Louisville & N. R. Co., 148 Ala. 527, 41 So. 683. **Cal.**—*Cargnani v. Cargnani*, 16 Cal. App. 96, 116 Pac. 306; *Martin v. Matfield*, 49 Cal. 43; Penal Code, §1181, subd. 6. **Ga.**—*Irwin v. State*, 54 Ga. 39; *Perdue v. Bailey*, 53 Ga. 333; *State v. Sims*, Dudley 213; *Johnson C. S. Bank v. Richardson*, 9 Ga. App. 466, 71 S. E. 757. **Haw.**—*Lewis v. Davis*, 1 Hawaii 248. **Idaho.**—*Say v. Hodgins*, 20 Idaho 64, 116 Pac. 410. **Ind.**—*Daily v. State*, 10 Ind. 536. **Ia.**—*State v. Rice*, 56 Iowa 431, 9 N. W. 343. **Md.**—*Swann v. State*, 64 Md. 423, 1 Atl. 872. **Mass.**—*Cunningham v. Magoun*, 18 Pick. 13; *Parrott v. Thacher*, 9 Pick. 426. **Miss.**—*Garvin v. Lowry*, 7 Smed. & M. 24. **N. Y.**—*Silva v. Low*, 1 Johns. 336; *Edgar v. Brooklyn Heights R. Co.*, 146 App. Div. 541, 131 N. Y. Supp. 286; *Cramer v. Klein*, 127 App. Div. 146, 111 N. Y. Supp. 469. **S. C.**—*Pee Dee Naval Stores Co. v. Hamer*, 92 S. C. 423, 75 S. E. 695. **Tex.**—Code Crim. Proc., 1895, §817, subd. 9. **Can.**—*Kilgour v. London Street R. Co.*, 30 Ont. L. Rep. 603, 5 Ont. W. N. 942; *Canada Landed Credit Co v. Thompson*, 8 Ont. App. 696.

[a] **Judgment Distinguished From Verdict.**—That a judgment is against the law is not ground for a motion for a new trial. The verdict or other decision of fact may be set aside, and a new trial granted, if such verdict or decision of fact be against the law; that is, if an error of law be committed resulting in an erroneous decision of fact. *Martin v. Matfield*, 49 Cal. 42, 44.

34. *Chambers v. Collier*, 4 Ga. 193; *State v. Sims*, 1 Dudley (Ga.) 213, Richmond superior court. See 13 STANDARD PROC. 712, 984.

35. **U. S.**—*Walker v. Smith*, 1 Wash. C. C. 202, 29 Fed. Cas. No. 17,087. **Ga.**—*Chambers v. Collier*, 4 Ga. 193. **S. C.**—*Turnbull v. Rivers*, 3 McCord 131.

But see *infra*, V, as to number of new trials which may be granted; and

verdict is merely defective or insufficient in law, but that it is contrary to the principles of law which should govern the case;³⁶ or, as also said, a verdict, report, or decision is contrary to law when it has been rendered in connection with issues of fact in material disregard of the principles of law applicable to the case.³⁷ Accordingly, where the jury in finding a general verdict clearly disregard,³⁸ or mistake,³⁹ the instructions of the court; or where they take the law into their own hands imagining it to be severe or inequitable;⁴⁰ or where a point of law has been improperly left to the jury;⁴¹ or where the verdict is founded upon an erroneous assumption of the law;⁴² or where the verdict is not supported by any evidence;⁴³ or where the verdict is

compare *Cunningham v. Magoun*, 18 Pick. (Mass.) 13.

36. *Bosseker v. Cramer*, 18 Ind. 44; *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 49, 39 Pac. 718.

37. *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 39 Pac. 718.

[a] Under the California statute, (1) it is held that the specified ground for a new trial that the decision is "against law" refers to a situation furnishing a reason for a re-examination of an issue of fact. *In re Keating's Estate*, 162 Cal. 406, 122 Pac. 1079; *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828. (2) Where all the issues of fact raised by the pleadings, are found upon by the court, and the findings are correct, an erroneous judgment drawn from those facts cannot be corrected by means of a motion for a new trial. *Swift v. Occidental Mining & Petroleum Co.*, 141 Cal. 161, 70 Pac. 470; *Thompson v. Los Angeles*, 125 Cal. 270, 57 Pac. 1015; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Martin v. Matfield*, 49 Cal. 42, 45. (3) "It was held in *Knight v. Roche*, 56 Cal. 17, that, where the court below fails to find upon a material issue raised by the pleadings, that the decision is 'against law,' and may be reviewed upon a motion for a new trial, for the alleged reason that the question raised involves a re-examination of an issue of fact. Whether the reasoning of that case would commend itself to us, were the question an open one, need not now be considered. It is sufficient to say that the question is one of practice, and has been so long followed and acquiesced in that we must regard it as settled. (*Brown v. Burbank*, 59 Cal. 535; *Soto v. Irvine*, 60 Cal. 436; *Cummings v. Conlan*, 66 Cal. 403; *Spotts v. Hanley*, 85 Cal. 155; *Langan*

v. Langan, 89 Cal. 186; *Nuttall v. Lovejoy*, 90 Cal. 163; *Adams v. Helbing*, 107 Cal. 301; *Haight v. Tryon*, 112 Cal. 6.)" The expression used in *Swift v. The Occidental Mining, etc. Co.*, *supra*, to the effect that the failure to find upon an issue made by the pleadings cannot be considered on an appeal from the judgment, was obiter dicta, was inadvertently made, and is not the law. *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828.

[b] Does Not Include Other Distinct Grounds.—"The statute in authorizing a new trial on the ground that the verdict 'is against law,' evidently does not intend to include in that phrase all or any of the other distinct and separate grounds of the motion, which are specified in the Act." *Brumagin v. Bradshaw*, 39 Cal. 24.

38. See *infra*, II, F, 2.

39. *Cunningham v. Magoun*, 18 Pick. (Mass.) 13, *per Shaw*, C. J. See, however, *infra*, II, F, 2.

40. *Cunningham v. Magoun*, 18 Pick. (Mass.) 13.

41. *Foxcroft v. Devonshire*, 2 Burr. 931, 1 Bl. 193, 97 Eng. Reprint 638; *Eddie v. The East-India Co.*, 2 Burr. 1216, 1 Bl. Rep. 285, 97 Eng. Reprint 797; *Bright v. Eynon*, 1 Burr. 390, 97 Eng. Reprint 365.

42. *Rose v. St. Charles*, 49 Mo. 509.

[a] Error of Law in Statement of Jury.—Although the jury is not required to state the principles on which their verdict is founded, yet if with their verdict they return a statement explaining their verdict which statement shows errors of law, the verdict will be set aside for this cause. *State v. Layton*, 3 Har. (Del.) 469.

43. *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309; *The Carpenter's Co. v. Hayward*, 1 Doug. 374, 99 Eng. Re-

based on insufficient evidence to sustain it;⁴⁴ or where the verdict has been reached by improper means,⁴⁵ the verdict is manifestly against the law of the case. Moreover, where a special verdict fails to find facts which ought to have been found,⁴⁶ or where the plaintiff recovers on a different cause of action from that set out in the declaration,⁴⁷ the verdict is contrary to law.

It is also said that a verdict is contrary to law where the verdict is prejudicially affected by an error occurring at the trial,⁴⁸ or where it has been influenced by a misdirection of the court.⁴⁹ The phrase clearly does not include misconduct on the part of the district attorney.⁵⁰

2. Contrary to Instructions.—A verdict contrary to the instructions of the court in a matter of law will be set aside, and a new trial granted.⁵¹ According to numerous authorities "law" as used

print 241. See *infra*, II, G. *Contra*, *Brumagin v. Bradshaw*, 39 Cal. 24, since that is a distinct ground under the statute.

44. *Richardson v. Van Voorhis*, 51 Hun 636, 3 N. Y. Supp. 599, 20 N. Y. St. 667; *Swartout v. Willingham*, 6 Misc. 179, 26 N. Y. Supp. 769, 31 Abb. N. C. 66. See *infra*, II, G.

[a] **Where a Material Fact Not Shown by Evidence.**—*Hodgson v. Richardson*, 1 W. Bl. 463, 96 Eng. Reprint 268.

45. See *Werner v. Edmiston*, 24 Kan. 147. See also *supra*, II, C, 5.

46. *Aydelotte v. Billings*, 8 Cal. App. 673, 97 Pac. 698; *Lafayette v. Allen*, 81 Ind. 166; *Ex parte Walls*, 73 Ind. 95.

47. *Mayor of Montezuma v. Wilson*, 82 Ga. 206, 9 S. E. 17, 14 Am. St. Rep. 150.

48. *Robinson Mach. Works v. Chandler*, 56 Ind. 575.

49. *Detwiler Real Estate & Inv. Co. v. Rausch*, 10 Ohio C. C. (N. S.) 33. Compare 13 STANDARD PROC. 983. *Contra*, *Swartout v. Willingham*, 6 Misc. 179, 26 N. Y. Supp. 769, 31 Abb. N. C. 66.

50. *People v. Amer*, 151 Cal. 303, 90 Pac. 698.

51. Cal.—*Emerson v. Santa Clara*, 40 Cal. 543. Fla.—*Ocala Iron Works v. Crosby*, 61 Fla. 369, 54 So. 815. Ga.—*Jones v. Lynch*, 54 Ga. 271; *Thornton v. Lane*, 11 Ga. 459. Ia.—*Broune v. Hickie*, 68 Iowa 330, 27 N. W. 276; *Graham v. McGeoch*, 61 Iowa 51, 15 N. W. 592. Ky.—*Dunn v. Blue Grass Realty Co.*, 163 Ky. 384, 173 S. W. 1112. Mass.—*Peterson v. Patrick*, 126 Mass. 395. Minn.—*Valerius v. Rich-*

ard, 57 Minn. 443, 59 N. W. 534. Miss.—*New Orleans, J. & G. N. R. Co. v. Enochs*, 42 Miss. 603. Mo.—*Shohoney v. Quincy*, O. & K. C. R. Co., 223 Mo. 649, 122 S. W. 1025. Mont.—*Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552; *Fearon v. Mullins*, 38 Mont. 45, 98 Pac. 650. Neb.—*Aultman v. Reams*, 9 Neb. 487, 4 N. W. 81. Nev.—*Hoffman v. Bosch*, 18 Nev. 360, 4 Pac. 703. N. J.—*Bowlby v. Phillipsburg*, 83 N. J. L. 377, 84 Atl. 1051. N. Y.—*Bigelow v. Garwitz*, 61 Hun 624, 15 N. Y. Supp. 940; *Candee v. Pennsylvania R. Co.*, 84 Misc. 506, 147 N. Y. Supp. 529; *Feldman v. Levy*, 56 Misc. 563, 106 N. Y. Supp. 1092. Okla.—*Myers v. Fear*, 21 Okla. 498, 96 Pac. 642, 129 Am. St. Rep. 795. S. C.—*Webber v. Jonesville*, 94 S. C. 189, 77 S. E. 857; *Massillon Sign, etc. Co. v. Buffalo L. Springs Co.*, 81 S. C. 114, 61 S. E. 1098; *Thompson v. Lee*, 19 S. C. 489. Tex.—*Collins v. Kay*, 69 Tex. 365, 6 S. W. 313. Utah.—*Pulos v. Denver & R. G. R. Co.*, 37 Utah 238, 107 Pac. 241, Ann. Cas. 1912C, 218; *Law v. Smith*, 34 Utah 394, 98 Pac. 300. Wis.—*Charles Baumbach Co. v. Gessler*, 79 Wis. 567, 48 N. W. 802. Eng.—*Rex v. Simons*, Sayer 34, 96 Eng. Reprint 794. Can.—*Green v. World Printing, etc. Co.*, 13 Brit. Col. 467; *Fournier v. Canadian Pac. R. Co.*, 33 New Brunsw. 565.

[a] **Harmless Error.**—Where an instruction is given that the plaintiff cannot recover unless he has proved a certain fact, and a verdict is returned in his favor, he cannot complain of the giving of the instruction, for the result shows that he suffered no

in this connection means the "law" as actually declared or given by the court, and and not necessarily the law as it really is and which should have been given.⁵² In other words, even though the instructions be wrong, and such as may be held error by a reviewing court, nevertheless the jury is bound to follow them for the purposes of its verdict.⁵³ Consequently, in accord with this view, the order of the trial court granting a new trial will be affirmed without considering the correctness of the instructions.⁵⁴ It is frequently held, however, that if the instructions are erroneous, and the verdict is correct as to the law and evidence, a new trial need not be granted.⁵⁵

prejudice from it; and he cannot complain of the failure of the jury to be governed by it, for the error in that respect, if any, is in his favor. *Sutler v. International Harvester Co.*, 81 Kan. 452, 106 Pac. 29.

52. Cal.—*Lind v. Closs*, 88 Cal. 6, 11, 25 Pac. 972; *Loveland v. Gardner*, 79 Cal. 317, 321, 21 Pac. 766, 4 L. R. A. 395; *Aguirre v. Alexander*, 58 Cal. 21; *Emerson v. Santa Clara*, 40 Cal. 543. Ia.—*Soderburg v. Chicago*, St. P., M. & O. R. Co., 167 Iowa 123, 149 N. W. 82; *Crane v. Chicago & N. W. R. Co.*, 74 Iowa 330, 37 N. W. 397, 7 Am. St. Rep. 479; *Caffrey v. Groome*, 10 Iowa 548. Ky.—*St. Paul Fire & M. Ins. Co. v. Kendle*, 163 Ky. 146, 173 S. W. 373; *Lynch v. Snead Architectural Iron Works*, 132 Ky. 241, 116 S. W. 693, 21 L. R. A. (N. S.) 852; *Gausman v. Paff*, 10 Ky. L. Rep. 240. Mont.—*King v. Lincoln*, 26 Mont. 157, 66 Pac. 836; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714. Neb.—*Standiford v. Green*, 54 Neb. 10, 74 N. W. 263. N. Y.—*Wood v. Belden*, 54 N. Y. 658; *Kaplan v. Shapiro*, 53 Misc. 606, 103 N. Y. Supp. 922. N. D. *Freel v. Pietzsch*, 22 N. D. 113, 132 N. W. 779. Eng.—*Wood v. Cox*, 17 C. B. 280, 84 E. C. L. 280, 139 Eng. Reprint 1078.

53. See cases in preceding note, and also: Ala.—*Fleming v. Louisville & N. R. Co.*, 148 Ala. 527, 41 So. 683. Ia.—*Evans v. St. Paul Harvester Works*, 63 Iowa 204, 18 N. W. 881; *Graham v. McGeoch*, 61 Iowa 51, 15 N. W. 592; *Griffith v. Parton*, 59 Iowa 31, 12 N. W. 739. S. C.—*Dent v. Bryce*, 16 S. C. 1.

[a] Reason for the Rule.—The reasons for this holding are well stated in *Dent v. Bryce*, 16 S. C. 1, 14. The court said: "It needs no authority,

then, to say that the jury is bound to take the law from the court. This principle applies in every class of cases except one not necessary now to be considered. And when the law is announced by the court, it is the law of the case until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law, and will in all cases be vacated in the first instance, either sua sponte by the judge or on motion of the aggrieved party. Any other doctrine would lead to the utmost confusion. If the jury could question the charge of the judge, the result would be that in every case the whole case, both law and facts, would go to the jury under the hope that, whatever might be the charge of the judge at the time, he could be satisfied afterward that he was in error."

54. Ia.—*Boyer v. Riley*, 41 Iowa 13; *Sullivan v. Otis*, 39 Iowa 328; *Jewett v. Smart*, 11 Iowa 505. Mont.—*McAllister v. Rocky Fork Coal Co.*, 31 Mont. 359, 78 Pac. 595; *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539. Neb.—*Standiford v. Green*, 54 Neb. 10, 74 N. W. 263; *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, 50 N. W. 10.

55. Ark.—*St. Louis, I. M. & S. R. Co. v. Dooley*, 77 Ark. 561, 92 S. W. 789; *Wood v. Wylds*, 11 Ark. 754. Ga.—*Pitts v. Thrower*, 30 Ga. 212; *Tilman v. Stringer*, 26 Ga. 171; *Dozier v. Dozier*, 20 Ga. 263; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. Ill.—*See Luken v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 94 N. E. 175, 140 Am. St. Rep. 220. Miss.—*Van Vacter v. Brewster*, 1 Smed. & M. 400. R. I.—*Galligan v. Woonsocket St. R. Co.*, 27 R. I. 363, 62 Atl. 376, verdict justified by evidence no new trial for reason that jury did not observe an erroneous

That the jury misapprehended, or misunderstood, the instructions is usually held no ground for a new trial.⁵⁶

3. **Exceptions.**—Where a verdict or a decision is alleged to be contrary to law on the ground that error was committed during the trial, it must appear that due exception was taken to the alleged error, else a new trial will be refused.⁵⁷ In case, however, it is alleged that the verdict is contrary to law as being against the evidence, a new trial may be granted although no exceptions were taken at the trial,⁵⁸ and, according to some decisions, although no motion for a nonsuit or for a directed verdict was made.⁵⁹

G. VERDICT OR FINDING CONTRARY TO EVIDENCE.—1. **In General.**

a. *Includes What.*—The phrase “verdict contrary to evidence” is a broad one, including, for the purposes of new trial, such other phrases as “verdict contrary to weight of evidence,” verdict rendered upon “insufficient evidence,” and verdicts for “excessive” or “inadequate” damages clearly showing “mistake, passion, or prejudice” on the part of the jury.⁶⁰ Verdicts contrary to evidence, or facts, are technically, readily distinguishable from verdicts contrary to law,⁶¹ although, in connection with “insufficient evidence” there may be an insufficiency in point of law as well as insufficiency in point of fact.⁶²

b. *The Rule Stated.*—Although some of the cases, particularly the

instruction. **Can.**—*Todd v. Liverpool*, etc. Ins. Co., 18 U. C. C. P. 192.

56. **Conn.**—*Witter v. Brewster*, Kirby 422. **Ky.**—*Lillard v. McGee*, 3 J. J. Marsh. 549. **Me.**—*Bishop v. Williamson*, 11 Me. 495, where one of the jurors misunderstood the instructions. **Mass.**—*Lathrop v. Sharon*, 12 Pick. 172. **N. H.**—*Tyler v. Stevens*, 4 N. H. 116, 17 Am. Dec. 404. **Tenn.**—*Roller v. Bachman*, 5 Lea 153.

Contra, **Ga.**—*Pace v. Mealing*, 21 Ga. 464. **Ia.**—*Packard v. United States*, 1 G. Gr. 225, 48 Am. Dec. 375. **Tex.**—*Johnson v. State*, 27 Tex. 758. **Va.**—*Dean v. Com.*, 32 Gratt. (73 Va.) 912.

57. *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Walsh v. Matchett*, 6 Misc. 114, 26 N. Y. Supp. 43, 58 N. Y. St. 1. See *Thayer v. Stevens*, 44 N. H. 484; also *Codner v. Bizzell*, 82 N. C. 390.

58. *Bridge v. Austin*, 4 Mass. 115; *Martin v. Platt*, 61 Hun 626, 16 N. Y. Supp. 115, 40 N. Y. St. 761 (*affirming* 26 Abb. N. C. 382, 15 N. Y. Supp. 49); *Powell v. Lamb*, 1 N. Y. Supp. 431, *affirmed*, 15 Daly 139, 3 N. Y. Supp. 930, 22 N. Y. St. 233.

59. *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705; *Picard v. Lang*, 3 App. Div. 51, 38 N. Y. Supp. 229, 73 N. Y. St. 846; *Slater v. Drescher*, 72 Hun 425,

25 N. Y. Supp. 153, 55 N. Y. St. 172; *Kelly v. Frazier*, 27 Hun (N. Y.) 314. *Contra*, *Clement v. Congress Spring Co.*, 91 Hun 636, 35 N. Y. Supp. 1004, 70 N. Y. St. 664.

60. See *infra*, this section, and *Streicher v. Third Ave. R. Co.*, 39 App. Div. 658, 57 N. Y. Supp. 716, 720.

[a] The phrase “insufficient evidence” is equivalent to “against the weight of evidence.” *Inland & S. Coasting Co. v. Hall*, 124 U. S. 121, 8 Sup. Ct. 397, 31 L. ed. 369; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022.

[b] There is no substantial distinction between the statutory phrases “insufficiency of the evidence to justify the verdict,” and “that the verdict is not justified by the evidence.” *Tozer v. Hershey*, 15 Minn. 257.

[c] **No Conflict in Testimony.**—A verdict may be contrary to evidence where there was no substantial conflict in the testimony, yet the scope and effect of the testimony was misunderstood by the jury. *Rankin v. Thompson*, 7 Colo. 381, 3 Pac. 719.

61. See *supra*, II, F, and *Brumagim v. Bradshaw*, 39 Cal. 24. See *Richardson v. Van Voorhis*, 3 N. Y. Supp. 599.

62. See *infra*, II, G, 5, b.

earlier ones, assert that the power should be rarely exercised, and only with extreme caution,⁶³ yet it is the general rule that if the verdict is contrary to the evidence,⁶⁴ or as, otherwise stated, is manifestly

63. *Baker v. Briggs*, 8 Pick. (Mass.) 122, 126, 19 Am. Dec. 311. See *Morse v. St. Paul Fire & Marine Ins. Co.*, 124 Fed. 451; *Ruffner's Heirs v. Hill*, 31 W. Va. 428, 7 S. E. 13.

[a] **Rare and Almost Singular Occurrence.**—In the case of *Mellin v. Taylor*, 2 Hodg. 125, 3 Bing. N. C. 109, 32 E. C. L. 59, 3 Scott 513, 5 L. J. C. P. 346, 132 Eng. Reprint 351, in which a new trial was granted because the verdict appeared to be against the weight of the evidence, Chief Justice Tindal observed: "We agree that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict, except that it is found, in the opinion of the court, against the weight of the evidence, the court ought to exercise not merely a cautious, but a strict and sure judgment, before they send the case to a second jury. The general rule under such circumstances is, that the verdict, once found, shall stand; the setting it aside is the exception and ought to be an exception of rare and almost singular recurrence." But see *Von Harten v. Courtade*, 35 Tex. 434.

64. **U. S.**—*Jones v. Smith*, 158 Fed. 911; *Parker v. Lewis*, Hempst. 72, 18 Fed. Cas. No. 10,741a. **Alaska.**—*McMurry v. Ryan*, 1 Alaska 516. **Ala.**—*Woodroof v. Hall*, 157 Ala. 416, 47 So. 570. **Ark.**—*Taylor v. Grant Lumber Co.*, 94 Ark. 566, 127 S. W. 962; *Benedict v. Lawson*, 5 Ark. 514. **Cal.**—*Wehner v. Bauer*, 10 Cal. App. 171, 101 Pac. 917. **Conn.**—*Dunning v. Crofutt*, 81 Conn. 101, 70 Atl. 630; *Fell v. John Hancock Mut. L. Ins. Co.*, 76 Conn. 494, 57 Atl. 175. **Ga.**—*Louisville & N. R. Co. v. Henderson*, 140 Ga. 655, 79 S. E. 556; *McCoy v. Meador*, 140 Ga. 253, 78 S. E. 848; *Pomeroy v. Gershon Bros.*, 118 Ga. 521, 45 S. E. 415; *Clark v. Georgia Fertilizer Works*, 13 Ga. App. 787, 79 S. E. 1134. **Idaho.**—*McGuire v. Grangeville Sav. & Tr. Co.*, 19 Idaho 635, 115 Pac. 18. **Ia.**—*Dittmer v. Mierandorf*, 139 Iowa 182, 117 N. W. 12. **Kan.**—*Knote v. DeShirley*, 84 Kan. 738, 115 Pac. 539; *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772.

Ky.—*Faulkner v. Hall*, 150 Ky. 416, 150 S. W. 506; *Slusher v. Pennington*, 31 Ky. L. Rep. 950, 104 S. W. 354. **Mass.**—*Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974. **Mich.**—*Conley v. Independent Order of F.*, 158 Mich. 190, 122 N. W. 567. **Mo.**—*Warner v. Michel*, 143 Mo. App. 131, 122 S. W. 338; *Iba v. Chicago, B. & Q. R. Co.*, 172 Mo. App. 141, 157 S. W. 675. **Mont.**—*Wallace v. Weaver*, 47 Mont. 437, 133 Pac. 1099; *Rumping v. Rumping*, 41 Mont. 33, 108 Pac. 10. **Neb.**—*Hileman v. Maxwell*, 97 Neb. 14, 149 N. W. 44. **N. M.**—*James v. Hood*, 19 N. M. 234, 142 Pac. 162. **N. Y.**—*Hutchins v. Rutland R. Co.*, 163 App. Div. 143, 148 N. Y. Supp. 397; *Candia v. Pescaie*, 120 N. Y. Supp. 32; *Cavin v. O'Rourke Engineering, etc. Co.*, 116 N. Y. Supp. 652; *Schuster v. Arscott*, 110 N. Y. Supp. 1107. **N. D.**—*Fulton v. Cretian*, 17 N. D. 335, 117 N. W. 344. **R. I.**—*Wilcox v. Rhode Island Co.*, 29 R. I. 292, 70 Atl. 913. **Wash.**—*Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175. **W. Va.**—*Kelley v. Aetna Ins. Co.*, 75 W. Va. 637, 84 S. E. 502. **Eng.**—*Toronto Railway v. King* (1908), App. Cas. 260; *Seaton v. Sheridan*, 12 T. L. R. 285; *Brown v. Railway Commissioner*, 15 App. Cas. 240. **Can.**—*Reg. v. Wilkinson*, 42 U. C. Q. B. 492; *Heintzman v. Graham*, 15 Ont. 137; *McDougall v. Ainslie Min., etc. Co.*, 42 Nova Scotia 226.

[a] **Power Incidental at Common Law.**—*Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226.

[b] **Evidence Disregarded.**—If the jury disregard the evidence generally, or in a material point, the verdict will be set aside. *Franklin Bank v. Small*, 26 Me. 136; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976; *Spurlin v. Rutherford*, 6 N. C. 360; *Tate v. Gray*, 4 Sneed (Tenn.) 591.

[c] **Mistake or Improper Motive.** It is said, however, in some cases, that a new trial will not be granted on the ground that the verdict is contrary to evidence unless it is manifest that the jury acted through mistake or some improper motive. **U. S.**—*Mengis v. Lebanon Mfg. Co.*, 10 Fed. 665;

or decidedly against the evidence,⁶⁵ or clearly against the weight⁶⁶ of

Wilkinson v. Greely, 1 Curt. 63, 29 Fed. Cas. No. 17,671. **Ga.**—*Dobbins v. Dupree*, 39 Ga. 394; *Perkins v. Attaway*, 14 Ga. 27. **Me.**—*Shepherd v. Inhabitants of Camden*, 82 Me. 535, 20 Atl. 91.

[d] Where the statutory grounds for new trials are held exclusive, the omission in the statute, as in Indiana, of this ground prevents the granting of any new trial for the cause that the verdict of the jury is contrary to evidence. *Indiana Union Traction Co. v. Cauldwell*, 59 Ind. App. 513, 107 N. E. 705; *Louisville, N. A. & C. Ry. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047.

65. **U. S.**—*Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321; *Burke v. Wood*, 162 Fed. 533; *Boudrot v. Cochrane Chem. Co.*, 110 Fed. 919; *Wright v. Southern Express Co.*, 80 Fed. 85. **Cal.** *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847; *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Dickey v. Davis*, 39 Cal. 565; *Smyth v. Tennon*, 24 Cal. App. 519, 141 Pac. 1059; *Walker v. Beaumont Land & W. Co.*, 15 Cal. App. 726, 115 Pac. 766; *Witter v. Redwine*, 14 Cal. App. 393, 112 Pac. 371. **Colo.**—*Dobbins v. Graer*, 50 Colo. 10, 114 Pac. 303; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848. **Conn.** *Schleifenbaum v. Rundbaken*, 81 Conn. 623, 71 Atl. 899; *Howe v. Raymond*, 74 Conn. 68, 49 Atl. 854; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37. **Fla.**—*Tampa Water Works Co. v. Mugge*, 60 Fla. 263, 53 So. 943; *Sanderson & Co. v. Hagan*, 7 Fla. 318. **Ga.** *Stancell v. Kenan*, 33 Ga. 56; *Calhoun v. Stokes*, 26 Ga. 325; *Bullock v. Cannon*, 20 Ga. 652. **Mo.**—*Barnett v. Metropolitan St. R. Co.*, 138 Mo. App. 192, 120 S. W. 730. **Mont.**—*Flaherty v. Butte Elect. R. Co.*, 42 Mont. 89, 111 Pac. 348. **N. J.**—*Hoppock v. Easton Transit Co.*, 77 N. J. L. 342, 72 Atl. 453. **N. Y.**—*Gottlieb & Co. v. Coutant*, 70 Misc. 380, 127 N. Y. Supp. 250. **Tenn.**—*Vaulx v. Tennessee Cent. R. Co.*, 120 Tenn. 316, 108 S. W. 1142. **Can.**—*Cloy v. Jacques*, 27 U. C. Q. B. 88; *Forwood v. Toronto*, 22 Ont. 351.

[a] Clearly Against the Evidence. The courts do not interfere with the

appropriate function of the jury unless the verdict is clearly against the evidence. *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202; *Smith v. Hicks*, 5 Wend. (N. Y.) 48; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616; *Eaton v. Benton*, 2 Hill (N. Y.) 576.

66. **U. S.**—*Burke v. Wood*, 162 Fed. 533; *Kohne v. Ins. Co. of North America*, 1 Wash. C. C. 123, 14 Fed. Cas. No. 7,921. **Ark.**—*McDonnell v. St. Louis Southwestern R. Co.*, 98 Ark. 334, 135 S. W. 925; *Anderson v. Wilburn*, 8 Ark. 155. **Cal.**—*Morgan v. Robinson Co.*, 157 Cal. 348, 107 Pac. 695; *Cooper v. Spring Valley Water Works*, 145 Cal. 207, 78 Pac. 654; *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. 361; *Smyth v. Tennon*, 24 Cal. App. 519, 141 Pac. 1059. **Colo.**—*Rankin v. Cardillo*, 38 Colo. 216, 88 Pac. 170; *Green v. Taney*, 7 Colo. 278, 3 Pac. 423. **Conn.** *Schleifenbaum v. Rundbaken*, 81 Conn. 623, 71 Atl. 899; *Newell v. Wright*, 8 Conn. 319. **Fla.**—*Anthony Farms Co. v. Seaboard Air Line Ry.*, 69 Fla. 188, 67 So. 913; *Branch v. Wilson*, 12 Fla. 543; *Sanderson & Co. v. Hagan*, 7 Fla. 318. **Ga.**—*Buice v. Buice*, 111 Ga. 887, 36 S. E. 969; *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258; *Williams v. Central R. Co.*, 77 Ga. 612, 3 S. E. 88; *Oliver v. Webb*, 12 Ga. App. 216, 76 S. E. 1081; *Chattanooga Pottery Co. v. Tatum N. Stores Co.*, 7 Ga. App. 179, 66 S. E. 479. **Ill.**—*People v. Alton*, 209 Ill. 461, 70 N. E. 640; *Lincoln v. Stowell*, 62 Ill. 84; *Higgins v. Lee*, 16 Ill. 495; *Tague v. Chicago City R. Co.*, 181 Ill. App. 346; *Hippard v. Stiehl*, 157 Ill. App. 72; *Chicago City R. Co. v. Maloney*, 99 Ill. App. 623. **Ia.** *Ford v. Central Iowa R. Co.*, 69 Iowa 627, 21 N. W. 587, 29 N. W. 755; *Jourdan v. Reed*, 1 Iowa 135. **Kan.**—*Ingalls v. Smith*, 93 Kan. 814, 145 Pac. 846; *Ireton v. Ireton*, 62 Kan. 358, 63 Pac. 429; *Union Pacific R. Co. v. Diehl*, 33 Kan. 422, 6 Pac. 566. **Me.**—*Phillips v. Laughlin*, 99 Me. 26, 58 Atl. 64, 105 Am. St. Rep. 253. **Mass.**—*Wait v. M'Neil*, 7 Mass. 261; *Hammond v. Wadhams*, 5 Mass. 353, 355. **Minn.** *Peterson v. Chicago Great Western R. Co.*, 106 Minn. 245, 118 N. W. 1016. **Mo.**—*Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354; *Cornell v. Mutual Life*

the evidence, or is supported with insufficient evidence,⁶⁷ a new trial will be granted.

Moreover, as a corollary to the preceding, a verdict which has apparently been actuated by mistake, passion, prejudice, bias, partiality, or other improper motive, will be set aside and a new trial granted.⁶⁸

Ins. Co., 179 Mo. App. 420, 165 S. W. 858; *Brinton v. Thomas*, 138 Mo. App. 64, 119 S. W. 1016; *Karnes v. Winn*, 126 Mo. App. 712, 105 S. W. 1098; *Reid, Murdock & Co. v. Lloyd*, 61 Mo. App. 646. **Mont.**—*Flaherty v. Butte Elec. R. Co.*, 42 Mont. 89, 111 Pac. 348; *Mullen v. Butte*, 37 Mont. 183, 95 Pac. 597; *White v. Barling*, 36 Mont. 413, 93 Pac. 348. **N. H.**—*Doody v. Boston & M. R. Co.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846; *Wendell v. Safford*, 12 N. H. 171. **N. J.**—*Goldman v. Central R. Co.*, 79 N. J. L. 205, 74 Atl. 261; *Hoppock v. Easton Transit Co.*, 77 N. J. L. 342, 72 Atl. 453; *Hays v. Pennsylvania R. Co.*, 42 N. J. L. 446. **N. Y.**—*Pangburn v. Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423; *Seibert v. Erie R. Co.*, 49 Barb. 583; *Hammond v. Delaware, L. & W. R. Co.*, 140 App. Div. 810, 126 N. Y. Supp. 141; *Rogers v. Macbeth*, 123 App. Div. 571, 108 N. Y. Supp. 74. **R. I.**—*Catrone v. Rhode Island Co.*, 94 Atl. 695; *Lynch v. Rhode Island Co.*, 69 Atl. 765; *Gunn v. Union R. Co.*, 22 R. I. 579, 48 Atl. 1045. **Tenn.**—*Vaulx v. Tennessee Cent. R. Co.*, 120 Tenn. 316, 108 S. W. 1142; *Nashville, C. & St. L. Ry. Co. v. Neely*, 102 Tenn. 700, 52 S. W. 167. **Vt.** *Lincoln v. Central Vt. R. Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998. **Va.**—*Cardwell v. Norfolk, etc. R. Co.*, 114 Va. 500, 77 S. E. 612; *Black's Admr. v. Virginia Portland Cement Co.*, 106 Va. 121, 55 S. E. 587. **Wis.** *Behling v. Wisconsin Bridge & Iron Co.*, 158 Wis. 584, 149 N. W. 484; *Lee v. Chicago, St. P., M. & O. Ry. Co.*, 101 Wis. 352, 77 N. W. 714. **Eng.** *Toronto Railway Co. v. King* (1908), App. Cas. 260; *Jones v. Spencer*, 77 L. T. N. S. 536; *Aitken v. McMeckan* (1895), App. Cas. 310; *Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152. **Can.**—*Campbell v. Prince*, 5 Ont. App. 330; *Roy v. Fraser*, 36 N. Brunsw. 113; *White v. Victoria Lumb., etc. Co.*, 14 Brit. Col. 367, 17 Ann. Cas. 1214; *Woods v. Sweeney*, 6 Newfoundl. 160.

[a] **Duty of the Court.**—The matter of setting aside a verdict on the ground that it was against the evi-

dence was considered by the court in *Wendell v. Safford*, 12 N. H. 171, a leading case upon this subject, where it was said: "Where the verdict is decidedly against the weight of evidence, so that it is apparent that the jury must have misunderstood or totally disregarded the instructions of the court thereon, or must have neglected to consider the facts and overlooked prominent and essential points in the evidence, where it is such a verdict that twelve honest and intelligent men would not have returned it, it is the duty of the court to set it aside."

67. See *infra*, II, G, 5, b.

68. **U. S.**—*Dow v. Wells*, 11 Fed. 132; *Stafford v. Pawtucket Hair Cloth Co.*, 2 Cliff. 82; 22 Fed. Cas. No. 13,275; *Shaw v. Scottish Commercial Ins. Co.*, 21 Fed. Cas. No. 12,723. **Alaska.**—*Williams v. Alaska Commercial Co.*, 2 Alaska 43. **Ark.**—*Oliver v. State*, 34 Ark. 632. **Cal.**—*Bagley v. Eaton*, 8 Cal. 159. **Conn.**—*McKone v. Schott*, 82 Conn. 70, 72 Atl. 570. **Fla.**—*Schultz v. Pacific Ins. Co.*, 14 Fla. 73. **Ga.** *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523. **Ill.**—*Illinois Cent. R. Co. v. Satkowski*, 107 Ill. App. 524; *Close v. Hinsley*, 104 Ill. App. 65; *St. Louis Nat. Stock Yards v. Godfrey*, 101 Ill. App. 40 (*affirmed* in 198 Ill. 288, 65 N. E. 90); *Armour v. McFadden*, 9 Ill. App. 508. **Ia.**—*Maynard v. Des Moines*, 159 Iowa 126, 140 N. W. 208; *Miller v. Chicago, M. & St. P. Ry. Co.*, 70 Iowa 302, 30 N. W. 580. **Kan.** *Missouri, K. & T. R. Co. v. Weaver*, 16 Kan. 456. **Me.**—*Boston v. Buffum*, 97 Me. 230, 54 Atl. 392; *Roberts v. Boston & M. R. Co.*, 83 Me. 298, 22 Atl. 174; *Hunnewell v. Hobart*, 40 Me. 28. **Mass.**—*Scannell v. Boston Elev. R. Co.*, 208 Mass. 513, 94 N. E. 696. **Mo.** *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257, 53 S. W. 897; *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441; *Spohn v. Missouri Pac. R. Co.*, 87 Mo. 74; *Powell v. Missouri Pac. Ry. Co.*, 59 Mo. App. 335; *Empey v. Grand Ave. Cable Co.*, 45 Mo. App. 422. **N. J.** *Hollister v. Wood* (N. J. L.), 43 Atl. 653; *Consumers' Coal Co. v. Hutchin-*

2. Special Verdict.—In case of a special verdict, the findings must be supported by evidence, or else they will be set aside and a new trial ordered.⁶⁹ Likewise, when a special verdict is insufficient or palpably contradictory to the evidence, it must be set aside.⁷⁰ Also, where some of the findings are without evidence, or are insufficiently supported by the evidence,⁷¹ or the special findings are inconsistent,⁷² or are in conflict with the general verdict,⁷³ or where a special finding on a material issue is in direct opposition to the evidence,⁷⁴ a new trial will be granted.

3. Findings by Court or Referee.—As in the case of verdicts, it is the general rule that where the findings of fact by the court, in a trial without a jury, are contrary to the evidence,⁷⁵ or “against the

son, 36 N. J. L. 24. **N. Y.**—Schmidt v. Brown, 80 Hun 183, 30 N. Y. Supp. 68, 61 N. Y. St. 831; McCarthy v. Christopher & Tenth St. R. Co., 10 Daly 540; Kingsley v. Finch, Pruyn & Co., 54 Misc. 317, 105 N. Y. Supp. 968; Schuman v. Brooklyn, etc. R. Co., 117 N. Y. Supp. 145. **N. C.**—Harvey v. Atlantic C. L. R. Co., 153 N. C. 567, 69 S. E. 627. **Pa.**—Bartholomew v. Speer, 7 North. Co. Rep. 152. **P. R.**—Goenaga v. Quiros, 5 Porto Rico Fed. 554. **S. C.**—English v. Clerry, 3 Hill 279. **Utah.**—Roach v. Gilmer, 3 Utah 389, 4 Pac. 221. **Vt.**—Lincoln v. Central Vt. R. Co., 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998. **Wis.**—See Parmentier v. McGinnis, 157 Wis. 596, 147 N. W. 1007. **Can.**—Reiffenstein v. Dey, 28 Ont. L. Rep. 491; Robson v. Suter, 1 Brit. Col. (Pt. II), 375; McGunigal v. Grand Trunk R. Co., 33 U. C. Q. B. 194.

69. U. S.—See Johnson v. Cadillac M. Car Co., 197 Fed. 485. **Ind.**—Louisville, N. A. & C. Ry. Co. v. Green, 120 Ind. 367, 22 N. E. 327; Vinton v. Baldwin, 95 Ind. 433; Lafayette v. Allen, 81 Ind. 166. **Neb.**—Albers v. Chicago, B. & Q. R. Co., 95 Neb. 506, 145 N. W. 1013. **Tex.**—Casey-Swasey Co. v. Manchester Fire Assur. Co., 32 Tex. Civ. App. 158, 73 S. W. 864. **Wis.**—State Journal Printing Co. v. Madison, 148 Wis. 396, 134 N. W. 909; Ohlweiler v. Lohmann, 82 Wis. 198, 52 N. W. 172.

70. State v. Blue, 84 N. C. 807; State v. Moore, 29 N. C. 228; Byington v. Merrill, 112 Wis. 211, 88 N. W. 26.

71. Atchison, T. & S. F. Ry. Co. v. Holland, 58 Kan. 317, 49 Pac. 71; Union P. Ry. Co. v. Sternbergh, 54 Kan. 410, 38 Pac. 436; St. Louis & S.

F. Ry. Co. v. Clark, 48 Kan. 321, 29 Pac. 312.

[a] **Contra**, where the statutory grounds are exclusive and this ground is not included in the statute. Cleveland, etc. R. Co. v. Miller, 165 Ind. 381, 74 N. E. 509; Vandalia Coal Co. v. Price, 178 Ind. 546, 97 N. E. 429.

72. Ia.—Ford v. Central Iowa R. Co., 69 Iowa 627, 21 N. W. 587, 29 N. W. 755. **Kan.**—Burnett v. Topeka R. Co., 90 Kan. 282, 133 Pac. 534; Underwood v. Fosha, 89 Kan. 768, 133 Pac. 866. **Tex.**—Trice v. Cone (Tex. Civ. App.), 163 S. W. 587. **Wis.**—See Kazmierczak v. Kokot, 154 Wis. 599, 143 N. W. 661.

73. Cal.—Hayes v. Fine, 91 Cal. 391, 27 Pac. 772. **Ind.**—Sievers v. Peters Box, etc. Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Indianapolis & St. L. Ry. Co. v. Stout, 53 Ind. 143; Jenny Elect. Mfg. Co. v. Flannery, 53 Ind. App. 397, 98 N. E. 424. **W. Va.**—Bare v. Victoria Coal, etc. Co., 73 W. Va. 632, 80 S. E. 941.

74. Atchison, T. & S. F. Ry. Co. v. Davis, 64 Kan. 127, 67 Pac. 441.

75. Ark.—White v. Beal & Fletcher Grocer Co., 65 Ark. 278, 45 S. W. 1060. **Cal.**—Dundon v. McDonald, 137 Cal. 1, 69 Pac. 498; Pacific Pav. Co. v. Diggins, 4 Cal. App. 240, 87 Pac. 415. See, however, Fagan v. Lentz, 156 Cal. 681, 105 Pac. 951, where finding was immaterial. **Ind.**—Reed v. Reed, 180 Ind. 511, 103 N. E. 324; Walters v. Walters, 168 Ind. 45, 79 N. E. 1037; Radabaugh v. Silvers, 135 Ind. 605, 35 N. E. 694; Crawford v. Powell, 101 Ind. 421; Cicero v. Lake Erie, etc. R. Co. (Ind. App.), 97 N. E. 389. **Minn.**—Quesnell v. Great Northern R. Co., 114 Minn. 276, 130 N. W. 1104. **Wyo.**—Chadron Bank v. Anderson, 7 Wyo.

weight of the evidence,"⁷⁶ a new trial will be granted.

Likewise, where the findings of a referee are contrary to the evidence,⁷⁷ or, as said in some of the cases, "clearly against the evidence,"⁷⁸ or against the weight of the evidence,⁷⁹ a new trial is the proper remedy.

The same rule applies where the findings do not embrace all the issues,⁸⁰ or are indefinite.⁸¹ If, however, the findings of a referee can be supported upon any reasonable view of the evidence, they should stand.⁸²

4. Judicial Discretion.—The granting of a new trial on the ground that the verdict is contrary to the evidence, or against the weight of the evidence, is a matter that rests largely in judicial discretion,⁸³

441, 53 Pac. 280. **Can.**—Charles v. Norton Griffiths Co., 18 Brit. Col. 179; Linke v. Canadian O. F., 33 Ont. L. Rep. 159; Myers v. Toronto R. Co., 30 Ont. L. Rep. 263; Boggs v. Scott, 34 N. Brunsw. 110.

Contra, O'Grady v. Supple, 148 Mass. 522, 20 N. E. 114.

[a] **Same Test as in Jury Trial.** The finding of the judge will be treated as if it were a verdict of a jury. It will not be set aside, as against the evidence, unless the preponderance be so great that a verdict of a jury upon the same testimony would also be set aside. Osborne's Admx. v. Marquand, 1 Sandf. (N. Y.) 457. See also Riley v. Boyer, 76 Ind. 152.

[b] **Findings Immaterial.**—A new trial will not be granted because of the insufficiency of the evidence to sustain a finding that is immaterial and that could not have affected the judgment. Fagan v. Lentz, 156 Cal. 681, 105 Pac. 951.

76. **Cal.**—Hooper v. Fletcher, 145 Cal. 375, 79 Pac. 418; McCarty v. Southern Pac. Co., 144 Cal. 677, 78 Pac. 260. **Ill.**—McClelland v. Mitchell, 82 Ill. 35. **Ind.**—Dodge v. Pope, 93 Ind. 480; Riley v. Boyer, 76 Ind. 152. **Mo.**—Title Guaranty & Surety Co. v. Drennon, 181 Mo. App. 198, 167 S. W. 1181. **Mont.**—See Leveridge v. Hennessy, 48 Mont. 58, 135 Pac. 906.

[a] **Not unless the finding is clearly against the weight of the evidence.** Hyde v. Bledsoe, 9 Kan. 399.

[b] **Judge May Change His Mind.** The judge sitting as a jury has the same right to change his mind as to the probative force of the testimony, when considering that question on a motion for a new trial as he has to sustain a motion for new trial when

the case has been heard by a jury. Loessing v. Loessing, 88 Mo. App. 494, 499; Title Guaranty & Surety Co. v. Drennon, 181 Mo. App. 198, 167 S. W. 1181.

77. **Ind.**—Gauntt v. State, 81 Ind. 137. **Minn.**—Koktan v. Knight, 44 Minn. 304, 46 N. W. 354; Thayer v. Barney, 12 Minn. 502. **N. Y.**—Wehrum v. Kuhn, 2 Jones & S. 336 (*affirmed*, 61 N. Y. 623); Brown v. Penfield, 24 How. Pr. (N. Y.) 64.

See generally the title "References."

78. Leveridge v. Hennessy, 48 Mont. 58, 135 Pac. 906.

79. Gibson v. Gibson, 24 Neb. 394, 39 N. W. 450; Wehrum v. Kuhn, 2 Jones & S. 336 (*affirmed*, 61 N. Y. 623); Spencer v. Utica & S. R. Co., 5 Barb. (N. Y.) 337.

80. Brown v. Burbank, 59 Cal. 535; Knight v. Roche, 56 Cal. 15.

81. Porter v. Muller, 65 Cal. 512, 4 Pac. 531.

82. Thayer v. Vermont Central R. Co., 60 Vt. 214, 13 Atl. 859, 861.

83. **U. S.**—Metropolitan R. Co. v. Moore, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022; McBride v. Neal, 214 Fed. 966, 131 C. C. A. 262; Copper River & N. W. R. Co. v. Reeder, 211 Fed. 280, 127 C. C. A. 648; Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321; Preble v. Bates, 37 Fed. 772. **Ala.**—United States Cast Iron Pipe & F. Co. v. Granger, 172 Ala. 546, 55 So. 244; Richardson v. Birmingham Cotton Mfg. Co., 116 Ala. 381, 22 So. 478. **Ark.**—Oliver v. State, 34 Ark. 632; Johnson v. McDaniel, 15 Ark. 109. **Cal.**—Wurzbarger v. Nellis, 165 Cal. 48, 130 Pac. 1052; Holtum v. Germania L. Ins. Co., 139 Cal. 645, 73 Pac. 591; Ball v. American Transfer Co., 21 Cal.

and this discretion will not be reviewed except in case of judicial abuse.⁸⁴ If, however, the court is satisfied that the verdict is arbitrary, or manifestly and clearly opposed to the evidence, or if it appears to

- App. 437, 132 Pac. 82; *Shea-Boqueraz Co. v. Hartman*, 20 Cal. App. 534, 129 Pac. 807; *Walker v. Beaumont Land & W. Co.*, 15 Cal. App. 726, 115 Pac. 766; *Witter v. Redwine*, 14 Cal. App. 393, 112 Pac. 311. **Conn.**—*Stern v. Simons*, 77 Conn. 150, 58 Atl. 696; *Fell v. John Hancock Mut. L. Ins. Co.*, 76 Conn. 494, 57 Atl. 175; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226 (but if, upon application of either party, the evidence is reported to the supreme court, it must grant a new trial if in its opinion the verdict is contrary to the evidence); *Zaleski v. Clark*, 45 Conn. 397; *Bartholomew v. Clark*, 1 Conn. 472. **Fla.**—*Farrell v. Solary*, 43 Fla. 124, 31 So. 283; *Bishop v. Taylor*, 41 Fla. 77, 25 So. 287. **Ga.**—*McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71; *Georgia, C. & N. Ry. Co. v. Mathews*, 116 Ga. 424, 42 S. E. 771; *Lamb v. State*, 91 Ga. 4, 16 S. E. 101; *Wheeler v. Long*, 73 Ga. 110. **Idaho.**—*McGuire v. Grangeville Sav. & Tr. Co.*, 19 Idaho 635, 115 Pac. 18; *Wolfe v. Ridley*, 17 Idaho 173, 104 Pac. 1014. **Ia.**—*Eggert v. Interstate Inv. & Dev. Co.*, 146 Iowa 481, 125 N. W. 246; *Holman v. Omaha & C. B. Ry. & B. Co.*, 110 Iowa 485, 81 N. W. 704; *Conklin v. Dubuque*, 54 Iowa 571, 6 N. W. 894. **Ky.**—*Byrd v. Central Ky. Tract. Co.*, 136 Ky. 766, 125 S. W. 174; *Hurt v. Louisville & N. R. Co.*, 116 Ky. 545, 76 S. W. 502. **Mich.**—*Lee v. Huron Indemnity Union*, 135 Mich. 291, 97 N. W. 709, 10 Det. Leg. N. 740. **Minn.**—*Buck v. Buck*, 122 Minn. 463, 142 N. W. 729; *Koenig v. St. Paul City R. Co.*, 110 Minn. 212, 124 N. W. 832; *Patzke v. Minneapolis & St. L. R. Co.*, 109 Minn. 97, 123 N. W. 57; *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (N. S.) 439. **Mo.**—*Fitzjohn v. St. Louis Transit Co.*, 183 Mo. 74, 81 S. W. 907; *Herndon v. Lewis*, 175 Mo. 116, 74 S. W. 976; *First Nat. Bank of Brunswick v. Wood*, 124 Mo. 72, 27 S. W. 554; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720; *McWilliams v. Missouri Pac. R. Co.*, 172 Mo. App. 318, 157 S. W. 1001; *Dent v. Springfield Tract. Co.*, 145 Mo. App. 61, 129 S. W. 1044. **Mont.**—*Lizott v. Big Blackfoot Mill. Co.*, 48 Mont. 171, 136 Pac. 46; *Monson v. La France Copper Co.*, 43 Mont. 65, 114 Pac. 778; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Harrington v. Butte & B. Min. Co.*, 27 Mont. 1, 69 Pac. 102. **N. Y.**—*People v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371; *Ross v. Metropolitan St. R. Co.*, 104 App. Div. 378, 93 N. Y. Supp. 679; *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842. **N. C.**—*Bouldin v. Daniel*, 151 N. C. 283, 65 S. E. 1001; *McCord v. Atlanta & C. Air Line R. Co.*, 134 N. C. 53, 45 S. E. 1031; *Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727; *Love v. McClure*, 99 N. C. 290, 6 S. E. 247, 250. **N. D.**—*Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765. **Ore.**—*State v. Mackey*, 12 Ore. 154, 6 Pac. 648. **Pa.**—*Dougherty v. Andrews*, 202 Pa. 633, 52 Atl. 47; *Reno v. Shallenberger*, 8 Pa. Super. 436. **R. I.**—*Arnold v. Treat*, 90 Atl. 382. **S. D.**—*Rex Buggy Co. v. Dinneen*, 23 S. D. 474, 122 N. W. 433; *Clifford v. Latham*, 19 S. D. 376, 103 N. W. 642. **Vt.**—*Averill v. Robinson*, 70 Vt. 161, 40 Atl. 49; *Newton v. Brown*, 49 Vt. 16. **Va.**—*Marshall's Admr. v. Valley R. Co.*, 97 Va. 653, 34 S. E. 455; *Brugh v. Shanks*, 5 Leigh (32 Va.) 598. **Wash.**—*Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Snyder v. Parker*, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726. **Wis.**—*Collins v. Janesville*, 117 Wis. 415, 94 N. W. 309; *Lee v. Chicago, St. P., M. & O. Ry. Co.*, 101 Wis. 352, 77 N. W. 714. **Can.**—*Eureka Woolen Mills Co. v. Moss*, 11 Can. Sup. Ct. 91; *Day v. Hagerman*, 5 U. C. Q. B. 451.
- ⁸⁴ *Gray v. Missouri Lumb. & Min. Co. (Mo.)*, 177 S. W. 595; *Higgins v. Higgins*, 243 Mo. 164, 171, 147 S. W. 962, and cases cited. See, in general, *infra*, III, H.

be the result of passion or prejudice, it is its duty to grant a new trial.⁸⁵

5. Limitations of the Rule.—a. *Weight of Evidence.*—(I.) **In General**—A new trial should not be granted for a mere preponderance of evidence against the verdict, especially where there is a conflict in the evidence,⁸⁶ or where the evidence is such as to render the issue doubtful, even though the verdict is against the apparent weight of

85. U. S.—*Pleasants v. Fant*, 22 Wall. 116, 121, 22 L. ed. 780; *Pringle v. Guild*, 119 Fed. 962; *United States v. Chaffee*, 2 Bond, 147, 25 Fed. Cas. No. 14,773. **Kan.**—*Union Pac. Ry. Co. v. Diehl*, 33 Kan. 422, 6 Pac. 566. **Mo.**—*Chouquette v. Southern Electric R. Co.*, 152 Mo. 257, 53 S. W. 897. **N. Y.**—*Klein v. Dunn*, 56 N. Y. Supp. 161. **Tenn.**—*Vaulx v. Herman*, 8 Lea 683; *Tate v. Gray*, 4 Sneed 591.

[a] In the discharge of this duty, it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given enough evidence to support or justify the verdict. Not whether on all the evidence the preponderating weight is in his favor. That is the business of the jury. But conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial." *Pleasants v. Fant*, 22 Wall. (U. S.) 121, 22 L. ed. 780, *quoted in* *Pringle v. Guild*, 119 Fed. 962. See also *U. S. v. Chaffee*, 2 Bond 147, 25 Fed. Cas. No. 14,773.

[b] **Law Requires It.**—"Although by the theory of our system the jury are the proper and exclusive triers of the facts, yet the law requires the circuit judge, who is presumed to have more practice and skill in the investigation of truth, to set aside their verdicts whenever, in his opinion, they have disregarded or misconceived the force of the proof, that a new trial may be had." *Tate v. Gray*, 4 Sneed (Tenn.) 591, 594. See, also, *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 620, 10 Sup. Ct. 628, 33 L. ed. 1032.

[c] **This Is No Infringement of Jury's Right.**—**Ga.**—*Oliver v. Coleman*, 36 Ga. 552. **Ill.**—*Higgins v. Lee*, 16 Ill. 495. **Ia.**—*Ford v. Central Iowa Ry. Co.*, 69 Iowa 627, 21 N. W. 587, 29 N. W. 755. **N. Y.**—*Cothran v. Collins*, 29

How. Pr. 155. **S. C.**—*Dogan v. Ashby*, 1 Strob. L. 433.

[d] **The court is required to grant a new trial only when the evidence is so convincing as to leave no room, in any reasonable view, for conflicting inferences.** *Behling v. Wisconsin Bridge & Iron Co.*, 158 Wis. 584, 149 N. W. 484.

86. U. S.—*Davey v. Aetna L. Ins. Co.*, 20 Fed. 494; *Aiken v. Bemis*, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109. **Ark.**—*Lindsay v. Wayland*, 17 Ark.

385. **Conn.**—*Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160. **Fla.**—*Gaines v. Forcheimer*, 9 Fla. 265. **Ga.**—*Georgia R. & Bkg. Co. v. Rhodes*, 87 Ga. 602, 13 S. E. 637; *Smith v. Smith*, 29 Ga. 365; *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368. **Haw.**—*Robinson v. Honolulu Rapid Transit, etc. Co.*, 20 Hawaii 426. **Ill.**—*Bloom v. Crane*, 24 Ill. 48; *Chicago Union Traction Co. v. O'Donnell*, 113 Ill. App. 259, *affirmed in* 211 Ill. 349, 71 N. E. 1015. **Me.**—*Linn v. Barker*, 106 Me. 339, 76 Atl. 700; *Shepherd v. Camden*, 82 Me. 535, 20 Atl. 91; *Glidden v. Dunlap*, 28 Me. 379. **Miss.**—*Buckingham v. Walker*, 48 Miss. 609; *Dickson v. Parker*, 3 How. 219, 34 Am. Dec. 78. **N. Y.**—*Hutchinson v. Market Bank*, 48 Barb. 302; *Craswell v. New York, etc. Ferry Co.*, 27 Misc. 822, 57 N. Y. Supp. 827; *Wagner v. Herrmann Lumber Co.*, 121 N. Y. Supp. 607. **Vt.**—*Lewis v. Roby*, 79 Vt. 487, 65 Atl. 524, 118 Am. St. Rep. 984. **Va.**—*Cardwell v. Norfolk, etc. R. Co.*, 114 Va. 500, 77 S. E. 612; *Morien v. Norfolk & A. Terminal Co.*, 102 Va. 622, 46 S. E. 907. **Can.**—*Frey v. Mutual Fire Ins. Co.*, 43 U. C. Q. B. 102; *Green v. St. John's Gas Co.*, 6 Newfoundland. 223.

See section following.

[a] **Preponderance Great.**—Where a variety of testimony is fairly submitted to the jury, and no question of law is raised, a new trial will not be granted unless the preponderance of the evidence against the verdict is great. *Kellogg v. Budlong*, 7 How.

the evidence.⁸⁷ Verdicts are not to be set aside merely because the court differs in opinion with the jury as to the merits of the case, and would, as a juror, have reached a different conclusion upon the facts,⁸⁸ since if the evidence be such as would justify the jury, acting as reasonable men, in returning the verdict in question, the verdict ought to be sustained.⁸⁹ In a criminal case, however, where all the evidence is such as to suspend the judicial mind in serious doubt as to the guilt of the accused, a new trial should be granted.⁹⁰

(Miss.) 340; *Perry v. Smith*, 4 Yerg. (Tenn.) 323, 26 Am. Dec. 236.

87. *Lurton, J.*, in *Mt. Adams & Eden P. I. Ry. Co. v. Lowery*, 74 Fed. 463, 473, 20 C. C. A. 596.

88. **U. S.**—*Plummer v. Granite Mountain Min. Co.*, 55 Fed. 755; *Gilmer v. Grand Rapids*, 16 Fed. 703; *Shaw v. Scottish Commercial Ins. Co.*, 2 Hask. 246, 21 Fed. Cas. No. 12,723; *Fearing v. DeWolf*, 3 Woodb. & M. 185, 8 Fed. Cas. No. 4,711; *Bayly v. London & L. Ins. Co.*, 2 Fed. Cas. No. 1,145. **Conn.** *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160. **Del.**—*Burton v. Philadelphia, W. & B. R. Co.*, 4 Har. 252. **Me.** *Lavigne v. Lewiston Mills Co.*, 10 Atl. 62; *Milo v. Gardiner*, 41 Me. 549. **Mass.** *Reeve v. Dennett*, 137 Mass. 315. **Mich.** *Rohde v. Biggs*, 108 Mich. 446, 66 N. W. 331. **N. H.**—*Lucier v. Larose*, 66 N. H. 141, 29 Atl. 249. **Eng.**—*Camden v. Cowley*, 1 W. Bl. 417, 96 Eng. Reprint 237; *Hankey v. Trotman*, 1 W. Bl. 1, 96 Eng. Reprint 1; *Swain v. Hall*, 3 Wils. K. B. 45, 95 Eng. Reprint 924; *Anonymous*, 1 Wils. K. B. 22, 95 Eng. Reprint 470; *Ashley v. Ashley*, 2 Str. 1142, 93 Eng. Reprint 1088.

See *infra*, II, G, 5, a, (III).

89. **Conn.**—*Bishop v. Perkins*, 19 Conn. 300. **Ky.**—*Steele's Heirs v. Logan*, 3 A. K. Marsh. 394. **W. Va.**—*Miller v. Citizens' Fire, Marine & Life Ins. Co.*, 12 W. Va. 116, 29 Am. Rep. 452.

[a] **The Proper Inquiry.**—The inquiry in such cases is not whether the judge acting as a juror would or would not have come to the conclusion returned by the jury in their verdict, but whether a reasonable man charged with finding facts from the evidence, under the court's instruction as to the law applicable to the case, could come to that result. *Lucier v. Larose*, 66 N. H. 141, 29 Atl. 249; *Hovey v. Brown*, 59 N. H. 114; *Fuller v. Bailey*, 58 N. H. 71; *Belknap v. Boston & M. R. R.*, 49 N. H. 358.

[b] **Directing a Verdict.**—(1) It has

been said that although the court might have directed a contrary verdict, yet such fact does not entitle the defeated party to a new trial. *Schlesinger v. Malloy*, 1 City Ct. R. (N. Y.) 458. (2) It has also been held that if there is sufficient evidence to require the submission of a case to the jury, it is error to set aside the verdict. See *Hensley v. Davidson Bros. Co.*, 135 Iowa 106, 112 N. W. 227. (3) The weight of authority, however, holds that although the trial court would not have been justified in directing a verdict, since there was some evidence to support it, yet the preponderance of the evidence against a verdict may be so great that a new trial should be granted. The direction of a verdict is conclusive. It prevents a trial of any issue of fact to a jury. The granting of a new trial leaves the case still open. **U. S.**—*Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321. **Ala.**—*Wood v. Empire Laundry Co.*, 14 Ala. App. 144, 68 So. 584. **Fla.** *Aberson v. Atlantic C. L. R. Co.*, 68 Fla. 196, 67 So. 44. **Ga.**—*Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595. **Ill.**—*Odett v. Chicago City R. Co.*, 166 Ill. App. 270; *Illinois Cent. R. Co. v. Satkowski*, 107 Ill. App. 524. **Minn.** *Voge v. Penney*, 74 Minn. 525, 77 N. W. 422. **N. Y.**—*Walker v. Newton Falls Paper Co.*, 99 App. Div. 47, 90 N. Y. Supp. 530. **Wis.**—*Jones v. Chicago & N. W. Ry. Co.*, 49 Wis. 352, 5 N. W. 854.

90. **Colo.**—*Piel v. People*, 52 Colo. 1, 119 Pac. 687. **Ga.**—*Forrester v. State*, 125 Ga. 28, 53 S. E. 767; *Reynolds v. State*, 24 Ga. 427; *Coleman v. State*, 15 Ga. App. 338, 83 S. E. 154; *Thompson v. State*, 5 Ga. App. 7, 62 S. E. 571. **Ill.**—*People v. Freeman*, 244 Ill. 590, 91 N. E. 708; *Rafferty v. People*, 72 Ill. 37. **Ind.**—*Stout v. State*, 78 Ind. 492; *Jerry v. State*, 1 Blackf. 395. **Ia.** *State v. Hilton*, 22 Iowa 241. **N. Y.** *People v. Nelson*, 189 N. Y. 137, 81 N. E. 768. **N. C.**—*State v. Martin*, 141 N.

(II.) **Conflicting Evidence.** — As a general rule, a new trial will not be granted on the ground of the insufficiency of the evidence, when the evidence is conflicting,⁹¹ or where the evidence tends to support the views of each party.⁹² The jury is presumed to consider and settle the conflict of testimony;⁹³ but if it is manifest that the jury have abused their trust,⁹⁴ or that the verdict is so unreasonable as to show mistake, prejudice, or passion,⁹⁵ a new trial should be awarded.

Moreover, the fact that the evidence is conflicting will not prevent a new trial where injustice would otherwise be done,⁹⁶ and even where the evidence is conflicting, the parties, upon motion for a new trial, are entitled to the independent judgment of the court upon the question

C. 832, 53 S. E. 874. **Ohio**—Crandall v. State, 28 Ohio St. 479. **Tex.**—Saltillo v. State, 16 Tex. App. 249; Owens v. State, 35 Tex. 361. **Va.**—Dean v. Com., 32 Gratt. (73 Va.) 912. **Can.**—Reg. v. Wilkinson, 42 U. C. Q. B. 492, 513.

See *infra*, II, G, 5, a, (III).

91. **U. S.**—Kelley v. Cunard S. S. Co., 120 Fed. 536; Pringle v. Guild, 119 Fed. 962. **Alaska.**—McMorry v. Ryan, 1 Alaska 516. **Cal.**—Hopper v. Jones, 29 Cal. 18. **Ga.**—Archer v. Heidt, 55 Ga. 200; Mayer v. Dawson, 33 Ga. 529; Boon v. Boon, 29 Ga. 134. **Ill.**—Buchanan v. Lennan, 105 Ill. 56; Clifford v. Luhring, 69 Ill. 401. **Kan.**—Atehison, T. & S. F. Ry. Co. v. Mathews, 58 Kan. 447, 49 Pac. 602; Carson v. Kerr, 7 Kan. 268. **Ky.**—Patton's Heirs v. Patton's Exrs., 5 J. J. Marsh. 389; Louisville & N. R. Co. v. Rhoads, 28 Ky. L. Rep. 692, 90 S. W. 219. **Me.**—Smith v. Inhab. of Brunswick, 80 Me. 189, 13 Atl. 390. **Mich.**—Lee v. Huron Indemnity Union, 135 Mich. 291, 97 N. W. 709, 10 Det. Leg. N. 740. **N. Y.**—Miller v. O'Dwyer, 49 Hun 607, 1 N. Y. Supp. 618, 16 N. Y. St. 1010; Benjamin v. Metropolitan St. Ry. Co., 85 N. Y. Supp. 1052; Cummings v. Vanderbilt, 1 N. Y. Supp. 523, 16 N. Y. St. 1023. **R. I.**—Shibley v. Gendron, 25 R. I. 519, 57 Atl. 304. **S. C.**—Revolution Cotton Mills v. Union Cotton Mills, 73 S. C. 43, 52 S. E. 674. **Tex.**—East Line & R. R. Co. v. Boon, 1 S. W. 632; Insurance Co. of North America v. Bell, 25 Tex. Civ. App. 129, 60 S. W. 262.

[a] **Discretion.**—It is a matter within the judicial discretion of the court whether or not a new trial shall be granted for insufficient evidence when there is a substantial conflict in the testimony. Cooper v. Spring Valley Waterworks, 145 Cal. 207, 78 Pac. 654;

Ross v. Robertson, 12 N. D. 27, 94 N. W. 765. See *supra*, II, G, 4.

[b] **Mere conflicting or contradictory statements** of the witnesses of the adverse party are not sufficient ground for granting a new trial after verdict in such party's favor. South Texas Tel. Co. v. Tabb, 52 Tex. Civ. App. 213, 114 S. W. 448.

92. Pim v. Wait, 32 Fed. 741.

[a] **Evidence on Both Sides.**—(1) Some of the earlier cases laid down the doctrine that a verdict would not be set aside as contrary to evidence where there was evidence on both sides. **Mass.**—Baker v. Briggs, 8 Pick. 122, 126, 19 Am. Dec. 311. **N. Y.**—Ward v. Center, 3 Johns. 271. **Tenn.**—Wilson v. Nations, 5 Yerg. 211. **Eng.**—Anonymous, 1 Wils. K. B. 22, 95 Eng. Reprint 470. See note appended to the case of Smith v. Brampton, 2 Salk. 664, 91 Eng. Reprint 543. But see Norris v. Freeman, 3 Wils. K. B. 38, 95 Eng. Reprint 921. (2) This rule applied, however, only when the evidence was conflicting and so contradictory that one might well doubt. See Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311. (3) It never applied to a case where the weight of testimony on one side was entirely disregarded, and counterbalanced by the most feeble evidence, or no evidence in effect, on the other. Johnson v. Scribner, 6 Conn. 185, 189. See also Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732, 736.

93. Doody v. Boston & M. R. Co., 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914 C, 846.

94. Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311.

95. Leitensdorfer v. King, 7 Colo. 436, 4 Pac. 37.

96. Woodbury Co. v. Dougherty &

of sufficient evidence.⁹⁷ Further, despite its conflict, if, upon weighing the evidence, the court finds the verdict against its weight, it is the court's duty to grant a new trial,⁹⁸ and a verdict is clearly or manifestly against the evidence, or the weight of the evidence, when the verdict is such as upon the whole of the evidence the jury could not reasonably find.⁹⁹ The weight of evidence is, however, not to be determined by the number of witnesses on each side. Witnesses are to be weighed not counted. Numerical superiority is not the test.¹

(III.) **Circumstantial Evidence.**—The fact that the evidence was circumstantial is not a ground for setting aside a verdict.² In criminal cases, where the evidence though circumstantial tends strongly to establish the guilt of the defendant, a new trial will not be granted;³

Bryant Co., 161 Iowa 571, 143 N. W. 416.

97. Green v. Soule, 145 Cal. 96, 78 Pac. 337. See *infra*, II, G, 5, b.

98. U. S.—Morse v. St. Paul F. & M. Ins. Co., 124 Fed. 451; Ulman v. Clark, 100 Fed. 180. Cal.—Franz v. Mendonea, 131 Cal. 205, 63 Pac. 361. Kan.—Ireton v. Ireton, 62 Kan. 358, 63 Pac. 429. Mass.—Miller v. Baker, 20 Pick. 285; Angier v. Jackson, Quincy 84. Mich. Montmorency v. Putnam, 144 Mich. 135, 107 N. W. 895, 13 Det. Leg. N. 229. Mo.—Bohle v. King-Brinsmade Mercantile Co., 114 Mo. App. 439, 89 S. W. 1036. R. I.—Gunn v. Union R. Co., 22 R. I. 579, 48 Atl. 1045. W. Va.—Chaney v. Roane County Court, 51 W. Va. 252, 41 S. E. 156; Miller v. Citizens' Fire, Marine & Life Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452.

[a] **Appellate Court Rule Not Applicable.**—The rule that an appellate court will not disturb the verdict in case of conflicting evidence does not bind a trial court. Green v. Soule, 145 Cal. 96, 78 Pac. 337; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Jones v. Campbell, 11 Idaho 752, 84 Pac. 510.

[b] **Where the witnesses are of good character,** the verdict ought not to be set aside unless manifestly wrong or improperly obtained; Nonce v. Richmond & D. R. Co., 33 Fed. 429.

[c] **Where any reasonable ground for doubt exists on the whole evidence,** as to which way the fact is, the verdict is conclusive. Thayer v. Central Vermont R. Co., 60 Vt. 214, 13 Atl. 859.

[d] **View by Jury.**—A new trial may be granted on the ground that the verdict is against the weight of the evidence although in addition to the testimony given in court the jury

have had the opportunity of a view. McQueen v. Mechanics' Institute, 107 Cal. 163, 40 Pac. 114; Tully v. Fitchburg R. Co., 134 Mass. 499.

99. Jones v. Spencer, 77 L. T. N. S. (Eng.) 536; Hampson v. Guy, 64 L. T. N. S. (Eng.) 778; Phillips v. Martin, 15 App. Cas. (Eng.) 193.

1. Braunschweiler v. Waits, 179 Pa. 47, 36 Atl. 155. See 14 ENCY. OF EV. 65, 89.

[a] **The greater weight does not necessarily mean a greater number of witnesses,** but the opportunity for knowledge, the information possessed, and the manner of testifying must be considered to determine the "weight" of testimony. Garver v. Garver, 52 Colo. 227, 121 Pac. 165, 166, 227, Ann. Cas. 1913D, 674.

[b] **Weight of Evidence.**—The expression "weight of evidence" signifies that the proof on one side is greater than on the other. Pumorlo v. Merrill, 125 Wis. 102, 103 N. W. 464.

2. Cal.—People v. Mallicoat, 27 Cal. App. 355, 149 Pac. 1000. Ga.—Waycross Lumber Co. v. Guy, 89 Ga. 148, 15 S. E. 22; Liberty F. Products Co. v. Maloof, 8 Ga. App. 166, 68 S. E. 846. Mass.—Greenfield Bank v. Crafts, 4 Allen 447. Okla.—St. Louis & S. F. R. Co. v. Shannon, 25 Okla. 754, 108 Pac. 401. Va.—Blosser v. Harshbarger, 21 Gratt. (62 Va.) 214.

[a] **The court will rarely interfere with a verdict founded upon circumstantial evidence.** Young v. Silkwood, 11 Ill. 36.

3. Blevins v. Com., 5 Gratt. (46 Va.) 703.

[a] **Where, however, the evidence is (1) circumstantial and does not exclude every other reasonable hypothesis save that of the guilt of the ac-**

and the mere fact that the court might have reached a different conclusion upon the evidence, is no ground for a new trial.⁴

(IV.) *Credibility of Witnesses.*—A new trial should not be granted merely for the reason that the court does not agree with the jury as to the credibility of witnesses.⁵ It is the peculiar province of the jury to pass upon the credibility of witnesses,⁶ and a new trial should not be awarded on such an issue unless it appears that the jury have acted arbitrarily.⁷

cused, a new trial will be granted on the ground that the verdict is contrary to the evidence. *Watson v. State*, 118 Ga. 66, 44 S. E. 803. (2) Moreover, circumstantial evidence which is consistent with the guilt of the accused, but not inconsistent with a reasonable hypothesis of his innocence, and insufficient to establish beyond a reasonable doubt, in a case of larceny, an intent to steal, furnishes ground for which a new trial should be granted. *Wilson v. State*, 5 Ga. App. 223, 62 S. E. 1003.

4. *U. S.*—*United States v. Ducourneau*, 54 Fed. 138. *Ga.*—*Sullivan v. State*, 14 Ga. App. 762, 82 S. E. 314. *N. Y.*—*People v. Schover*, 140 N. Y. Supp. 427. *S. C.*—*State v. Boyleston*, 84 S. C. 574, 66 S. E. 1047. *Va.*—*Russell v. Com.*, 78 Va. 400; *Pryor v. Com.*, 27 Gratt. (68 Va.) 1009. *Wash.*—*State v. Smith*, 9 Wash. 341, 37 Pac. 491. *Wis.*—*State v. Leppere*, 66 Wis. 355, 28 N. W. 376.

See *supra*, II, G, 5, a, (I).

5. *U. S.*—*Pringle v. Guild*, 119 Fed. 962; *Fearing v. DeWolf*, 3 Woodb. & M. 185, 8 Fed. Cas. No. 4,711; *Blagg v. Phoenix Ins. Co.*, 3 Wash. C. C. 58, 3 Fed. Cas. No. 1,478. *Conn.*—*Reboul v. Chalker*, 27 Conn. 114; *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160. *Ga.*—*Thornton v. Abbott*, 105 Ga. 846, 22 S. E. 603; *Creighton v. Hewitt*, 51 Ga. 174; *Scott v. Valdosta*, etc. R. Co., 13 Ga. App. 65, 78 S. E. 784; *Brown v. Hawkins*, 13 Ga. App. 309, 79 S. E. 76. *Ill.*—*Chicago*, etc. R. Co. v. *Stumps*, 69 Ill. 409; *Delaware*, etc. Canal Co. v. *Mitchell*, 113 Ill. App. 429. *Ky.*—*Alcorn v. Powell*, 22 Ky. L. Rep. 1353, 60 S. W. 520. *Me.*—*Robertson v. Burke*, 109 Me. 574, 85 Atl. 295; *Pendleton v. Tolman*, 113 Me. 568, 94 Atl. 753. *Mass.*—*Wait v. McNeil*, 7 Mass. 261. *Mich.*—*Ewing v. Lamphere*, 160 Mich. 117, 132, 125 N. W. 51. *Miss.*—*Stovall v. Farmers', etc. Bank*, 8 Smed. & M. 305, 47 Am. Dec. 85. *Mo.*—*Kiel v. Ott*, 168 Mo. App. 40, 151 S. W. 182; *Hollen-*

beck v. McCord, 152 Mo. App. 248, 132 S. W. 1189; *Noble v. Kansas City*, 95 Mo. App. 167, 68 S. W. 969. *N. H.*—*Clark v. Congregational Soc.*, 44 N. H. 382; *Wendell v. Safford*, 12 N. H. 171. *N. J.*—*Bowell v. Public Service Corp.*, 77 N. J. L. 231, 71 Atl. 119. *N. Y.*—*Odell v. Webendorfer*, 60 App. Div. 460, 69 N. Y. Supp. 930; *Radjavi v. Third Ave. R. Co.*, 58 App. Div. 11, 68 N. Y. Supp. 617; *Jarehover v. Dry Dock, E. B. & B. R. Co.*, 54 App. Div. 238, 66 N. Y. Supp. 575; *Layman v. John Anderson & Co.*, 4 App. Div. 124, 38 N. Y. Supp. 883, 74 N. Y. St. 776; *Panker v. Whitridge*, 80 Misc. 409, 141 N. Y. Supp. 308; *Zwirn v. Joline*, 122 N. Y. Supp. 231; *Schwartz v. Joline*, 111 N. Y. Supp. 726; *Cheney v. New York Cent.*, etc. R. Co., 16 Hun 415. *Pa.*—*Boak v. Commings*, 19 Pa. Co. Ct. 79; *Metz v. Clark*, 2 Dauph Co. Rep. 415; *Pell v. Fortner*, 3 Del. Co. 568. *R. I.*—*Stiff v. Havens*, 69 Atl. 553. *Tex.*—*Morgan v. Bement*, 24 Tex. Civ. App. 564, 59 S. W. 907. *Va.*—*Cardwell v. Norfolk*, etc. R. Co., 114 Va. 500, 77 S. E. 612; *Southern R. Co. v. Cash*, 110 Va. 282, 65 S. E. 601. *W. Va.*—*Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385. *Wis.*—*Behling v. Wisconsin Bridge & Iron Co.*, 158 Wis. 584, 149 N. W. 484. *Can.*—*Johnson v. Calnan*, 38 N. Brunsw. 52; *Malcolmson v. Hamilton Provident & L. Soc.*, 10 Ont. App. 610; *Weegar v. Grand Trunk Ry. Co.*, 23 Ont. 436; *Green v. St. John's Gas Co.*, 6 Newfoundl. 223; *White v. Grieve*, 4 Newfoundl. 28.

Perjury as surprise, see *supra*, II, E, 2, k, (VI), (B).

6. *Doody v. Boston & M. R. Co.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914 C, 846.

7. *U. S.*—*Burch v. Southern Pac. Co.*, 145 Fed. 443. *Ala.*—*Roe v. Doe ex dem. Delage*, 43 So. 856. *Ill.*—*Tague v. Chicago City R. Co.*, 181 Ill. App. 346; *Delaware & H. Canal Co. v. Mitchell*, 113 Ill. App. 429, *affirmed*, 211

(V.) **Amount Involved.**—Where the amount involved is trifling a new trial will not usually be granted,⁸ unless, as said in an early English case, the conduct of the jury has been quite outrageous.⁹ Moreover, a new trial will not usually be granted to enable the plaintiff to recover merely nominal damages,¹⁰ although if the action is

Ill. 379, 71 N. E. 1026. **Ky.**—Louisville & N. R. Co. v. Helm, 121 Ky. 645, 89 S. W. 709; *Alcorn v. Powell*, 22 Ky. L. Rep. 1353, 60 S. W. 520. **Me.**—*Polard v. Grand Trunk R. Co.*, 62 Me. 93. **Mont.**—*Mullen v. Butte*, 37 Mont. 183, 95 Pac. 597. **N. Y.**—*Seibert v. Erie R. Co.*, 49 Barb. 583; *Bauer v. Montague Mailing Machinery Co.*, 163 App. Div. 589, 148 N. Y. Supp. 990; *Cunningham v. Gans*, 79 Hun 434, 29 N. Y. Supp. 979, 61 N. Y. St. 249; *Chavias v. Dry Dock, E. B. & B. R. Co.*, 34 Misc. 694, 70 N. Y. Supp. 1014. **Pa.**—*Melody v. Chester Tract. Co.*, 9 Del. Co. 105; *Ernst v. Tomblor*, 1 Lehigh Val. L. Rep. 133; *Burk v. Coy*, 22 Leg. Int. 117. **R. I.**—*Gunn v. Union R. Co.*, 22 R. I. 579, 48 Atl. 1045. **Tenn.**—*Sweany v. Bledsoe*, 8 Humph. 612. **Wis.**—*Lee v. Chicago, St. P., M. & O. Ry. Co.*, 101 Wis. 352, 77 N. W. 714. **Can.**—*Grieve v. Molson's Bank*, 8 Ont. 162; *Doe dem. Hatheway v. Hatch*, 6 N. Brunswick. 200.

[a] But where positive and direct testimony is undisputed and uncontradicted, and there is no improbability or inconsistency apparent in it, the jury should believe it, for the purpose of the suit, and it is the duty of a court to set aside a verdict founded upon a disbelief of such clear and uncontradicted evidence. *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382; *Lomer v. Meeker*, 25 N. Y. 361.

8. **U. S.**—*United States v. Barnhardt*, 17 Fed. 579. **Conn.**—*Mathews v. Livingston*, 86 Conn. 263, 85 Atl. 529, Ann. Cas. 1914 A, 195; *Watson v. New Milford*, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; *Briggs v. Morse*, 42 Conn. 258; *Cooke v. Barr*, 39 Conn. 296. **Me.**—*Jenney v. Delesdernier*, 20 Me. 183. **Mass.**—*Abbott v. Walker*, 204 Mass. 71, 74, 90 N. E. 405, 26 L. R. A. (N. S.) 814. **N. Y.**—*Nolan v. Harris*, 52 How. Pr. 409. **Pa.**—*Harper v. Busse*, 4 Lanc. Law Rev. 74. **R. I.**—*Wightman v. Kruger*, 23 R. I. 78, 49 Atl. 395. **Eng.**—*Roberts v. Karr*, 1 Taunt. 495, 127 Eng. Reprint 926 (where the damages to be recovered would not exceed

five pounds); *Goodwin v. Gibbons*, 4 Burr. 2108, 98 Eng. Reprint 100; *Farewell v. Chaffey*, 1 Burr. 54, 97 Eng. Reprint 187.

[a] **De Minimis.**—Where the amount in litigation is trivial, the rule *de minimis non curat lex* is applied, and a new trial will be refused. The maxim seems to be confined, however, to cases in which the motion is made on the ground that the verdict is against the evidence, because where the verdict is the result of an erroneous ruling or direction of the judge, a new trial will be granted however small the amount in question. *United States v. Barnhardt*, 17 Fed. 579; *Broom, Leg. Max.*, 142, and cases cited.

9. *Chitty, Gen. Pr.*, IV, 51; *Manning v. Underwood, McClell. & Y.* 266, where the amount recovered was under twenty pounds. See also *Sowell v. Champion*, 6 Ad. & El. 407, 33 E. C. L. 226, 2 N. & P. 627, 112 Eng. Reprint 156; *Adams v. Midland R. Co.*, 31 L. J. Exch. 35; *Grimm v. Fischer*, 25 U. C. Q. B. 383.

[a] **The twenty-pound limit** enunciated in a number of early English cases has become a fixed rule of court in that country, in contract cases, unless some right independent of the damages be in question. *Wharton, Law Lex.*, 12th ed., London, 1916.

10. **Ark.**—*Ringlehaupt v. Young*, 55 Ark. 128, 17 S. W. 710. **Conn.**—*Beattie v. New York, etc. R. Co.*, 84 Conn. 555, 80 Atl. 709; *Michael v. Curtis*, 60 Conn. 363, 22 Atl. 949; *Briggs v. Morse*, 42 Conn. 258; *Cooke v. Barr*, 39 Conn. 296. **Ill.**—*People v. Petrie*, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268; *Comstock v. Brosseau*, 65 Ill. 39; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199. **Ind.**—*Hudspeth v. Allen*, 26 Ind. 165; *Jennings v. Loring*, 5 Ind. 250; *State v. Miller*, 5 Blackf. 381. **Ia.**—*Watson v. Van Meter*, 43 Iowa 76. **Me.**—*Jenney v. Delesdernier*, 20 Me. 183. **Mont.**—*Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591. **N. J.**—*Phillips v. Phillips*, 34 N. J. L. 208. **N. Y.**—*Devendorf v. Wert*, 42 Barb. 227; *Chase v.*

brought to try a question of permanent right, the fact that the plaintiff is entitled also to nominal damages will not affect the right to a new trial.¹¹

(VI.) **Different Issues or Parties.** — A general verdict covering two or more issues, some of which are sufficiently supported by the evidence, but others not, should be set aside.¹² The same rule applies to a general verdict against two or more parties, where the verdict as to some of the parties is against the evidence.¹³ Where, however, there are several counts in an action,¹⁴ or several defenses,¹⁵ if the evidence is sufficient to maintain any one of them, the verdict should stand.

(VII.) **Must Work Injury.** — It does not necessarily follow that a new trial must always be granted even if the verdict be contrary to evidence, since it is possible that the verdict may still be on the side of the real justice and equity of the case.¹⁶ Moreover, courts are reluctant to grant a new trial merely on the ground that the verdict is contrary to evidence, and it must appear that injustice has been done, and that there is a probability it will be remedied upon a second trial.¹⁷

b. *Insufficient Evidence.* — (I.) **No Evidence.** — When there is no evidence to support a verdict, a new trial will be granted,¹⁸ as often

Bassett, 15 Abb. Pr. (N. S.) 293; Nolan v. Harris, 52 How. Pr. 409; Rundell v. Butler, 10 Wend. 119; Brantingham v. Fay, 1 Johns. Cas. 255. **S. C.**—Westbrook v. McMillan, 1 Hill 317, 26 Am. Dec. 187. **Eng.**—Burton v. Thompson, 2 Burr. 664, 97 Eng. Reprint 500. **Can.**—Scammell v. Clarke, 23 Can. Sup. Ct. 307 (*affirming* 31 N. Bruns. 250); Simmonds v. Chesley, 20 Can. Sup. Ct. 174.

11. **Conn.**—Michael v. Curtis, 60 Conn. 363, 22 Atl. 949. **Ill.**—Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199. **Ia.**—Watson v. Van Meter, 43 Iowa 76.

12. Field v. Ringo, 7 Ark. 435. *Compare*, however, Lonsdale v. Brown, 4 Wash. C. C. 148, 15 Fed. Cas. No. 8,494.

13. **U. S.**—United States v. Chaffee, 2 Bond 147, 25 Fed. Cas. No. 14,773. **Ga.**—Brownlee v. Abbott, 108 Ga. 761, 33 S. E. 44; Finley v. Southern R. Co., 5 Ga. App. 722, 64 S. E. 312. **Neb.**—Gerner v. Yates, 61 Neb. 100, 84 N. W. 596. **Can.**—Menton v. Lee, 30 U. C. Q. B. 281.

14. **U. S.**—Lonsdale v. Brown, 4 Wash. C. C. 148, 15 Fed. Cas. No. 8,494. **Cal.**—*In re Hellier's Estate*, 169 Cal. 77, 145 Pac. 1008. **Mass.**—Nye v. Otis, 8 Mass. 122, 5 Am. Dec. 79. **Can.**—Creveling v. Canadian Bridge Co., 51 Can. Sup. Ct. 216.

15. Kidd v. Laird, 15 Cal. 161, 76

Am. Dec. 472. See Board of Com'rs. v. Robbins, 82 Conn. 623, 74 Atl. 938.

16. Lord Mansfield, in Burton v. Thompson, 2 Burr. 664, 97 Eng. Reprint 500, *quoted* in Levi v. Milne, 4 Bing. 195, 201, 13 E. C. L. 464, 12 Moore 418, 5 L. J. C. P. (O. S.) 153, 130 Eng. Reprint 743.

17. Derwort v. Loomer, 21 Conn. 245; Hinton v. McNeil, 5 Ohio 509, 24 Am. Dec. 315.

18. **Ark.**—Watkins v. Rogers, 21 Ark. 298; Mississippi, O. & R. R. Co. v. Cross, 20 Ark. 443; Johnson v. McDaniell, 15 Ark. 109; Field v. Ringo, 7 Ark. 435. **Cal.**—Hawkins v. Reichert, 28 Cal. 534; Shilling v. Dodge, 22 Cal. App. 517, 135 Pac. 299. **Colo.**—Carothers v. Jones, 1 Colo. 196. **Fla.**—Clinch v. Canova, 33 Fla. 655, 15 So. 427. **Ga.**—Rome v. Shropshire, 112 Ga. 93, 37 S. E. 168; Watkins v. Defoor, 33 Ga. 494; Schofield-Burkett Const. Co. v. Rich, 16 Ga. App. 321, 85 S. E. 285. **Ill.**—Corey v. McDaniel, 42 Ill. 512; Chicago & G. v. Hunt, 5 Pick. 240. **Minn.**—Buck v. Pritchett, 16 Ill. 66. **Ind.**—Wheeler, etc. Mfg. Co. v. Worrall, 80 Ind. 297; Spieely v. True, 14 Ind. 437; Ohio & M. Ry. Co. v. McDaniel, 5 Ind. App. 108, 31 N. E. 836. **Ia.**—Schrader v. Hoover, 87 Iowa 654, 54 N. W. 463; Browne v. Hickie, 68 Iowa 330, 27 N.

as such a verdict is rendered.¹⁹ Such a verdict is, indeed, contrary to law.²⁰ Consequently, where a verdict has been rendered in opposition to uncontradicted evidence,²¹ or where there has been no proof

W. 276. **Kan.**—Bressler *v.* McVey, 82 Kan. 341, 108 Pac. 97; Prinz *v.* Moses, 76 Kan. 232, 91 Pac. 785; King *v.* Western Union Tel. Co., 81 Kan. 223, 105 Pac. 449; Wendt *v.* Diemer, 9 Kan. App. 481, 58 Pac. 1003. **Mass.**—Brightman *v.* Eddy, 97 Mass. 478; Maynard *v.* Hunt, 5 Pick. 240. **Minn.**—Buck *v.* Buck, 122 Minn. 463, 142 N. W. 729; Marek *v.* Holey, 119 Minn. 216, 137 N. W. 969; Gustafson *v.* Gustafson, 92 Minn. 139, 99 N. W. 631. **Mo.**—Foley *v.* Harrison, 233 Mo. 460, 136 S. W. 354; James *v.* Oliver, 129 Mo. App. 86, 107 S. W. 1012; Iron Mountain Bank *v.* Armstrong, 92 Mo. 265, 4 S. W. 720; Moore *v.* Missouri Pac. Ry. Co., 28 Mo. App. 622. **Mont.**—Garwood *v.* Corbett, 38 Mont. 364, 99 Pac. 958. **N. Y.**—Coughlan *v.* Elfin, 140 N. Y. Supp. 978; Kelly *v.* Frazier, 2 Civ. Proc. 322, 27 Hun 314. **N. D.**—Dinnie *v.* Johnson, 8 N. D. 153, 77 N. W. 612. **Pa.**—Sloan *v.* Philadelphia R. Co., 231 Pa. 332, 80 Atl. 366; Malson *v.* Fry, 1 Watts 433; Lodge *v.* Railroad Co., 10 Phila. 153. **R. I.**—Rounds *v.* Humes, 7 R. I. 535. **S. C.**—Everett *v.* Bennettsville & C. R. Co., 96 S. C. 299, 80 S. E. 485; Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380; Charleston *v.* Hollenback, 3 Strobb. 355; Dogan *v.* Ashby, 1 Strobb. 433. **S. D.**—Baird *v.* Vines, 18 S. D. 52, 99 N. W. 89. **Tenn.**—Dickinson *v.* Cruise, 1 Head 258. **Tex.**—Moore *v.* Anderson, 30 Tex. 224; Rowe *v.* Collier, 25 Tex. Supp. 252; Pecos & N. T. R. Co. *v.* Welshimer (Tex. Civ. App.), 170 S. W. 263; Hilliard *v.* Johnson (Tex. Civ. App.), 32 S. W. 914. **Vt.**—Averill *v.* Robinson, 70 Vt. 161, 40 Atl. 49. **Wash.**—Thomas & Co. *v.* Hillis, 64 Wash. 288, 116 Pac. 854. **W. Va.**—Wandling *v.* Straw, 25 W. Va. 692; Black *v.* Thomas, 21 W. Va. 709. **Wis.**—Cawley *v.* La Crosse City Ry. Co., 101 Wis. 145, 77 N. W. 179; Hickey *v.* Chicago, etc. R. Co., 64 Wis. 649, 26 N. W. 112. **Can.**—Gray *v.* Macallum, 2 Brit. Col. 104; Lindsay *v.* Lancashire F. Ins. Co., 34 U. C. Q. B. 440; Wilson *v.* Street, 8 N. Brunsw. 80; Mitchell *v.* Lantz, 7 Nova Scotia 518.

[a] **Oregon.**—It is provided in the constitution of Oregon that a verdict can be set aside as not being sustained

by evidence only when the court can say that there is no evidence to support it. Martini *v.* Oregon-Washington R. & Nav. Co., 73 Ore. 283, 144 Pac. 104.

19. Turnbull *v.* Rivers, 3 McCord (S. C.) 131, 15 Am. Dec. 622. See *infra*, V.

[a] **Statute Limiting Number of New Trials.**—(1) Although a statute may provide that not more than two new trials shall be granted in any action, it does not apply to a case where there is no evidence at all to sustain the verdict (East Tenn., etc. Railway Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652. See Louisville & N. R. Co. *v.* Woodson, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. ed. 1032), (2) although it would apply if the court were of the opinion that there was some evidence, but not sufficient to support it. Knoxville Iron Co. *v.* Dobson, 15 Lea (Tenn.) 409, 416.

20. See *supra*, II, F.

21. **U. S.**—Kelly *v.* Jackson *ex dem.* Morris, 6 Pet. 622, 8 L. ed. 523; Morse *v.* St. Paul F. & M. Ins. Co., 129 Fed. 233; United States *v.* Duval, Gilp. 356, 25 Fed. Cas. No. 15,015. **Ala.**—Hamilton *v.* Maxwell, 133 Ala. 233, 32 So. 13. **Colo.**—Rankin *v.* Thompson, 7 Colo. 381, 3 Pac. 719. **Ga.**—Central of Georgia Ry. Co. *v.* Mote, 120 Ga. 593, 48 S. E. 136; Alabama Great Southern R. Co. *v.* Scruggs, 119 Ga. 70, 45 S. E. 689; Fain *v.* Jones, 26 Ga. 360. **Ill.**—Higgins *v.* Lee, 16 Ill. 495. **Ind.**—Roe *v.* Cronkhite, 55 Ind. 183; Young *v.* Ulrich, 15 Ind. 326. **Ia.**—Sleeper *v.* Des Moines, 93 N. W. 585; Anderson *v.* Cahill, 65 Iowa 252, 21 N. W. 593. **La.**—Welsh *v.* Barrow, 9 Rob. 520. **Me.**—Franklin Bank *v.* Small, 26 Me. 136. **Mo.**—Roman *v.* Boston Trading Co., 87 Mo. App. 186; Wear *v.* Lee, 26 Mo. App. 99. **Mont.**—Boe *v.* Lynch, 20 Mont. 80, 49 Pac. 381. **Neb.**—Chicago, B. & Q. R. Co. *v.* Landauer, 36 Neb. 642, 54 N. W. 976. **N. Y.**—Allgro *v.* Duncan, 39 N. Y. 313 (*affirming* 24 How. Pr. 210); Cunningham *v.* Gans, 79 Hun 434, 29 N. Y. Supp. 979, 61 N. Y. St. 249; Baker *v.* Bonesteel, 2 Hilt. 397. **N. C.**—Spurlin *v.* Rutherford, 6 N. C. 360. **Pa.**—Denkla *v.* Insurance

at all of a material fact,²² a new trial will be granted.

(II.) **Not Sufficient Evidence.** — An application for a new trial on the ground that the verdict or finding is contrary to evidence, involves the question whether it was sustained by sufficient evidence,²³ and that the verdict, report, or decision is not sustained by sufficient evidence is a well recognized ground for a new trial both at common law and under the statutes.²⁴ But where the evidence supports or author-

Co., 6 Phila. 233; *Stack v. Patterson*, 6 Phila. 225. **R. I.**—*Nicholas v. Peck*, 21 R. I. 404, 43 Atl. 1038, 20 R. I. 533, 40 Atl. 418. **S. C.**—*Marshall Springs & Co. v. Smith*, 85 S. C. 196, 67 S. E. 129; *Charleston v. Hollenback*, 3 Strobb. 355; *Bradley v. Long*, 2 Strobb. 160; *Roberts v. Stagg*, 1 Nott & McC. 429. **Tenn.**—*Sweany v. Bledsoe*, 8 Humph. 612. **Tex.**—*Nading v. Denison & P. Suburban Ry. Co.*, 22 Tex. Civ. App. 173, 54 S. W. 412. **Eng.** *Bright v. Eynon*, 1 Burr. 390, 97 Eng. Reprint 365. **Can.**—*Vidal v. Donald*, 20 U. C. Q. B. 507; *Lowry v. Thompson*, 29 Ont. L. Rep. 478, 5 Ont. W. N. 240; *Robson v. Suter*, 1 Brit. Col. 375; *Hartley v. Fisher*, 6 N. Brunsw. 694; *Chaney v. Law*, 4 Newfoundl. 153.

22. **Ark.**—*Watkins v. Rogers*, 21 Ark. 298; *Holeman v. State*, 13 Ark. 105. **Cal.**—*Hawkins v. Reichert*, 28 Cal. 534; *People v. Ab Ti*, 9 Cal. 16. **Ga.**—*Lee v. State*, 71 Ga. 260; *Earp v. State*, 50 Ga. 513. **Ill.**—*Corey v. McDaniel*, 42 Ill. 512. **Kan.**—*King v. Western Union Tel. Co.*, 81 Kan. 223, 105 Pac. 449; *Prinz v. Moses*, 76 Kan. 232, 91 Pac. 785; *State v. Spidle*, 44 Kan. 439, 24 Pac. 965. **Mo.**—*Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354; *James v. Oliver*, 129 Mo. App. 86, 107 S. W. 1012. **S. C.**—*State v. Spenlove*, *Riley* 269. **Tex.**—*Gazley v. State*, 17 Tex. App. 267. **Va.**—*Dean v. Com.*, 32 Gratt. (73 Va.) 912.

23. *White v. Beal & Fletcher Grocer Co.*, 65 Ark. 278, 45 S. W. 1060.

24. **U. S.**—*Pleasant v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Southern Pac. Co. v. Hamilton*, 54 Fed. 468, 4 C. C. A. 441; *Wright v. Southern Express Co.*, 80 Fed. 85; *Gaither v. Kansas City*, etc. R. Co., 27 Fed. 544. **Alaska**—*Barnette v. Freeman*, 2 Alaska 286; *Morphy v. Ryan*, 1 Alaska 516. **Ark.** *White v. Beal*, etc. Grocer Co., 65 Ark. 278, 45 S. W. 1060. **Fla.**—*Hicks v. State*, 25 Fla. 535, 6 So. 441. **Ga.** *Jones v. State*, 112 Ga. 220, 37 S. E. 392; *Merce v. Merry*, 112 Ga. 823, 38

S. E. 40; *Moseley v. Rambo*, 106 Ga. 597, 32 S. E. 638; *Georgia R., etc. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939. **Ind.** *Louisville, etc. R. Co. v. Ader*, 110 Ind. 376, 11 N. E. 437; *Christy v. Holmes*, 57 Ind. 314. **Ia.**—*Holman v. Omaha, etc. R., etc. Co.*, 110 Iowa 495, 81 N. W. 704; *Kirk v. Litterst*, 71 Iowa 71, 32 N. W. 106. **Kan.**—*Sovereign Camp, W. O. W. v. Thiebaud*, 65 Kan. 332, 69 Pac. 348; *Chicago, R. I. & P. Ry. Co. v. Beardon*, 1 Kan. App. 114, 40 Pac. 931. **La.**—*Reed v. Corbin*, 111 La. 654, 35 So. 801; *Gill v. Reneau*, 12 La. 399. **Me.**—*Seavey v. Laughlin*, 98 Me. 517, 57 Atl. 796; *Sawyer v. Huff*, 25 Me. 464. **Mass.**—*Bridge v. Austin*, 4 Mass. 115; *Dunham v. Baxter*, 4 Mass. 79. **Minn.**—*Breen v. Minneapolis R. Transfer Co.*, 51 Minn. 4, 52 N. W. 975. **Mo.**—*Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533, 33 S. W. 64, 1150; *Kreis v. Missouri Pac. R. Co.*, 30 S. W. 310; *Reid v. Piedmont & A. L. Ins. Co.*, 58 Mo. 421. **Mont.**—*Hamilton v. Montidah Trust*, 39 Mont. 269, 102 Pac. 335. **Neb.**—*Meyer v. Midland Pac. R. Co.*, 2 Neb. 219. **N. Y.**—*Mackey v. New York Cent. R. Co.*, 27 Barb. 528; *Curtiss v. Marshall*, 8 Bosw. 22; *Azzara v. Nassau Elec. R. Co.*, 134 App. Div. 167, 118 N. Y. Supp. 830; *Oliver v. Moore*, 58 Hun 609, 12 N. Y. Supp. 343, 35 N. Y. St. 131. **Pa.**—*Howard Express Co. v. Wile*, 64 Pa. 201; *Lloyd v. Wunderlich*, 2 Del. Co. 377. **P. R.**—*Santiago v. Vazquez*, 15 Porto Rico 214. **R. I.** *Cunningham v. Warren Bros. Co.*, 94 Atl. 427. **S. C.**—*Fox v. Levingsworth*, 2 Bay 520. **Tenn.**—*Railroad v. Brown*, 26 Tenn. 559, 35 S. W. 560; *Nailing v. Nailing*, 2 Sneed 630; *Kirby v. State*, 3 Humph. 289. **Tex.**—*Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734; *Collins v. Ballow*, 72 Tex. 330, 10 S. W. 248; *Gibson v. Hill*, 23 Tex. 77. **Va.** *Norfolk & W. R. Co. v. Crowe's Admx.*, 110 Va. 798, 67 S. E. 518. **W. Va.** *Sims v. Carpenter*, *Frazier & Co.*, 68 W. Va. 223, 69 S. E. 794; *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E.

izes the verdict, a motion for a new trial on the ground of the insufficiency of the evidence is properly denied,²⁵ though on the other hand, the evidence may be insufficient although there was some evidence to support the verdict.²⁶

(III.) **Insufficient in Law or Fact.**—There has been some confusion in the phrase "insufficient evidence" as applied to new trials, some cases holding that the term applied only to evidence insufficient in law, since as to evidence sufficient in fact the jury was the exclusive judge.²⁷ On the other hand, it is held, by weight of authority, that

153; *Black's Admr. v. Thomas*, 21 W. Va. 709. **Wis.**—*Collins v. Janesville*, 117 Wis. 415, 94 N. W. 309. **Can.** *Craig v. Corcoran*, 23 U. C. Q. B. 441; *McDermott v. Bell*, 4 N. Brunsw. 363; *Jaffrey v. Toronto*, etc. R. Co., 24 U. C. C. P. 271.

[a] **Thirteenth Juror.**—With reference to the sufficiency of the evidence, a motion for a new trial is directed to the discretion of the trial judge as a thirteenth juror. *McBride v. Neal*, 214 Fed. 966, 131 C. C. A. 262.

[b] **Insufficient evidence** means a verdict for a party upon evidence insufficient to establish his right to recover, and which therefore ought not to stand. A party cannot move to set aside a verdict in his own favor, on the ground that the evidence is insufficient to sustain it. *Moore v. Wood*, 19 How. Pr. (N. Y.) 405.

[c] **Oregon Statute as to Insufficient Evidence.**—*See Ann. Codes & St. (Ore.) 1901, §688.*

[d] **"Insufficient evidence"** as used in the statute, means testimony which does not support and clearly warrant a verdict in the case. Where plaintiff, if entitled to recover at all, was clearly entitled to a larger amount than allowed by the jury, a verdict may be set aside for insufficient evidence. *Emmons v. Sheldon*, 26 Wis. 648, 649.

[e] **Verdict Based on Mere Probability.**—*Seavey v. Laughlin*, 98 Me. 517, 57 Atl. 796.

[f] **Criminal Cases.**—In criminal cases, a verdict must be sustained by evidence sufficient to establish the guilt of the accused beyond a reasonable doubt, and a new trial should be granted where a conviction is had on evidence insufficient for such a conclusion. *Brown v. State*, 125 Ga. 8, 53 S. E. 767; *Summerour v. State*, 112 Ga. 19, 37 S. E. 98; *Williams v. State*, 85 Ga. 535, 11 S. E. 859. *See Spears v.*

State, 59 Fla. 44, 51 So. 815; *Reg. v. Wilkinson*, 42 U. C. Q. B. 492.

25. **Conn.**—*Stern v. Leopold, Simons & Co.*, 77 Conn. 150, 58 Atl. 696. **Ga.** *Swords v. Robertson*, 124 Ga. 518, 52 S. E. 544; *Linder v. Rowland*, 122 Ga. 425, 50 S. E. 142; *Revis v. Roper*, 121 Ga. 428, 49 S. E. 291; *Hill v. Lundy*, 118 Ga. 93, 44 S. E. 830; *Dover & S. R. R. v. Deal*, 115 Ga. 42, 41 S. E. 256. **Ky.**—*Robertson v. Carrio*, 11 Ky. L. Rep. 441. **N. D.**—*Magnusson v. Linwell*, 9 N. D. 154, 82 N. W. 746. **S. C.** *Pooler v. Smith*, 73 S. C. 102, 52 S. E. 967; *Robert Buist Co. v. Lancaster Mercantile Co.*, 73 S. C. 48, 52 S. E. 789; *Newell v. Taylor*, 74 S. C. 8, 54 S. E. 212; *Strickland v. Capital City Mills*, 70 S. C. 211, 49 S. E. 478; *Hagen v. Anderson County*, 61 S. C. 490, 29 S. E. 712. **Va.**—*New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879. **Wash.**—*Snyder v. Parker*, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726. **W. Va.** *Parrish v. Huntington*, 57 W. Va. 286, 50 S. E. 416.

26. **Ore.**—*Serles v. Serles*, 35 Ore. 289, 57 Pac. 634. **Tenn.**—*Nashville Spoke & Handle Co. v. Thomas*, 114 Tenn. 458, 86 S. W. 379. **Wash.**—*Welver v. Advance Shingle Co.*, 34 Wash. 331, 75 Pac. 863.

27. *See infra*, this note.

[a] **Insufficiency in Law and in Fact.**—In *Stewart v. Elliott*, 2 Mackey (D. C.) 307, 315, the court said: "By a loose use of language it may be said that a verdict 'contrary to the evidence' or 'against the weight of evidence' was rendered upon 'insufficient evidence'; and, on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence. But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a twofold sufficiency, i. e.,

the term applies equally to insufficiency in point of law and to insufficiency in point of fact.²⁸

c. *Excessive or Inadequate Verdicts.*—(I.) *In General.*—That the jury returned a verdict for either an excessive or an inadequate amount, may, as a general proposition, where there is a legal measure of damages, be urged as a ground for a new trial.²⁹ Whether a new trial upon this ground should be granted or refused, rests in the sound judicial discretion of the court.³⁰ That the court, as a juror, would have given more or less is not, however, the criterion;³¹ neither is the

sufficiency in law and sufficiency in fact; that of its sufficiency *in law* the court is the exclusive judge; its sufficiency *in fact* is a question exclusively for the jury."

28. *Inland & Seaboard Coasting Co. v. Hall*, 124 U. S. 121, 8 Sup. Ct. 397, 31 L. ed. 369; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022; *Gunn v. Union R. Co.*, 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362.

[a] *Insufficient in Law.*—Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of such proof, either as to its quantity or kind, as, in the particular case, some rule of law requires as essential. "Such, for instance would be the case where a fact was attested by only one witness, when the law required two; or when the alleged agreement was proved to be verbal, when the law required it to be in writing. In such cases a verdict might be said to be against the law, because founded on insufficient evidence." *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022.

[b] *Insufficiency in Point of Fact.* Insufficiency in point of fact is evidence so slight, though competent in law, that a verdict may be plainly unjust. In this sense insufficiency of evidence would be equivalent to contrary to evidence, or against the weight of evidence. "Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion. . . . So, upon the whole evidence in the case the

testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust." *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022.

29. *Ala.*—*Hardeman v. Williams*, 157 Ala. 422, 48 So. 108. *Ga.*—*Sanders, Swann & Co. v. Allen*, 124 Ga. 684, 52 S. E. 884; *Holland v. Williams*, 3 Ga. App. 636, 60 S. E. 331. *Ill.*—*Daniel v. Allen*, 149 Ill. App. 351. *Ind.*—*Nutter v. Junction R. Co.*, 13 Ind. 479. *Ia.*—*Clark v. Iowa Cent. R. Co.*, 162 Iowa 630, 144 N. W. 332, Ann. Cas. 1916B, 457. *N. H.*—*Doody v. Boston & M. R. R.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846. *N. J.*—*Berry v. Vreeland*, 21 N. J. L. 183. *N. Y.*—*McDonald v. Walter*, 40 N. Y. 551. *Wash.*—*Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144. *Wis.*—*Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284, 151 N. W. 795.

30. *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (N. S.) 439, 5 Am. & Eng. Ann. Cas. 303; *Epstein v. Chicago G. W. R.*, 95 Minn. 516, 104 N. W. 12; *Pratt v. Pioneer Press Co.*, 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712.

[a] *It is the duty of the court in case of both excessive and inadequate damages to set aside the verdicts if the jury in rendering them either disregarded the testimony or acted from passion or prejudice.* *Paul v. Leyenberger*, 17 Ill. App. 167; *Cayford v. Wilbur*, 86 Me. 414, 29 Atl. 1117; *Leavitt v. Dow*, 105 Me. 50, 72 Atl. 735, 134 Am. St. Rep. 534, 17 Ann. Cas. 1072; *McDonald v. Walter*, 40 N. Y. 551.

31. *Phillips v. London South West-*

fact that by a slight preponderance of the evidence the verdict appears to be a little too high or too low;³² but the verdict must be unreasonable or unjust, or fail to do substantial justice.³³ In the absence of a legal measure of damages, or where the damages are unliquidated, the verdict will seldom be disturbed,³⁴ since in such cases a new trial is not ordinarily grantable merely for excessive or inadequate damages, but only where it appears probable that the verdict was the result of mistake, passion, or prejudice on the part of the jury.³⁵

ern Ry. Co., 5 Q. B. D. 78, 85. See *supra*, II, G, 5, a, (I).

32. Henderson v. Richards, 5 J. J. Marsh. (Ky.) 531.

33. Ala.—Mobile & M. Ry. Co. v. Ashcraft, 48 Ala. 15. S. C.—Cassidy v. Varni, 3 Strobbh. 358; Houston v. Gilbert, 3 Brev. 63, 5 Am. Dec. 542. Tenn.—Knickerbocker Life Ins. Co. v. Heidel, 8 Lea 488. W. Va.—Battrell v. Ohio River Ry. Co., 34 W. Va. 232, 12 S. E. 699, 11 L. R. A. 290.

See also *infra*, II, G, 5, c, (III) and (IV).

34. Ala.—Cox v. Birmingham Ry., L. & P. Co., 163 Ala. 170, 50 So. 975; Montgomery Traction Co. v. Knabe, 158 Ala. 458, 48 So. 501. Cal.—Lee v. Southern Pac. R. Co., 101 Cal. 118, 35 Pac. 572, 13 Am. Neg. Cas. 334. Fla.—Harby v. Florida East Coast Hotel Co., 59 Fla. 280, 52 So. 193. Ill.—Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Kleczewski v. Chicago City R. Co., 152 Ill. App. 481; Litchfield v. Whitenack, 78 Ill. App. 364; Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181. Ind.—Southern Indiana R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550; Board of Comrs. v. Sappenfield, 10 Ind. App. 609, 38 N. E. 358. Kan.—Saindon v. Morrell, 78 Kan. 53, 95 Pac. 1056; Missouri, K. & T. R. Co. v. Wade, 73 Kan. 359, 85 Pac. 415. Ky.—Louisville & N. R. Co. v. Setser's Admr., 149 Ky. 162, 147 S. W. 956; Louisville & N. R. Co. v. Pedigo, 129 Ky. 661, 113 S. W. 116; Merchants' I. & C. S. Co. v. Bargholt, 129 Ky. 60, 110 S. W. 364. La.—Starnes v. Pine Woods Lumb. Co., 122 La. 284, 47 So. 607. Me.—Boyd v. Bangor Ry. & Elec. Co., 111 Me. 332, 89 Atl. 139. Mass.—Lufkin v. Hitchcock, 194 Mass. 231, 80 N. E. 456. Minn.—Schmidt v. Chicago, etc. R. Co., 108 Minn. 329, 122 N. W. 9. Miss.—Yazoo, etc. R. Co. v. Williams, 87 Miss. 344, 39 So. 489. Mo.—Dowd v. Westinghouse Air Brake Co., 132 Mo. 579, 34

S. W. 493; Brown v. Union R. Co., 51 Mo. App. 192. N. H.—Lucier v. Larose, 66 N. H. 141, 20 Atl. 249. N. J. Killen v. North Jersey St. R. Co., 74 N. J. L. 286, 65 Atl. 836. Pa.—Hertzberg v. Pittsburgh Taxicab Co., 243 Pa. 540, 90 Atl. 203. Tex.—Houston & T. Cent. R. Co. v. Rutland, 45 Tex. Civ. App. 621, 101 S. W. 529. Va.—Hoffman v. Shartle, 113 Va. 262, 74 S. E. 171. W. Va.—Rodgers v. Bailey, 68 W. Va. 186, 69 S. E. 698; Trice v. Chesapeake & O. R. Co., 40 W. Va. 271, 21 S. E. 1022, 8 Am. Neg. Cas. 663. Wis.—Silber v. Larkin, 94 Wis. 9, 68 N. W. 406; Donovan v. Chicago & N. W. Ry. Co., 93 Wis. 373, 67 N. W. 721.

35. U. S.—Walker v. Smith, 1 Wash. C. C. 152, 29 Fed. Cas. No. 17,086, 4 Dall. 389, 1 L. ed. 878. Ala.—Richardson v. Birmingham C. Mfg. Co., 116 Ala. 381, 22 So. 478. Ariz.—Southern Pac. Co. v. Fitchett, 9 Ariz. 128, 80 Pac. 359. Ark.—Dunbar v. Cowger, 68 Ark. 444, 58 S. W. 951. Cal.—Ingraham v. Weidler, 139 Cal. 588, 73 Pac. 415; Russell v. Dennison, 45 Cal. 337; Aldrich v. Palmer, 24 Cal. 513. Colo.—Denver & R. G. R. Co. v. Heckman, 45 Colo. 470, 101 Pac. 976, 21 Am. Neg. Rep. 481. Conn.—Haight v. Hoyt, 50 Conn. 583; Waters v. Bristol, 26 Conn. 398. Ga.—Anglin v. Columbus, 128 Ga. 469, 57 S. E. 780; Nuckolls v. Anderson, 120 Ga. 677, 48 S. E. 191; Hamer v. White, 110 Ga. 300, 34 S. E. 1001; Georgia S. & F. R. Co. v. Jones, 90 Ga. 292, 15 S. E. 824. Ill.—Loftus v. Illinois Midland Coal Co., 181 Ill. App. 197; Frick v. Aurora, etc. R. Co., 154 Ill. App. 277; Hackett v. Pratt, 52 Ill. App. 346. Ind.—Harris v. Rupel, 14 Ind. 209; Paxson v. Dean, 31 Ind. App. 46, 67 N. E. 112; Sturgeon v. Sturgeon, 4 Ind. App. 232, 30 N. E. 805. Ia.—Tathwell v. Cedar Rapids, 122 Iowa 50, 97 N. W. 96. Kan.—Bressler v. McVey, 82 Kan. 341, 108 Pac. 97; Miller v. Miller, 81 Kan. 397, 105 Pac. 544; Atchison v. Plunkett, 61 Kan,

It is not ground for a new trial that the jury failed to assess merely nominal damages where the right of recovery was purely technical,³⁶ and a failure on the jury's part to allow interest may not be sufficient ground.³⁷ The assessing of damages, however, not warranted

- 297, 59 Pac. 646; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1086. **Ky.** *Palmer T. Co. v. Long*, 140 Ky. 111, 130 S. W. 961; *Baries v. Louisville E. L. Co.*, 118 Ky. 830, 80 S. W. 814, 85 S. W. 1186; *North v. Cates*, 2 Bibb 591. **Me.**—*Boyd v. Bangor Ry. & Elec. Co.*, 111 Me. 332, 89 Atl. 139; *Leavitt v. Dow*, 105 Me. 50, 72 Atl. 735, 134 Am. St. Rep. 534, 17 Ann. Cas. 1072. **Mass.**—*Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. **Minn.**—*Ott v. Tri-State Tel., etc. Co.*, 127 Minn. 373, 149 N. W. 544; *Alton v. Chicago, etc. R. Co.*, 107 Minn. 457, 120 N. W. 749; *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (N. S.) 439, 5 Am. & Eng. Ann. Cas. 303; *Shartle v. Minneapolis*, 17 Minn. 308. **Mo.**—*McCarty v. St. Louis T. Co.*, 192 Mo. 396, 91 S. W. 132; *Loevenhart v. Lindell R. Co.*, 190 Mo. 342, 88 S. W. 757; *Chouquette v. Southern Elec. R. Co.*, 152 Mo. 257, 53 S. W. 897; *Lee v. Publishers, George Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107; *Richardson v. Missouri F. B. Co.*, 122 Mo. App. 529, 99 S. W. 778. **Mont.**—*De Celles v. Casey*, 48 Mont. 568, 139 Pac. 586. **Nev.**—*Solen v. Virginia, etc. R. Co.*, 13 Nev. 106, 12 Am. Neg. Cas. 240; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Dec. 757. **N. J.**—*Barry v. Pennsylvania R. Co.*, 65 N. J. L. 407, 47 Atl. 464; *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. 752; *Miller v. Delaware, L. & W. R. Co.*, 58 N. J. L. 428, 33 Atl. 950. **N. Y.**—*Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253; *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502, 73 N. Y. St. 94; *Katz v. Brooklyn Heights R. Co.*, 35 Misc. 302, 71 N. Y. Supp. 744. **N. C.** *Isley v. Virginia B. & I. Co.*, 143 N. C. 51, 59 S. E. 1132; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33. **N. D.**—*Waterman v. Minneapolis, St. P., etc. R. Co.*, 26 N. D. 540, 145 N. W. 19. **Ohio.**—*Toledo R. & L. Co. v. Mason*, 81 Ohio St. 463, 91 N. E. 292, 28 L. R. A. (N. S.) 130; *Simpson v. Pitman*, 13 Ohio 365; *Henning v. Bartz*, 25 Ohio C. C. 15. **Ore.**—*Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637. **P. R.**—*Munich v. Valdes*, 3 Porto Rico Fed. 251. **R. I.**—*McNeil v. Lyons*, 20 R. I. 672, 40 Atl. 831. **S. C.**—*Nettles v. Harrison*, 2 McCord 230. **Tenn.**—*Goodall v. Thurman*, 1 Head 209; *Duncan v. Finnyhorn*, Sneed 262; *Boyers v. Pratt*, 1 Humph. 90. **Tex.**—*International, etc. R. Co. v. Telephone & T. Co.*, 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416; *Nading v. Denison & P. Ry. Co.*, 22 Tex. Civ. App. 173, 54 S. W. 412. **Vt.**—*Barrette v. Carr*, 75 Vt. 425, 56 Atl. 93. **Va.**—*Nichols v. Camden I. R. Co.*, 62 W. Va. 409, 59 S. E. 968; *Farish & Co. v. Reigle*, 11 Gratt. (52 Va.) 697, 62 Am. Dec. 666, 10 Am. Neg. Cas. 344. **Wash.**—*Wait v. Robertson M. Co.*, 37 Wash. 282, 79 Pac. 926. **Wis.**—*Whitney v. Milwaukee*, 65 Wis. 409, 27 N. W. 39; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Flath v. Braunsdorff*, 40 Wis. 107. **Wyo.** *Union Pac. R. Co. v. Hause*, 1 Wyo. 27, 10 Am. Neg. Cas. 566. **Eng.**—*Armstrong v. Haley*, 4 Q. B. 917, 45 E. C. L. 914, D. & M. 139, 12 L. J. Q. B. 323, 7 Jur. 671, 114 Eng. Reprint 1142. **36. Conn.**—*Michael v. Curtis*, 60 Conn. 363, 22 Atl. 949. **Ill.**—*People v. Petrie*, 94 Ill. App. 652 (*affirmed*), 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268; *Comstock v. Brosseau*, 65 Ill. 39. **Ind.**—*Hudspeth v. Allen*, 26 Ind. 165; *Jennings v. Loring*, 5 Ind. 250. **Ia.**—*Watson v. Van Meter*, 43 Iowa 76. **Mont.**—*Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591. **Ore.**—*Rainier v. Masters*, 79 Ore. 534, 154 Pac. 426, 155 Pac. 1197, L. R. A. 1916E, 1175. **Can.**—*Milligan v. Jamieson*, 4 Ont. L. Rep. 650; *Whittaker v. Goggin*, 39 N. Brunsw. 403; *Murphy v. Dundas*, 38 N. Brunsw. 563. **37. U. S.**—*Walker v. Smith*, 1 Wash. C. C. 202, 29 Fed. Cas. No. 17,087. **Del.** *Prettyman v. Waples' Exr.*, 4 Har. 299. **Mass.**—*Hagar v. Weston*, 7 Mass. 110. **S. C.**—*Westbrook v. McMillan*, 1 Hill 317, 26 Am. Dec. 187. [a] Where a judgment erroneously allowed interest on a demand note from its date, a new trial was not neces-

by the declaration or complaint, is a proper cause for awarding a new trial.³⁸

(II.) **Error in Assessment.** — In some states, the statutes provide that a new trial may be granted for "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property."³⁹ It is obvious that a provision of this sort applies only to cases where there are definite rules of law governing the measure of damages. Personal injury cases are not included. Where a legal measure of damages applies, errors in verdicts, whether too large or too small, would fall under this statutory ground.⁴⁰

(III.) **Excessive Damages.** — (A.) **IN GENERAL.** — Where damages are manifestly excessive or unreasonable, a new trial will be awarded,⁴¹

sary since the error could be corrected by the court. *Reynolds v. Powers* (Ky.), 29 S. W. 299; *Cooke v. Clark's Committee*, 21 Ky. L. Rep. 316, 51 S. W. 316; *Dayton v. Gardner*, 19 Ky. L. Rep. 302, 40 S. W. 779.

38. **Conn.**—*McCann v. McGuire*, 83 Conn. 445, 76 Atl. 1003. **Ind.**—*Hall v. Hall*, 42 Ind. 585. **Ky.**—*Stewart v. Tevis' Exr.*, 7 Mon. 109. **N. J.**—*Butler v. Hoboken Printing & Pub. Co.*, 73 N. J. L. 45, 62 Atl. 272. **Tex.**—*Ft. Worth, etc. R. Co. v. Jones*, 38 Tex. Civ. App. 129, 85 S. W. 37, 17 Am Neg. Rep. 668.

39. See the statutes, and *infra*, II, G, 5, c, (III) and (IV).

40. *Ecton v. Harlan*, 20 Kan. 452. See *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 23 N. E. 1138.

[a] **Indiana Statute.**—Under the Indiana statute providing for new trials on various grounds, one being "error in the assessment of the amount of recovery," and another being "that the damages are excessive," it is held that the former ground, namely, "error in assessment," applies to actions in contract, while the latter ground, namely, that excessive damages were awarded, is not applicable in any action, save for tort. *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 182, 23 N. E. 1138, 1140; *Smith v. State*, 117 Ind. 167, 173, 19 N. E. 744; *McKinney v. State*, 117 Ind. 26, 30, 19 N. E. 613, 615; *McCormick Harvesting Mach. Co. v. Gray*, 114 Ind. 340, 345, 16 N. E. 787; *Lake Erie & W. R. Co. v. Acres*, 108 Ind. 548, 550, 9 N. E. 453, 454.

41. **U. S.**—*Fox v. Chicago, etc. R.*

Co., 207 Fed. 886; *Carberry v. Acme Transit Co.*, 203 Fed. 780; *Vreeland v. Michigan R. Co.*, 189 Fed. 495; *Stockton v. Pennsylvania R. Co.*, 182 Fed. 282; *Usher v. Scranton R. Co.*, 132 Fed. 405; *United States v. Taffe*, 78 Fed. 524. **Ala.**—*Montgomery L. & T. Co. v. King*, 187 Ala. 619, 65 So. 993, Ann. Cas. 1916B, 449, L. R. A. 1915F, 491; *Cox v. Birmingham Ry., L. & P. Co.*, 163 Ala. 170, 50 So. 975; *Hamilton v. Maxwell*, 133 Ala. 233, 32 So. 13; *Richardson v. Birmingham Cotton Mfg. Co.*, 116 Ala. 381, 22 So. 478; *Central of Georgia R. Co. v. Crane*, 12 Ala. App. 662, 66 So. 1010. **Ark.**—*Bright v. Bostik*, 27 Ark. 55; *Peterson v. Gresham*, 25 Ark. 380; *Ayliff v. Hardy's Exrs.*, 25 Ark. 49; *Walworth v. Pool*, 9 Ark. 394. **Cal.**—*Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *George v. Law*, 1 Cal. 363; *Payne v. Pacific Mail Steamship Co.*, 1 Cal. 33. **Colo.**—*Black v. Drake*, 2 Colo. 230. **Conn.**—*Knight v. Continental A. Mfg. Co.*, 82 Conn. 291, 73 Atl. 751; *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160. **D. C.**—*Washington Fifth Baptist Church v. Baltimore, etc. R. Co.*, 5 Mackey 269. **Fla.**—*Clark v. Pope*, 29 Fla. 238, 10 So. 586. **Ga.**—*Smith v. Maddox-Rucker Banking Co.*, 135 Ga. 151, 68 S. E. 1031; *Hamer v. White*, 110 Ga. 300, 34 S. E. 1001; *Levens v. Smith*, 102 Ga. 480, 31 S. E. 104; *Baker v. Moor*, 84 Ga. 186, 10 S. E. 737; *Southern R. Co. v. Wright*, 6 Ga. App. 172, 64 S. E. 703; *Wilson v. Tuttle*, 6 Ga. App. 83, 64 S. E. 290. **Haw.**—*Whittit v. Miller*, 1 Hawaii 139. **Ill.**—*Schwabacher v. Wells*, 49 Ill. 257; *Chicago & N. W. Ry. Co. v. Peacock*,

but, as a general rule, where there is no fixed standard of measuring

48 Ill. 253; *Hallberg v. Brosseau*, 64 Ill. App. 520. **Ind.**—*Hill v. Newman*, 47 Ind. 187; *Klitzke v. Smith*, 59 Ind. App. 461, 109 N. E. 412; *Strange v. Huntington Light & Fuel Co.*, 42 Ind. App. 14, 84 N. E. 355, 992; *Waechter v. Walters*, 41 Ind. App. 408, 84 N. E. 22. **Ia.**—*Kelly v. Cummins*, 143 Iowa 148, 121 N. W. 540; *Keniston v. Todd*, 139 Iowa 287, 117 N. W. 674; *Tathwell v. Cedar Rapids*, 122 Iowa 50, 97 N. W. 96; *La Salle v. Tift*, 52 Iowa 164, 2 N. W. 1031; *Russ v. The War Eagle*, 14 Iowa 363. **Kan.**—*Atehison, T. & S. F. Ry. Co. v. Richards*, 58 Kan. 344, 49 Pac. 436; *Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352. **Ky.**—*Taylor v. Howser*, 12 Bush 465; *Nolan's Admr. v. Standard S. Mfg. Co.*, 33 Ky. L. Rep. 745, 111 S. W. 290; *Mobile, etc. R. Co. v. Reeves*, 25 Ky. L. Rep. 2236, 80 S. W. 471. **La.**—*Reems v. New Orleans, etc. R. Co.*, 126 La. 511, 52 So. 681; *Driggs v. Morgan*, 10 Rob. 119. **Mass.**—*Tully v. Fitchburg R. Co.*, 134 Mass. 499; *Harding v. Medway*, 10 Mete. 465; *Lambert v. Craig*, 12 Pick. 199. **Minn.**—*Ott v. Tri-State Tel., etc. Co.*, 127 Minn. 373, 149 N. W. 544; *Halness v. Anderson*, 110 Minn. 204, 124 N. W. 830; *Barrett v. Minneapolis, etc. R. Co.*, 106 Minn. 51, 117 N. W. 1047, 130 Am. St. Rep. 585; *Marsh v. Minneapolis Brewing Co.*, 92 Minn. 182, 99 N. W. 630. **Miss.**—*Harris, Wright & Co. v. Halliday*, 4 How. 338; *Vicksburg, etc. R. Co. v. Lawrence*, 78 Miss. 86, 28 So. 826. **Mo.**—*Morrell v. Lawrence*, 203 Mo. 363, 101 S. W. 571; *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257, 53 S. W. 897; *Wells v. Andrews*, 133 Mo. 663, 34 S. W. 865; *Gentry v. Wabash R. Co.*, 172 Mo. App. 638, 156 S. W. 27. **Neb.**—*Warner v. Sohn*, 85 Neb. 571, 123 N. W. 1054; *Lenzen v. Miller*, 51 Neb. 855, 71 N. W. 715. **N. J.**—*Hoppock v. Easton Transit Co.*, 77 N. J. L. 342, 72 Atl. 453; *Graham v. Consolidated Traction Co.*, 65 N. J. L. 539, 47 Atl. 453; *Hollister v. Wood (N. J. L.)*, 43 Atl. 653; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Ellsworth v. Central R. Co.*, 34 N. J. L. 93. **N. Y.**—*Houghkirk v. Delaware, etc. Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Abrashkov v. Ryan*, 130 App. Div. 429, 114 N. Y. Supp. 973; *Jones v. New York Cent. & H. R. R. Co.*, 144 App. Div. 55, 128 N. Y. Supp. 741; *Salmon v. Blasier Mfg. Co.*, 123 App. Div. 171, 108 N. Y. Supp. 448; *Von Au v. Magenheimer*, 115 App. Div. 84, 100 N. Y. Supp. 659; *Ross v. Metropolitan St. R. Co.*, 104 App. Div. 378, 93 N. Y. Supp. 679; *Murphy v. Weidmann Coorporage*, 1 App. Div. 283, 37 N. Y. Supp. 151, 72 N. Y. St. 486. **N. C.**—*Billings v. Charlotte Observer*, 150 N. C. 540, 64 S. E. 435; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33. **Ohio.**—*Bailey v. Cincinnati*, 1 Handy 438, 12 Ohio Dec. 225. **Okla.**—*Fitch v. Green*, 39 Okla. 18, 134 Pac. 34. **Ore.**—*Sigel v. Portland Ry., L. & P. Co.*, 67 Ore. 285, 135 Pac. 866. **Pa.**—*Hollinger v. York Rys. Co.*, 225 Pa. 419, 74 Atl. 344; *Vallo v. United States Express Co.*, 147 Pa. 404, 23 Atl. 594, 30 Am. St. Rep. 741, 14 L. R. A. 743; *Kuhn v. North, 10 Serg. & R.* 399; *Dubs v. Hanover, etc. Water Co.*, 53 Pa. Super. 470. **R. I.**—*Hickey v. Booth*, 29 R. I. 466, 72 Atl. 529, 132 Am. St. Rep. 832. **S. C.**—*Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848; *Wood v. Pacolet Mfg. Co.*, 80 S. C. 47, 61 S. E. 95; *Dobson v. Postal Tel. Cable Co.*, 79 S. C. 429, 60 S. E. 948; *Bodie v. Charleston, etc. R. Co.*, 66 S. C. 302, 44 S. E. 943; *Stuckey v. Atlantic Coast Line R. Co.*, 57 S. C. 395, 35 S. E. 550; *Davis v. Ruff, Cheves* 17, 34 Am. Dec. 584. **Tenn.**—*Knickerbocker L. Ins. Co. v. Heidel*, 8 Lea 488; *Thompson v. French*, 10 Yerg. 452. **Tex.**—*Nunnally v. Taliaferro*, 82 Tex. 286, 18 S. W. 149; *Texas Cent. R. Co. v. Ascue*, 4 S. W. 13; *Western Union Tel. Co. v. Goodwin (Tex. Civ. App.)*, 173 S. W. 1164; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416; *Nading v. Denison & P. R. Co.*, 22 Tex. Civ. App. 173, 54 S. W. 412. **Vt.**—*Barrette v. Carr*, 75 Vt. 425, 56 Atl. 93. **Va.**—*McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930; *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922. **Wash.**—*Field v. Spokane, P. & S. R. Co.*, 74 Wash. 356, 133 Pac. 611; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *Kohler v. Fairhaven, etc. R. Co.*, 8 Wash. 452, 36 Pac. 253, 681. **W. Va.**—*Hall v. Philadelphia Co.*, 74 W. Va. 172,

damages, it is only when the verdict is grossly excessive,⁴² or so disproportionate as to show prejudice, misapprehension, passion, or some other improper, or corrupt consideration, that the court will interfere with the jury's discretion.⁴³ Such verdicts are, in reality, ver-

81 S. E. 727; *First Nat. Bank v. Bank of Mannington*, 76 W. Va. 356, 85 S. E. 541; *Rodgers v. Bailey*, 68 W. Va. 186, 69 S. E. 698. **Eng.**—*Johnston v. Great Western Ry.* (1904), 2 K. B. 250; *Praed v. Graham*, 24 Q. B. Div. 53; *Watt v. Watt*, App. Cas. (1905) 115; *Wood v. Gunston*, Style 466, 82 Eng. Reprint 867. **Can.**—*Canadian Pac. R. Co. v. Lachance*, 42 Can. Sup. Ct. 205; *Hope v. Davidson*, 33 U. C. Q. B. 550; *Stevens v. Queen Ins. Co.*, 32 N. Bruns. 387; *Crandall v. Crandall*, 30 U. C. C. P. 497; *White v. Victoria Lumber, etc. Co.*, 14 Brit. Col. 367, 17 Ann. Cas. 1214; *Farquharson v. British, etc. R. Co.*, 15 Brit. Col. 280.

See also *supra*, II, G, 5, c, (I).

[a] **In Any Case.**—(1) Upon the ground of excessive damages the court may grant a new trial in any case *Ducker v. Wood*, 1 T. R. 277, 99 Eng. Reprint 1092. (2) There is no species of action in which the court will not grant a new trial for excessive damages, if the circumstances require it. *Hewlett v. Cruchley*, 5 Taunt. 277, 1 E. C. L. 149, 128 Eng. Reprint 696.

Remittitur.—As to the discretion of the court to refuse to grant a new trial providing the prevailing party remits a part of an excessive verdict, see *infra*, III, G, 5. As to remission of damages generally, see the title "**Remission of Damages.**"

42. **U. S.**—*Peltomaa v. Katahdin Pulp, etc. Co.*, 149 Fed. 282 (*affirmed* in 156 Fed. 342, 84 C. C. A. 238); *Edwards v. Southern Ry. Co.*, 102 Fed. 720; *Brown v. Memphis, etc. R. Co.*, 7 Fed. 51. **Ga.**—*Dye v. Denham*, 54 Ga. 224; *Broach v. King*, 23 Ga. 500. **Ill.**—*Hinchman v. Whetstone*, 23 Ill. 185. **Ind.**—*Guard v. Risk*, 11 Ind. 156. **Ky.**—*Vanzant v. Jones*, 3 Dana 464; *Respass v. Farmer*, 2 A. K. Marsh. 365; *Webber v. Kenny*, 1 A. K. Marsh. 345. **Mass.**—*Bodwell v. Osgood*, 3 Pick. 379, 15 Am. Dec. 228. **Minn.**—*Blume v. Scheer*, 83 Minn. 409, 86 N. W. 466. **N. J.**—*Campbell v. Delaware & A. Tel. & T. Co.*, 70 N. J. L. 195, 56 Atl. 303; *Deacon v. Allen*, 4 N. J. L. 338. **N. Y.**—*Kendall v. Stone*, 2 Sandf. 269; *Tisdale v. Delaware, etc. Canal Co.*, 42

Hun 654, 4 N. Y. St. 812; *Oehlhof v. Solomon*, 32 Misc. 773, 66 N. Y. Supp. 484. **Pa.**—*Sommer v. Wilt*, 4 Serg. & R. 19; *Kenderdine v. Phelin*, 1 Phila. 343; *Carpenter v. Lancaster*, 22 Lanc. L. Rev. 265, *affirmed* in 212 Pa. 581, 61 Atl. 1113. **Tex.**—*Texas & G. R. Co. v. Hall*, 58 Tex. Civ. App. 598, 125 S. W. 71. **Eng.**—*Edgell v. Francis*, 1 M. & G. 222, 30 E. C. L. 729, 1 Scott N. R. 118, 9 L. J. C. P. 233, 4 Jur. 366, 133 Eng. Reprint 314; *Praed v. Graham*, 24 Q. B. Div. 53, 59 L. J. Q. B. 230, 38 Wkly. Rep. 103; *Gilbert v. Burtenshaw*, 1 Cowp. 230, Lofft. 771, 98 Eng. Reprint 911, 1059. **Can.**—*Wentworth v. Hallett*, 4 N. Bruns. 560; *Sornberger v. Canadian Pac. R. Co.*, 24 Ont. App. 263; *Johnson v. Port Dover Harbour Co.*, 17 U. C. Q. B. 151.

[a] **Excessive Damages Through Misapprehension of Permanency of Injuries.**—In an action for personal damages for personal injuries growing out of a trolley accident, the defendant sought a new trial on the ground of excessive damages. If the disability resulting from the damages was liable to be permanent the damages would not be regarded as so excessive as to warrant an interference with the verdict. But it appearing that the trial was brought on so soon after a surgical operation on the patient that a sufficient time had not elapsed to enable the physicians to determine whether the operation would result in her complete or partial recovery—a result which they regarded however, as highly probable—it was held that, in the exercise of its sound discretion it became the duty of the reviewing court to set aside the verdict and grant a new trial, since it was a case where by reason of mistake or surprise at the trial justice had not been done by the verdict. *Searles v. Elizabeth, P. & C. J. Ry. Co.*, 70 N. J. L. 388, 57 Atl. 134.

43. **U. S.**—*Fox v. Chicago G. W. R. Co.*, 207 Fed. 886; *Carberry v. Acme Transit Co.*, 203 Fed. 780; *Stockton v. Pennsylvania R. Co.*, 182 Fed. 282; *Felt v. Puget Sound Electric Ry.*, 175 Fed.

dicts against the evidence.⁴⁴ Moreover, in a number of states, it is expressly provided by statute that a new trial will be granted "for excessive damages appearing to have been given under the influence of passion or prejudice."⁴⁵ That the verdict is greater than the court, if acting as a juror, would have given is not sufficient ground for setting it aside,⁴⁶ and to warrant a conclusion that the damages are the fruit of passion and prejudice, the award must be, according to various judicial expressions, shocking to the sense of justice,⁴⁷

477; *Burch v. Southern Pac. Co.*, 145 Fed. 443. **Ark.**—*Walworth v. Pool*, 9 Ark. 394. **Cal.**—*Kinsey v. Wallace*, 36 Cal. 462. **Colo.**—*Tunnel Min. & L. Co. v. Cooper*, 50 Colo. 390, 115 Pac. 901, Ann. Cas. 1912C, 504, 39 L. R. A. (N. S.) 1064. **Ga.**—*Lang v. Hopkins*, 10 Ga. 37. **Ind.**—*Pittsburg, C. C. & St. Ry. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033. **Ia.**—*Chapman v. Pfarr*, 145 Iowa 196, 123 N. W. 992. **Kan.**—*Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1086; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120, 26 Pac. 403. **Ky.**—*Benge's Admr. v. Fouts*, 163 Ky. 796, 174 S. W. 510; *Snyder v. Louisville R. Co.*, 150 Ky. 816, 150 S. W. 986; *Louisville, etc. R. Co. v. Fox*, 11 Bush 495. **Mass.**—*Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189. **Minn.**—*Landro v. Great Northern R. Co.*, 114 Minn. 162, 130 N. W. 553; *Ewing v. Stickney*, 107 Minn. 217, 119 N. W. 802. **Mo.**—*Chlanda v. St. Louis Transit Co.*, 213 Mo. 244, 112 S. W. 249; *Rigby v. St. Louis Transit Co.*, 153 Mo. App. 330, 133 S. W. 110; *Matthews v. Missouri Pac. Ry. Co.*, 26 Mo. App. 75. **Mont.**—*Chenoweth v. Great Northern R. Co.*, 50 Mont. 481, 148 Pac. 330; *De Celles v. Casey*, 48 Mont. 568, 139 Pac. 586. **N. H.**—*Belknap v. Boston & M. R. R.*, 49 N. H. 358. **N. J.**—*Quinlan v. Welsh*, 75 N. J. L. 225, 66 Atl. 950; *Barry v. Pennsylvania R. Co.*, 65 N. J. L. 407, 47 Atl. 464; *Reuck v. McGregor*, 32 N. J. L. 70. **N. Y.**—*Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Collins v. Albany & S. R. Co.*, 12 Barb. 492. **N. D.**—*Carpenter v. Dickey*, 26 N. D. 176, 143 N. W. 964. **Tenn.**—*Massadillo v. Nashville & K. R. Co.*, 89 Tenn. 661, 15 S. W. 445. **Tex.**—*Thomas v. Womack*, 13 Tex. 580. **Wis.**—*Gillen v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 91 Wis. 663, 65 N. W. 373; *Murray v. Buell*, 74 Wis. 14, 41 N. W. 1010; *Goodno v. Oshkosh*, 28 Wis. 300. **Can.**—*Milloy v. Wellington*, 4

Ont. W. R. 82; *Key v. Thomson*, 12 N. Brunsw. 295; *Huntsman v. Great Western R. Co.*, 20 U. C. Q. B. 24.

44. **U. S.**—*Mengis v. Lebanon Mfg. Co.*, 10 Fed. 665; *Wilkinson v. Greely*, 1 Curt. 63, 29 Fed. Cas. No. 17,671; *Wiggin v. Coffin*, 3 Story 1, 29 Fed. Cas. No. 17,624; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451, 1 Fed. Cas. No. 262. **Ga.**—*Dobbins v. Dupree*, 39 Ga. 394; *Perkins v. Attaway*, 14 Ga. 27. **Me.**—*Shepherd v. Inhabitants of Camden*, 82 Me. 535, 20 Atl. 91.

45. See the statutes.

[a] The terms of the statute are controlling, and a verdict will not be set aside merely because it is, perhaps, excessive, in the absence of a showing that it is so grossly excessive as to indicate that it was given under the influence of passion or prejudice. *Louisville & I. R. Co. v. Speckman*, 169 Ky. 385, 183 S. W. 915. See also *Denver & R. G. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. 976, 21 Am. Neg. Rep. 481; *Chicago, R. I. & P. Ry. Co. v. Frazier*, 66 Kan. 422, 71 Pac. 831.

[b] In Minnesota, it is only cases in which the damages cannot be computed by mathematical computation, are not susceptible to proof by opinion evidence, and are within the discretion of the jury, that come within such a provision. Other cases, whether sounding in tort or contract come under the section of the statute providing for new trial where the verdict is not justified by the evidence or is contrary to law. *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (N. S.) 439, 5 Am. & Eng. Ann. Cas. 303.

46. *Chesapeake & O. Ry. Co. v. Witte*, 169 Ky. 568, 184 S. W. 1128; *Phillips v. London & South Western Ry. Co.*, 5 Q. B. Div. (Eng.) 78, 85. See *supra*, II, G, 5, c, (I).

47. **U. S.**—*Smith v. Pittsburg, etc. R. Co.*, 90 Fed. 783. **D. C.**—*Washing-*

flagrantly excessive,⁴⁸ grossly unjust,⁴⁹ or extravagant and outrageous under the circumstances of the case.⁵⁰

(B.) PUNITIVE DAMAGES. — Where exemplary, or punitive, damages are properly claimed, a motion for a new trial on account of an excessive verdict is not often available,⁵¹ but a verdict for excessive punitive damages may be set aside where such verdict is manifestly against the weight of the evidence,⁵² or where the court is satisfied the jury abused its discretion,⁵³ or when influenced by passion or prejudice.⁵⁴

(C.) ACTIONS ON CONTRACT. — In contract actions there are fixed standards of damages, and an excessive verdict in such actions may be made the ground for a new trial where it clearly appears that the verdict is greater than the evidence warrants.⁵⁵

ton Fifth Baptist Church *v.* Baltimore, etc. R. Co., 5 Mackey 269. **Kan.**—Union Pac. Ry. Co. *v.* Sternbergh, 54 Kan. 410, 414, 38 Pac. 486. **Minn.**—Blume *v.* Scheer, 83 Minn. 409, 86 N. W. 446; Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87. **Mo.** Brown *v.* Globe Printing Co., 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627. **N. Y.**—Cook *v.* Hill, 3 Sandf. 341. **R. I.**—McGowan *v.* Interstate Consol. St. R. Co., 20 R. I. 264, 38 Atl. 497.

48. **Ill.**—Hinchman *v.* Whetstone, 23 Ill. 185. **Ky.**—Vanzant *v.* Jones, 3 Dana 464; Respass *v.* Parmer, 2 A. K. Marsh. 365; Worford *v.* Isbel, 1 Bibb 247, 4 Am. Dec. 633. **N. J.**—Deacon *v.* Allen, 4 N. J. L. 338; Vunck *v.* Hull, 3 N. J. L. 814. **N. Y.**—Kendall *v.* Stone, 2 Sandf. 269. **Pa.**—Kenderine *v.* Phelin, 1 Phila. 343, 9 Leg. Int. 54.

49. Peterson *v.* Gresham, 25 Ark. 380.

50. Tisdale *v.* Delaware & H. Canal Co., 42 Hun 654, 4 N. Y. St. 812; Pleydell *v.* Lord Dorechester, 7 T. R. 529, 101 Eng. Reprint 1115; Sharp *v.* Brice, 2 W. Bl. 942, 96 Eng. Reprint 557.

[a] No Nice Balancing.—Damages in such cases ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous and indicate passion or partiality in the jury. Tidd's Pr., vol. II, p. 909.

[b] Flagrantly Outrageous.—Excessive damages, sufficient to authorize a new trial, are those which "are so enormous as to show that the jury were under some improper influence, or were led astray by the violence or prejudice of passion. It is not enough that the judge may think he would not

have given so much if he had been one of the jury. He ought to see clearly that the damages are flagrantly outrageous and that the verdict *cannot* be just, before he will, on that ground, grant a new trial; otherwise, the verdict of the jury must, in all cases, depend on the opinion of the judge and the constitutional trial by jury will be prostrated." Taylor *v.* Giger, Hard. (Ky.) 586, 587.

51. **Ala.**—Cox *v.* Birmingham Ry., L. & P. Co., 163 Ala. 170, 50 So. 975. **Conn.**—Kornblau *v.* McDermant, 90 Conn. 624, 98 Atl. 587. **Ill.**—Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43. **Miss.**—Yazoo, etc. R. Co. *v.* Williams, 87 Miss. 344, 39 So. 489.

52. **Ala.**—Mobile & M. Ry. Co. *v.* Ashcraft, 48 Ala. 15. **Mo.**—State *ex rel.* Atchison, etc. R. Co. *v.* Ellison, 268 Mo. 225, 186 S. W. 1075. **Tex.**—Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. 315.

53. Schneider *v.* Hosier, 21 Ohio St. 98. See Pittsburg, Ft. W. & C. Ry. Co. *v.* Slusser, 19 Ohio St. 157.

[a] Where it is clear that the evidence presented no cause or justification for the awarding of such damages, and it is obvious that the jury have included them in their verdict, it is the duty of the court to award a new trial. Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

54. **N. J.**—Allen *v.* Craig, 13 N. J. L. 294. **Tex.**—Barnette *v.* Hicks, 6 Tex. 352. **Eng.**—Reeves *v.* Penrose, L. R. 26 Ir. 141. **Can.**—Lamontagne *v.* Quebec Ry. L. & P. Co., 50 Can. Sup. Ct. 423, reversing 23 Queb. L. Rep. (K. B.) 212.

55. **Ala.**—Prince *v.* Bissinger, 101 Ala. 358, 13 So. 495. **Ark.**—Speiser *v.*

(D.) ACTIONS IN TORT.—(1.) *In General*.—Although there is no fixed standard for determining damages in many tort actions, the courts will grant new trials in such actions where it appears that the amount of the verdict is so unreasonable that it could have been rendered only through prejudice or corruption.⁵⁶

(2.) *Personal Injuries*.—In personal injury cases, the amount of damages does not depend upon computation, and, as a rule, the amount to be recovered in such cases rests largely in the discretion of the jury.⁵⁷ Yet, if in such actions it appears that verdicts are rendered

Cook, 21 S. W. 36; Walworth v. Finnegan, 33 Ark. 751. **Ga.**—Rockdale Paper Mills v. Stevens, 65 Ga. 350; Killen v. Sistrunk, 7 Ga. 283. **Ill.** Hob v. O'Donnell, 147 Ill. App. 379. **Ind.**—Baker v. Anderson Tool Co., 45 Ind. App. 619, 91 N. E. 514. But see American Quarries Co. v. Lay, 37 Ind. App. 386, 73 N. E. 608. **Ky.**—Williams v. McKee's Exrs., 5 J. J. Marsh. 288; White v. Green, 3 Mon. 155. **Me.** Fogg v. Stinson, 8 Atl. 459. **Minn.** First Nat. Bank v. St. Cloud, 73 Minn. 219, 75 N. W. 1054. See Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (N. S.) 439, 5 Am. & Eng. Ann. Cas. 303. **Miss.**—Hariston v. Sale, 6 Smed. & M. 634; Ingraham v. Russell, 3 How. 304. **N. J.**—Dodd v. Pierson, 11 N. J. L. 284. **N. Y.**—Robinson v. Fuller, 1 N. Y. St. 786. **Tex.**—Houston v. Morrison, 10 Tex. 1. **Va.**—Rowland Lumber Co. v. Ross, 100 Va. 275, 40 S. E. 922. **W. Va.**—Morgan v. King, 28 W. Va. 1, 57 Am. Rep. 633. **Eng.**—Pleydell v. Dorchester, 7 T. R. 529, 101 Eng. Reprint 1115. **Can.**—Guildford v. Anglo-French Steamship Co., 9 Can. Sup. Ct. 303; Smith v. Lunt, 15 N. Brunsw. 64; Archbold v. Merchants' Mar. Ins. Co., 16 Nova Scotia 98; Chaplin v. Provincial Ins. Co., 23 U. C. C. P. 278.

[a] **Separate Statutes for Tort and Contract Cases.**—Under separate statutes allowing new trials for excessive damages, the one in contract actions, the other in actions of tort, an application for a new trial in a contract action on the ground specified in the statute for the tort action is insufficient. American Quarries Co. v. Lay, 37 Ind. App. 386, 73 N. E. 608.

56. **U. S.**—Peltomaa v. Katahdin Pulp, etc. Co., 149 Fed. 282 (*affirmed* in 156 Fed. 342, 84 C. C. A. 238); Edwards v. Southern Ry. Co., 102 Fed. 720. **Ga.**—Dye v. Denham, 54 Ga. 224;

Broach v. King, 23 Ga. 500. **Ill.**—Hinchman v. Whetstone, 23 Ill. 185. **Ind.** Guard v. Risk, 11 Ind. 156. **Ky.**—Vanzant v. Jones, 3 Dana 464; Respass v. Parmer, 2 A. K. Marsh. 365; Webber v. Kenny, 1 A. K. Marsh. 345. **Mass.** Bodwell v. Osgood, 3 Pick. 379, 15 Am. Dec. 228. **Minn.**—Blume v. Scheer, 83 Minn. 409, 86 N. W. 466. **Mont.** Chenoweth v. Great Northern R. Co., 50 Mont. 481, 148 Pac. 330. **N. J.** Campbell v. Delaware & A. Tel. & T. Co., 70 N. J. L. 195, 56 Atl. 303; Deacon v. Allen, 4 N. J. L. 338. **N. Y.** Kendall v. Stone, 2 Sandf. 269 (*reversed* on other grounds in 5 N. Y. 14); Oehlhof v. Solomon, 32 Misc. 773, 66 N. Y. Supp. 484; Tisdale v. Delaware, etc. Canal Co., 42 Hun 654, 4 N. Y. St. 812. See Peterson v. Eighmie, 94 Misc. 706, 158 N. Y. Supp. 202. **Pa.**—Sommer v. Wilt, 4 Serg. & R. 19; Carpenter v. Lancaster, 22 Lane. L. Rev. 265, *affirmed* in 212 Pa. 581, 61 Atl. 1113. **Tex.**—Texas & G. Ry. Co. v. Hall, 58 Tex. Civ. App. 598, 125 S. W. 71. **Eng.**—Edgell v. Francis, 1 M. & G. 222, 39 E. C. L. 729, 1 Scott N. R. 118, 9 L. J. C. P. 233, 4 Jur. 366, 133 Eng. Reprint 314; Praed v. Graham, 24 Q. B. Div. 53, 59 L. J. Q. B. 230, 38 Wkly. Rep. 103. **Can.** Wall v. New Walrus Co., 8 Newfoundl. 499; Wentworth v. Hallett, 4 N. Brunsw. 560; Sornberger v. Canadian Pac. R. Co., 24 Ont. App. 263; Johnson v. Port Dover Harbour Co., 17 U. C. Q. B. 151.

See *supra*, II, G, 5, c, (I).

57. **U. S.**—Lancaster v. Providence & S. S. S. Co., 26 Fed. 233; Reese v. Third Ave. R. Co., 16 Fed. 368; Reiss v. North German Lloyd, 11 Fed. 844; Marriott v. Fearing, 11 Fed. 846. **Colo.** Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705; Wall v. Livezey, 6 Colo. 465. **N. J.**—Deacon v. Allen, 4 N. J. L. 338. **N. Y.**—Sargent v. ———, 5

through passion, partiality, prejudice, or corruption, new trials will be ordered.⁵⁸

(3.) *Libel and Slander*. — The same rule applies to libel and slander cases as to personal injury suits. The jury have a large discretion in such actions, and their verdict will not be set aside as excessive unless it appears that passion or prejudice has controlled it.⁵⁹

(IV.) *Inadequate Damages*. — (A.) *IN GENERAL*. — The early English doctrine was that a new trial would not be granted on the ground that the damages were too small,⁶⁰ or, at least, only in very exceptional cases.⁶¹ Under the modern doctrine, however, a new trial may be granted where the damages are manifestly insufficient,⁶² and it has been pertinently said that a verdict for a grossly inadequate amount

Cow. 106. Wis.—Karasich v. Hasbrouck, 28 Wis. 569.

58. Ga.—Lang v. Hopkins, 10 Ga.

37. Mass.—Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189. Minn.—See Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462. Wis.—Goodno v. Oshkosh, 28 Wis. 300.

59. U. S.—Malloy v. Bennett, 15 Fed. 371; McGowan v. La Plata Min. & S. Co., 9 Fed. 861, 3 McCrary 393. Ill.—Stumer v. Pitchman, 22 Ill. App. 399, affirmed, 124 Ill. 250, 15 N. E. 757. Ind.—Guard v. Risk, 11 Ind. 156. Ky.—Riley v. Nugent, 1 A. K. Marsh. 431. Mass.—Shute v. Barrett, 7 Pick. 82; Clark v. Binney, 2 Pick. 113. Mo.—Brown v. Globe Printing Co., 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; Fallenstein v. Booth, 13 Mo. 427. N. Y.—Potter v. Thompson, 22 Barb. 87; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616.

60. Duberley v. Gunning, 4 T. R. 651, 100 Eng. Reprint 1226; Wilford v. Berkeley, 1 Burr. 609, 97 Eng. Reprint 472; Hayward v. Newton, 2 Str. 940, 93 Eng. Reprint 955; Anonymous, 2 Salk. 647, 91 Eng. Reprint 549.

As to Contracts.—As to an exception in cases of contract, see *infra*, II, G, 5, c, (IV), (B).

61. Tidd's Pr. 909, where that author says, "it is not usual to grant a new trial for smallness of damages."

62. Ga.—Anglin v. Columbus, 128 Ga. 469, 57 S. E. 780. Ill.—Hanson v. Urbana & C. E. St. Ry. Co., 75 Ill. App. 474; Hallberg v. Brosseau, 64 Ill. App. 520. Minn.—Ford v. Minneapolis St. Ry. Co., 98 Minn. 96, 107

N. W. 817. Miss.—Moseley v. Jamison, 68 Miss. 336, 8 So. 744. Mo.—Pacific Exp. Co. v. Emerson, 86 Mo. App. 683. N. H.—Belknap v. Boston & M. R. R., 49 N. H. 358, 371. N. Y.—Tuxedo Automobile Station v. Lyman, 88 N. Y. Supp. 1008. N. C.—Benton v. Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33. R. I.—Hill v. Union Ry. Co., 25 R. I. 565, 57 Atl. 374. S. C.—Bodie v. Charleston & W. C. Ry. Co., 66 S. C. 302, 44 S. E. 943. Wash.—Aboltin v. Heney, 62 Wash. 65, 113 Pac. 245. Eng. Phillips v. London & South Western R. Co., 5 Q. B. D. 78; Phillips v. London & S. W. R. Co., 4 Q. B. D. 406; Burrows v. London G. O. Co., 10 T. L. Rep. 298.

[a] **By Statute.**—Barnes' Code (W. Va.) 1916, ch. 131, §15, p. 1138.

[b] **The generally accepted doctrine** at the present time is that the verdict of a jury is subject to the supervision of the court, whether it is too large or too small. Toledo R. & L. Co. v. Mason, 81 Ohio St. 463, 91 N. E. 292, 28 L. R. A. (N. S.) 130.

[c] **"It is a power rarely exercised,** and especially in actions for personal wrongs, such as slanders, batteries and the like; but where the foundation of the action is a breach of contract and the damages are capable of estimation, if there is a glaring deficiency, justice requires that the case shall be revised. . . . It is certainly within the discretion of the court, to be exercised very cautiously, and perhaps never for this cause alone, where the action is of a vindictive nature, and the damages properly arbitrary with the jury; though there may be flagrant cases even of that nature in which the court would interpose." Taunton Mfg. Co. v. Smith, 9 Pick. (Mass.) 11.

stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount.⁶³ In fact, where the verdict is, upon the evidence, inadequate, the verdict is contrary to evidence.⁶⁴

The general rule is particularly applicable where the damages are capable of exact measurement in accordance with a prescribed standard.⁶⁵ As in the case, however, of excessive damages, where there is no standard for measuring damages, a new trial should not be granted for inadequacy of recovery unless prejudice or passion is clear,⁶⁶ or unless it is manifest that injustice has been done.⁶⁷ But where the damages awarded are manifestly or grossly inadequate, or where by reason of inadequacy injustice would be done, a new trial ought to be granted.⁶⁸ The fact, however, that only nominal damages were allowed may justify a trial court in treating the verdict as in effect one for the defendant, where the evidence would have sustained such a verdict, and in denying a new trial requested on the ground of the inadequacy of the amount.⁶⁹ So also a new trial may be denied where upon the law or the evidence the trial court is satisfied the verdict should have been for the defendant.⁷⁰

63. *McDonald v. Walter*, 40 N. Y. 551, 554. In this case the court further says: "It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But where the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged." And see *Mariani v. Dougherty*, 46 Cal. 26; *Hackett v. Pratt*, 52 Ill. App. 346.

64. *Emmons v. Sheldon*, 26 Wis. 648.

65. See *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304, and *infra*, II, G, 5, c, (IV), (B) and (C).

66. *Moseley v. Jamison*, 68 Miss. 336, 8 So. 744. See also cases *supra*, this section.

67. *Olek v. Fern Rock Woolen Mills* 180 Fed. 117; *Carter v. Wells, Fargo & Co.*, 64 Fed. 1005; *Wunderlich v. City of New York*, 33 Fed. 854; *Lancaster v. Providence & S. S. S. Co.*, 26 Fed. 233.

68. **N. H.**—*Doody v. Boston & M. R. R.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846. **N. Y.**—*McDonald v. Walter*, 40 N. Y. 551; *Collins v. Albany, etc. R.*, 12 Barb. 492, 499. **N. C.**—*Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33. **Eng.**—*Phillips v. London, etc. Ry. Co.*, 4 Q. B.

D. 406, 5 Q. B. D. 78; *Richards v. Rose*, 2 Exch. 218, 23 L. J. Ex. 3.

See *infra*, II, G, 5, c, (IV), (D) to (F).

[a] **Loss of Support of Husband.** In *Greenleo v. Schoenheit*, 23 Neb. 669, 37 N. W. 600, a new trial was granted where a verdict for only one dollar was returned in action of a married woman against a saloon-keeper for loss of support of her husband resulting from intoxication.

[b] In actions for death by wrongful act, grossly inadequate verdicts will be set aside. **U. S.**—*Usher v. Scranton Ry. Co.*, 132 Fed. 405. **Minn.**—*Rawitzer v. St. Paul City Ry. Co.*, 94 Minn. 494, 103 N. W. 499. **Mo.**—*Lee v. Publishers, George Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107. **Tex.**—*Burns v. Merchants' & Planters' Oil Co.*, 26 Tex. Civ. App. 223, 63 S. W. 1061.

69. **Del.**—*Fulmele v. Forrest*, 4 Boyce 155, 86 Atl. 733. **Ia.**—*Hubbard v. Mason City*, 64 Iowa 245, 20 N. W. 172. **Ky.**—*Simrall v. Morton*, 12 Ky. L. Rep. 31, 12 S. W. 185. **Mo.**—*Haven v. Missouri R. Co.*, 155 Mo. 216, 55 S. W. 1035. **Pa.**—*Reeve v. Wilkes-Barre, etc. Traction Co.*, 9 Kulp 182. **P. I.**—*Garcia v. Georgetti*, 4 Porto Rico Fed. 495.

70. **U. S.**—*Olek v. Fern Rock Woolen Mills*, 180 Fed. 117. **Ill.**—*O'Malley v. Chicago City R. Co.*, 33 Ill. App. 354, 30 Ill. App. 309. **Minn.**—*Maki*

Under Statutes. — The right to a new trial for inadequate damages is sometimes regulated by statute.⁷¹ Thus it is sometimes provided that a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation.⁷² Such a statute does not apply to special damages capable of accurate measurement by a definite rule of law.⁷³

Right of Defendant To Complain. — A new trial will not be granted, however, upon the application of a defendant on the ground that the amount found for the plaintiff was too small, even where plaintiff, if entitled to recover anything was admittedly entitled to more than the verdict gave him, one cannot take advantage of an error favorable to himself.⁷⁴

v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705.

71. See the statutes.

[a] **Statute Permitting New Trial.**

Colo.—*Ferrari v. Brooks-Harrison Fuel Co.*, 53 Colo. 259, 125 Pac. 125. **Ia.** *Stone v. Turner*, 159 N. W. 989. **Wash.** *Jorgenson v. Crane*, 92 Wash. 642, 159 Pac. 796.

72. **Ind.**—*Gann v. Worman*, 69 Ind. 458; *Sharpe v. O'Brien*, 39 Ind. 501. See, however, *State v. Richeson*, 36 Ind. App. 373, 75 N. E. 846. **Ky.**—*Rossi v. Jewell Jellico Coal Co.*, 157 Ky. 332, 163 N. W. 220; *Lloyd v. Knadler*, 22 Ky. L. Rep. 776, 58 S. W. 803; *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304. **Ohio.**—*Bailey v. Cincinnati*, 1 Handy 438, 12 Ohio Dec. 225.

[a] **Statute formerly existed in** (1) Iowa. See *Tathwell v. Cedar Rapids*, 122 Iowa 50, 97 N. W. 96; *Kinser v. Soap Creek Coal Co.*, 85 Iowa 26, 51 N. W. 1151; *Hubbard v. Mason City*, 64 Iowa 245, 20 N. W. 172. (2) In Nebraska, see *Blakely v. Omaha & C. B. St. Ry. Co.*, 94 Neb. 119, 142 N. W. 525; *Norton v. Lincoln Traction Co.*, 92 Neb. 649, 138 N. W. 1132. (3) The statute in Kansas to the same effect was repealed in 1905. Laws of 1905, ch. 332.

[b] **Statute applies to any action** for damages whether of contract or tort. *Netter's Admr. v. Louisville R. Co.*, 134 Ky. 678, 121 S. W. 636.

[c] **Death by Wrongful Act.**—The statutory restriction applies to actions for death by wrongful act. *Gann v. Worman*, 69 Ind. 458; *Netter's Admr. v. Louisville R. Co.*, 134 Ky. 678, 121 S. W. 636. See, however, *Hughey v. Sullivan*, 80 Fed. 72.

73. *Ray v. Jeffries*, 86 Ky. 367, 5

S. W. 867; *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304; *Taylor v. Howser*, 12 Bush (Ky.) 465; *Bailey v. Cincinnati*, 1 Handy (Ohio) 438, 12 Ohio Dec. 225. See *Hubbard v. Mason City*, 64 Iowa 245, 20 N. W. 172.

Contra, *Gann v. Worman*, 69 Ind. 458; *Sharpe v. O'Brien*, 39 Ind. 501 (*overruling Sullivan v. Wilson*, 15 Ind. 246); *O'Reilly v. Hoover*, 70 Neb. 357, 97 N. W. 470.

[a] **Where merely general damages** are alleged and no special damages are alleged or proved, a new trial cannot be granted for smallness of the award. *Louisville & N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74.

[b] **Where the evidence shows even approximately** the special damages suffered, a new trial may be granted for an inadequate verdict. *Netter's Admr. v. Louisville R. Co.*, 134 Ky. 678, 121 S. W. 636.

74. **Ga.**—*Dolvin v. American Harrow Co.*, 131 Ga. 300, 62 S. E. 198; *Wrens v. Sammons*, 129 Ga. 755, 59 S. E. 776; *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407. **Ill.**—*Reid v. Houston*, 20 Ill. App. 448. **Ind.**—*Fischer v. Holmes*, 123 Ind. 525, 24 N. E. 377; *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350. **N. Y.**—*Wolf v. Goodhue F. Ins. Co.*, 43 Barb. 400 (*affirmed in 41 N. Y. 620*); *Rockefeller v. Lamora*, 106 App. Div. 345, 94 N. Y. Supp. 549; *Scheider v. Corby*, 15 Hun 493. See *Tompkins v. Lamb*, 121 App. Div. 366, 106 N. Y. Supp. 6. But *contra*, see *Scheuer v. Manashaw*, 77 Misc. 208, 137 N. Y. Supp. 534; *Feldman v. Levy*, 56 Misc. 563, 106 N. Y. Supp. 1092; *Powers v. Gouraud*, 19 Misc. 268, 44 N. Y. Supp. 249. **Tex.**—See *Blassingame v. Davis*,

Punitive Damages. — It has been held that a new trial cannot be allowed on the ground that the punitive damages allowed were too small.⁷⁵

(B.) **CONTRACTS.** — Even in the earlier cases, it was held that the rule that verdicts would not be set aside on account of their smallness did not apply to contracts,⁷⁶ since in actions upon breach of contract, the injury done can be estimated by fixed standards of value,⁷⁷ and it is well established that where in contract actions, the verdict is glaringly deficient, a new trial will be awarded.⁷⁸

(C.) **PROPERTY AND PROPERTY RIGHTS.** — The rule as to contracts applies generally to actions relating to injuries to property and property rights. In such cases, the damages are usually subject to rules of measurement, and where there are substantial inadequacies in the amounts recovered, new trials are proper remedies.⁷⁹

(D.) **PERSONAL INJURIES.** — It was especially in connection with tort actions, and particularly in the case of personal injuries and defamation, that the early common law rule, which refused to grant new trials, on the ground of the verdict being too small, applied.⁸⁰ The rule,

68 Tex. 595, 5 S. W. 402, where amount of land allowed plaintiff was less than he was entitled to, if entitled to anything. Wis.—See *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468, where court improperly reduces plaintiff's verdict, defendant cannot complain.

75. *Louisville & N. R. Co. v. Street*, 164 Ala. 155, 51 So. 306.

76. *Colyer v. Huff*, 3 Bibb (Ky.) 34; *Woodford v. Eades*, 1 Str. 425, 93 Eng. Reprint 612; *Markham v. Middleton*, 2 Str. 1259, 93 Eng. Reprint 1167.

77. *Watson v. Harmon*, 85 Mo. 443.

78. Ga.—*Hood v. Ware*, 34 Ga. 328. Ill.—*Hallberg v. Brosseau*, 64 Ill. App. 520. Ia.—*Fawcett v. Woods*, 5 Iowa 400. Mass.—*Taunton Mfg. Co. v. Smith*, 9 Pick. 11. Kan.—*Howe v. Lincoln*, 23 Kan. 468. Minn.—*Conrad v. Doemeier*, 57 Minn. 147, 58 N. W. 870. Mo.—*Watson v. Harmon*, 85 Mo. 443. Neb.—*Porter v. Sherman County Bkg. Co.*, 36 Neb. 271, 54 N. W. 424. N. Y. *McDonald v. Walter*, 40 N. Y. 551; *Bigelow v. Garwitz*, 61 Hun 624, 15 N. Y. Supp. 940, 40 N. Y. St. 580; *Powers v. Gouraud*, 19 Misc. 268, 44 N. Y. Supp. 249; *Hoe v. Hoey*, 15 N. Y. Supp. 105, 39 N. Y. St. 221. Tex.—*Shropshire v. Doxey*, 25 Tex. 127.

[a] Where the plaintiff is either entitled to the whole amount claimed, or is not entitled to recover at all, a verdict for a part of his claim is illogical. Consequently, where plaintiff

was entitled either to the whole amount of the note sued on, being three hundred dollars, or to nothing, a verdict for one hundred dollars will be set aside on his motion. *Conrad Seipp Brewing Co. v. Peck*, 85 Ill. App. 637.

But defendant cannot complain, see *supra*, II, G, 5, c, (IV), (A).

79. Cal.—*Hall v. The Emily Banning*, 33 Cal. 522. Ga.—*Georgia & F. R. Co. v. Jones*, 90 Ga. 292, 15 S. E. 824; *Bishop v. Macon*, 7 Ga. 200, 50 Am. Dec. 400. Ill.—*Bernstein v. Walker*, 25 Ill. App. 224. Mo.—*Watson v. Harmon*, 85 Mo. 443. N. Y.—*Jones v. Metropolitan Elev. R. Co.*, 14 N. Y. Supp. 632, 39 N. Y. St. 177, 27 Jones & S. 437.

[a] But the defendant cannot complain that the plaintiff, if entitled to recover at all, should have recovered more land than the jury gave him. *Blossingame v. Davis*, 68 Tex. 595, 5 S. W. 402.

80. Ill.—*Kilmer v. Parrish*, 144 Ill. App. 270; *Bolles v. Bloomington*, etc. R. Co., 130 Ill. App. 263; *Hamilton v. Pittsburgh, C. & St. L. Ry. Co.*, 104 Ill. App. 207; *Hackett v. Pratt*, 52 Ill. App. 346; *Lovett v. Chicago*, 35 Ill. App. 570. Ky.—*Colyer v. Huff*, 3 Bibb 34; *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304. Mass.—*Lufkin v. Hitchcock*, 194 Mass. 231, 80 N. E. 456. N. Y.—*Wavle v. Wavle*, 9 Hun 125. Ohio.—*Bailey v. Cincinnati*, 1 Handy 438, 12 Ohio Dec. 225. Eng.

however, has been relaxed, and it is now held both in England and in the United States that it is the duty of the court to grant, in such cases, a new trial where the verdict is so grossly inadequate as to suggest it must have been rendered under the influence of passion or prejudice, or by some misconception of the law or evidence.⁸¹ This rule applies not only where the verdict was for merely nominal damages,⁸² unless the court regards such a verdict as, in effect, one for the defendant,⁸³ but also where it did not amount to substantial compensation for the injuries received.⁸⁴ The exercise by the trial court,

Rendall v. Hayward, 2 Arn. 14, 5 Bing. N. C. 424, 7 Scott 424, 8 L. J. C. P. 243, 3 Jur. 363, 132 Eng. Reprint 1162; Queen v. Justices of West Riding, etc., 1 Q. B. 624, 41 E. C. L. 701, 1 G. & D. 198, 10 L. J. M. C. 137, 5 Jur. 824, 113 Eng. Reprint 1271; Mauricet v. Brecknock, 2 Dougl. 509, 99 Eng. Reprint 325. **Can.**—Pickels v. Lane, 47 Nova Scotia 465; Atkins v. Thornton, Draper (U. C. K. B.) 239.

81. Ark.—Carroll v. Texarkana Gas & Electric Co., 102 Ark. 137, 143 S. W. 586. **Cal.**—Taylor v. Northern Electric R. Co., 26 Cal. App. 765, 148 Pac. 543. **Colo.**—Ferrari v. Brooks-Harrison Fuel Co., 53 Colo. 259, 269, 125 Pac. 125. **Ia.**—Migiliaccio v. Smith Fuel Co., 151 Iowa 705, 130 N. W. 720; Tathwell v. Cedar Rapids, 122 Iowa 50, 97 N. W. 96. **Kan.**—Jackson v. Humbolt, 84 Kan. 445, 113 Pac. 1047. **Me.**—Leavitt v. Dow, 105 Me. 50, 72 Atl. 735, 134 Am. St. Rep. 534, 17 Ann. Cas. 1072. **Mass.**—Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. **N. H.**—Doody v. Boston & M. R. R., 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846. **N. Y.**—Fahlbusch v. Brooklyn Heights R. Co., 145 App. Div. 544, 129 N. Y. Supp. 877. **R. I.**—Sullivan v. White & Son, 36 R. I. 488, 90 Atl. 738; Clark v. New York, N. H. & H. R. Co., 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356. **Wash.**—Aboltin v. Heney, 62 Wash. 65, 113 Pac. 245. **Wis.**—Lines v. Milwaukee, 147 Wis. 546, 133 N. W. 592.

See *supra*, II, G, 5, c, (IV), (A).

[a] The jury cannot base their finding on chance or prejudice, or arbitrarily disregard the elements of damage as defined and limited by the court. Where it is apparent that a plaintiff has suffered injuries proximately caused by the defendant's negligence which entitles him to substantial damages, the jury must award him

substantial damages. Doody v. Boston & M. R. R., 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846.

[b] Where the jury made a mistake in assessing the damages, as where they failed to take into consideration some element of damage properly in the case, a new trial may be granted. Berry v. Lake Erie & W. R. Co., 72 Fed. 488.

82. Ia.—Stone v. Turner, 159 N. W. 989. **N. Y.**—Robbins v. Hudson R. R. Co., 7 Bosw. 1. **S. C.**—Bacot v. Keith, 2 Bay 466. **Wis.**—Whitney v. Milwaukee, 65 Wis. 409, 27 N. W. 39.

83. Hubbard v. Mason City, 64 Iowa 245, 20 N. W. 172, where such a verdict for defendant would have been sustained by the evidence. See *supra*, II, G, 5, c, (IV), (A).

84. See *infra*, this note, and Ferrari v. Brooks-Harrison Fuel Co., 53 Colo. 259, 125 Pac. 125.

[a] **Inadequate Verdicts.**—In *Mariani v. Dougherty*, 46 Cal. 26, a verdict for \$200 was set aside for this reason; in *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473, the same result was reached upon a similar verdict; in *Clark v. New York, N. H. & H. R. Co.*, 33 R. I. 83, 102, 80 Atl. 406, Ann. Cas. 1913B, 356, it was held that \$2,000 might be deemed inadequate for injuries inflicted; and in *Phillips v. London & Southwestern Ry. Co.*, 4 Q. B. D. (Eng.) 406, 5 Q. B. D. 78, 7,000 pounds was regarded as too small an amount. At a second trial the verdict was for 16,000 pounds, which was sustained. *Phillips v. London & S. W. Ry. Co.*, 5 Com. Pl. Div. 280.

[b] "The only rational rule upon this subject is that when the verdict in a personal injury case is so small, in view of the uncontroverted facts of the case disclosing the extent of the injury that the court can clearly see that the jury have not performed their

of its discretion in granting a new trial for inadequate damages, will not be interfered with on appeal, in the absence of abuse.⁸⁵ A new trial will not be granted, however, merely because the court thinks the amount is less than it ought to have been.⁸⁶

(E.) **LIBEL AND SLANDER.** — In libel and slander cases, a new trial will not be given for inadequacy of recovery except in rare instances. In such cases, damages are seldom subject to any fixed standard of computation.⁸⁷ Where, however, the damages are so grossly inadequate as to raise a presumption of passion or prejudice, a new trial may properly be awarded.⁸⁸

(F.) **ASSAULT AND BATTERY.** — While it is the general rule, in actions for assault and battery, that a new trial will not be granted save in extreme cases, yet where the verdict is grossly inadequate the courts will, usually, not permit it to stand.⁸⁹

duty, as defined in the charge of the court, it must be set aside. Such a trial is not the fair trial to which the parties are entitled: It is not the result of reasonable deliberation." *Doody v. Boston & M. R.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846.

[c] **Where the verdict is for an unreasonably small amount.** *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. 752.

85. See *infra*, III, H, 4, d, (V).

86. **U. S.**—*Lancaster v. Providence & S. S. Co.*, 26 Fed. 233; *Walker v. Smith*, 1 Wash. C. C. 202, 29 Fed. Cas. No. 17,087. **Ia.**—*Fawcett v. Woods*, 5 Iowa 400. **N. Y.**—*Reger v. Rochester Ry. Co.*, 2 App. Div. 5, 37 N. Y. Supp. 520, 73 N. Y. St. 209; *Brooks v. Ludin*, 1 N. Y. Supp. 338, *affirmed*, 6 N. Y. Supp. 510, 25 N. Y. St. 820, 25 Jones & S. 145.

See *supra*, II, G, 5, c, (IV), (A).

87. **N. Y.**—*Wavle v. Wavle*, 9 Hun 125. **Ohio**—*Bailey v. Cincinnati*, 1 Handy 438, 12 Ohio Dec. 225. **Eng.** *Mears v. Griffin*, 1 Mann. & G. 796, 2 Scott N. R. 15, 133 Eng. Reprint 553; *Rendall v. Hayward*, 5 Bing. N. C. 424, 35 E. C. L. 231, 7 Scott 424, 2 Arn. 14, 8 L. J. C. P. 243, 3 Jur. 363, 132 Eng. Reprint 1162; *Haywood v. Newton*, 2 Strange 940, 93 Eng. Reprint 955; *Kelly v. Sherlock*, L. R. 1 Q. B. 686.

[a] **Twenty Shillings.**—Where the jury found only twenty shillings damages in a case of slander, although very gross, the court refused a new trial on the ground of the smallness of damages. *Rendall v. Hayward*, 5 Bing. N. C. 424, 35 E. C. L. 231, 7 Scott 424, 2 Arn. 14, 8 L. J. C. P. 243, 3 Jur. 363, 132 Eng. Reprint 1162.

[b] **Effect of statute**, see *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304, and *supra*, II, G, 5, c, (IV), (A).

88. **Cal.**—*Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576. **Ky.**—*Riley v. Nugent*, 1 A. K. Marsh. 431. **Mass.** *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189. **N. Y.**—*Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401. **Wis.**—*Cottrill v. Cramer*, 59 Wis. 231, 18 N. W. 12. **Eng.**—*Falvey v. Stanford*, L. R. 10 Q. B. 54, 44 L. J. Q. B. 7, 31 L. T. Rep. (N. S.) 677, 23 Wkly. Rep. 162.

[a] **Where the damages are manifestly too small**, a new trial is proper in an action of slander. *Rixey v. Ward*, 3 Rand. (24 Va.) 52.

89. **Cal.**—*Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108, verdict for \$500 held grossly inadequate in case of severe assault rendering amputation of arm necessary. **Mo.**—*Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265, verdict for one dollar for maliciously shooting and wounding plaintiff upheld. **Ohio.**—*Bailey v. Cincinnati*, 1 Handy 438, 12 Ohio Dec. 225, new trial granted only in extreme cases. **S. C.**—*Bacot v. Keith*, 2 Bay 466, verdict for one dollar in cruel assault set aside. **Vt.**—*Barrette v. Carr*, 75 Vt. 425, 56 Atl. 93, the court will set aside inadequate verdicts in assault and battery cases the same as in other similar cases.

[a] **Statute forbidding new trial for smallness of damage**, see *Lloyd v. Knadler*, 22 Ky. L. Rep. 776, 38 S. W. 803, and *supra*, II, G, 5, c, IV, (A).

H. NEWLY DISCOVERED EVIDENCE. — 1. In General. — Newly discovered evidence is recognized generally as a sufficient ground for new trial, both in civil⁹⁰ and criminal cases.⁹¹ Despite the many cases connected with this cause for new trial, judicial utterance declares it to be a ground looked upon by the courts with distrust and disfavor,⁹²

90. **U. S.**—*Usher v. Scranton R. Co.*, 132 Fed. 405; *Marshall v. Union Ins. Co.*, 2 Wash. C. C. 411, 16 Fed. Cas. No. 9,134. **Ala.**—*Cox v. Mobile & G. R. Co.*, 44 Ala. 611. **Cal.**—*Blewett v. Miller*, 131 Cal. 149, 63 Pac. 157; *Heintz v. Cooper*, 104 Cal. 668, 38 Pac. 511. **Colo.**—*Lowell v. Hessey*, 46 Colo. 517, 105 Pac. 870; *Wells, etc. Co. v. Gunn*, 33 Colo. 217, 79 Pac. 1029. **Ga.**—*Florida Cent. & P. R. Co. v. Grant*, 110 Ga. 328, 35 S. E. 271; *Hays v. Westbrook*, 96 Ga. 219, 22 S. E. 893. **Ill.**—*Junget v. Aurora, etc. R. Co.*, 177 Ill. App. 435; *Cairo & St. L. R. Co. v. Schumacker*, 77 Ill. 583. **Ind.**—*Bronson v. Hickman*, 10 Ind. 3; *Stauffer v. Martin*, 43 Ind. App. 675, 88 N. E. 363; *Oldfather v. Zent*, 14 Ind. App. 89, 41 N. E. 555. **Ia.**—*Etzkorn v. Oelwein*, 142 Iowa 107, 120 N. W. 636; *Mally v. Mally*, 114 Iowa 309, 86 N. W. 262; *Bogges v. Read*, 83 Iowa 548, 50 N. W. 43. **Ky.**—*Goddard v. Latta*, 152 Ky. 538, 153 S. W. 737; *Duncan v. Allender*, 110 Ky. 828, 62 S. W. 851; *Louisville, etc. R. Co. v. Whitley County Ct.*, 100 Ky. 413, 38 S. W. 678; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233. **La.**—*Buckley v. Seymour*, 30 La. Ann. 1341; *Robison v. Howell*, 22 La. Ann. 524. **Me.**—*Putnam v. Woodbury*, 68 Me. 58. **Mass.**—*Watts v. Howard*, 7 Mete. 478. **Minn.**—*McDonald v. Smith*, 101 Minn. 476, 112 N. W. 627. **Miss.**—*Kane v. Burrus*, 2 Smed. & M. 313. **Mo.**—*Roth Grocery Co. v. Hotel Monticello Co.*, 183 Mo. App. 429, 166 S. W. 1125; *Allen v. St. Louis, etc. R. Co.*, 167 Mo. App. 498, 151 S. W. 762. **N. Y.**—*Jacquish v. Kelly*, 165 App. Div. 847, 151 N. Y. Supp. 187; *Beers v. West Side R. Co.*, 101 App. Div. 308, 91 N. Y. Supp. 957; *Berger Mfg. Co. v. Block*, 69 App. Div. 186, 74 N. Y. Supp. 753. **Eng.**—*Thurtell v. Beaumont*, 1 Bing. 339, 8 E. C. L. 538, 2 L. J. C. P. (O. S.) 4, 130 Eng. Reprint 136; *Lister v. Mundell*, 1 Bos. & Pul. 427, 126 Eng. Reprint 991; *Broadhead v. Marshall*, 2 W. Bl. 955, 96 Eng. Reprint 564; *Turnbull & Co. v. Duval*, App. Cas. (1902) 429; *Young v. Kershaw*, 81 L. T. N.

S. 531; *Anderson v. Titmas*, 36 L. T. N. S. 711. **Can.**—*Downey v. Patterson*, 38 U. C. Q. B. 513.

91. **U. S.**—*Gourdain v. United States*, 154 Fed. 453, 83 C. C. A. 309; *Trafton v. United States*, 147 Fed. 513, 78 C. C. A. 79; *United States v. Radford*, 131 Fed. 378. **Conn.**—*Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 369; *State v. Lockier*, 2 Root 84; *Scott v. State*, 1 Root 155. **Idaho.**—*State v. Davis*, 8 Idaho 115, 66 Pac. 932. **La.**—*State v. Rollins*, 50 La. Ann. 925, 24 So. 664. **S. C.**—*State v. Ezzard*, 41 S. C. 522, 19 S. E. 854; *State v. Sullivan*, 41 S. C. 506, 19 S. E. 722. **Tex.**—*Shultz v. State*, 5 Tex. App. 390.

[a] Under the statute, (1) newly discovered evidence is not made a ground for new trial in criminal cases. *State v. Graff*, 97 Iowa 568, 66 N. W. 779; *State v. Harris*, 97 Iowa 407, 66 N. W. 728. (2) But a new trial may undoubtedly be granted on that ground in a proper case, in the exercise of the court's discretion, in the interest of justice. *State v. Pell*, 140 Iowa 655, 119 N. W. 154; *State v. Leuth*, 128 Iowa 189, 103 N. W. 345; *State v. Reinheimer*, 109 Iowa 624, 80 N. W. 669.

[b] A court of equity will not interfere in a criminal case for the purpose of granting a new trial on the ground of newly discovered evidence. *Hubbard v. State*, 72 Neb. 62, 100 N. W. 153, 9 Am. & Eng. Anno. Cas. 1034.

92. **Ark.**—*Murphy v. State*, 38 Ark. 514; *Pleasant v. State*, 13 Ark. 360. **Cal.**—*People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *Jones v. Singleton*, 45 Cal. 92; *Baker v. Joseph*, 16 Cal. 173. **Del.**—*McCombs v. Chandler*, 5 Har. 423. **Fla.**—*Florida East Coast R. Co. v. Knowles*, 68 Fla. 400, 67 So. 122, 123. **Ga.**—*Sarah v. State*, 28 Ga. 576. **Ia.**—*Carson v. Cross*, 14 Iowa 463. **Ky.**—*Denny v. Wickliffe*, 1 Mete. 216. **Mo.**—*Mills v. Sampsel*, 53 Mo. 360, 364. **Neb.**—*Tomer v. Densmore*, 8 Neb. 384, 1 N. W. 315. **N. Y.**—*Richardson v. Backus*, 1 Johns. 59. **S. D.**—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524. **W. Va.**—*Var-*

entertained with great reluctance,⁹³ one that will be critically examined by the court,⁹⁴ and one for which new trials will be granted rarely and with great caution.⁹⁵ The movant must make a clear and strong case,⁹⁶ and it must appear that injustice was done by the verdict.⁹⁷ Moreover, as in the case of other grounds, a motion for a new trial on the ground of newly discovered evidence is addressed largely to the discretion of the court.⁹⁸

2. Basic Requisites.—New trials upon the ground of newly discovered evidence are granted only under the following restrictions: (1) The evidence must have been discovered since the former trial; (2) the party must have used diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of a witness; (5) it must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits.⁹⁹

ner v. Core, 20 W. Va. 472. **Wis.**—*Edmiston v. Garrison*, 18 Wis. 594.

[a] **Distrust and Disfavor.**—"Applications for this cause," says the court, in *Baker v. Joseph*, 16 Cal. 173, "are regarded with distrust and disfavor. The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests and the circumstances that testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing to be made of diligence and all other facts necessary to give effect to the claim."

[b] **Viewed With Jealousy.**—Such motions have been uniformly viewed with jealousy by the courts, and generally have been granted only upon a very satisfactory showing. *Howard v. Winters*, 3 Nev. 539.

93. *Callahan v. Caffarata*, 39 Mo. 136.

94. *Wallace v. Tumlin*, 42 Ga. 462.

95. *Wiggin v. Coffin*, 3 Story 1, 29 Fed. Cas. No. 17,624; *State v. Carr*, 21 N. H. 166, 53 Am. Dec. 179.

96. *Swift v. Wakeman*, 9 Ind. 552.

97. *Crafts v. Union Mut. Fire Ins. Co.*, 36 N. H. 44.

98. **Ind. Ter.**—*Whitehead v. Breckenridge*, 5 Ind. Ter. 133, 82 S. W. 698. **Me.**—*Parsons v. Lewiston, B. & B. St. Ry.*, 96 Me. 503, 52 Atl. 1006. **Minn.**—*Bunker v. United Order of Foresters*, 97 Minn. 361, 107 N. W. 392; *Wingen v. May*, 92 Minn. 255, 99 N. W. 809. **Mo.**—*Coleman v. Cole*, 96 Mo. App. 22, 69 S. W. 692. **Mont.**—*Case v. Kramer*,

34 Mont. 142, 85 Pac. 878. **N. Y.**—*Kring v. New York Cent. & H. R. R. Co.*, 45 App. Div. 373, 60 N. Y. Supp. 1114; *Vollkommer v. Nassau Electric R. Co.*, 23 App. Div. 88, 48 N. Y. Supp. 372. **N. D.**—*Aylmer v. Adams*, 30 N. D. 514, 153 N. W. 419; *Pengilly v. J. I. Case Threshing Mach. Co.*, 11 N. D. 249, 91 N. W. 63. **S. D.**—*Grigsby v. Wolven*, 20 S. D. 623, 108 N. W. 250. **Tex.**—*Galveston, H. & S. A. R. Co. v. Kief*, 58 S. W. 625.

99. See the sections following, and *Florida East Coast R. Co. v. Knowles*, 68 Fla. 400, 67 So. 122, 123; *Howard v. State*, 36 Fla. 21, 17 So. 84. See also to similar effect, the following cases: **Ga.**—*Berry v. State*, 10 Ga. 511. **Kan.**—*Hotchkiss v. Patterson*, 5 Kan. App. 358, 48 Pac. 435. **N. Y.**—*O'Hara v. Brooklyn Heights R. Co.*, 102 App. Div. 398, 92 N. Y. Supp. 777, 16 N. Y. Ann. Cas. 116; *Rossin v. Petigor*, 88 N. Y. Supp. 350. **N. C.**—*Crenshaw v. Asheville & B. St. Ry. & Transp. Co.*, 140 N. C. 192, 52 S. E. 731. **W. Va.**—*Roderick v. Baltimore & O. R. Co.*, 7 W. Va. 54.

[a] **The mere ascertainment of the materiality of previously known evidence** (1) cannot serve as a cause for a new trial. *Wright v. State*, 34 Ga. 110. See also *O'Barr v. Alexander*, 37 Ga. 195. (2) The fact that counsel did not present the evidence at the trial because he did not think it material, is not sufficient. *Codman v. Vermont & C. R. Co.*, 17 Blatchf. 1, 5 Fed. Cas. No. 2,936.

Must the evidence have been in existence at time of trial, see *infra*, II,

3. Nature or Character of New Evidence. — a. *Must Be Material.* The alleged newly discovered evidence must be material,¹ and it must be so material and important that it will probably produce a different verdict.² Newly discovered evidence of a general character, and relating wholly to an immaterial issue,³ or which tends merely to mitigate damages,⁴ is not sufficient. In a criminal case evidence tending to show commission of the crime by another person may be material and important;⁵ but the opinion of non-experts as to the sanity of the

H, 4, b. As to admissions after trial, see *infra*, II, H, 3, e.

1. **U. S.**—Brown v. Evans, 17 Fed. 912, 8 Sawy. 488 (*affirmed* in 109 U. S. 180, 3 Sup. Ct. 83, 27 L. ed. 898); Macy v. DeWolf, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8,933. **Cal.**—People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74; People v. Feld, 149 Cal. 464, 86 Pac. 1100. **Fla.**—Gilbert v. State, 61 Fla. 25, 55 So. 464. **Ga.**—Rome v. Rhodes, 134 Ga. 650, 68 S. E. 330; Greer v. Raney, 120 Ga. 290, 47 S. E. 939; Golding v. State, 116 Ga. 526, 42 S. E. 744; Etowah Gold Min. Co. v. Exter, 91 Ga. 171, 16 S. E. 991. **Ill.**—Springer v. Schultz, 205 Ill. 144, 68 N. E. 753 (*affirming* 105 Ill. App. 544); Conlan v. Mead, 172 Ill. 13, 49 N. E. 720; Sahlinger v. People, 102 Ill. 241. **Ind.**—Davis v. Davis, 145 Ind. 4, 43 N. E. 935; Anderson v. Hathaway, 130 Ind. 528, 30 N. E. 638. **Ia.**—Brackcn v. Jackson, 159 Iowa 424, 140 N. W. 592; Newton v. Southwestern Mut. Life Assn., 116 Iowa 311, 90 N. W. 73; Trimble v. Tautlinger, 104 Iowa 665, 74 N. W. 25; State v. Burge, 7 Iowa 255. **Kan.**—Brock v. Corbin, 94 Kan. 542, 146 Pac. 1150; Strong v. Moore, 75 Kan. 437, 89 Pac. 895; Olathe v. Horner, 38 Kan. 312, 16 Pac. 468. **Ky.**—South Covington, etc. R. Co. v. Lee, 153 Ky. 621, 156 S. W. 99; Hays v. Davis, 20 Ky. L. Rep. 342, 46 S. W. 212; Chesapeake & O. Ry. Co. v. Friel, 19 Ky. L. Rep. 152, 39 S. W. 704. **Minn.**—Smith v. Chapel, 36 Minn. 180, 30 N. W. 660; Knoblauch v. Kronschnabel, 18 Minn. 300. **Mo.**—Lyons v. Metropolitan St. R. Co., 253 Mo. 143, 161 S. W. 726, Ann. Cas. 1915B, 508; State v. Waters, 144 Mo. 341, 46 S. W. 173; Liberty v. Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728. **Nev.**—Whise v. Whise, 36 Nev. 16, 131 Pac. 967, 44 L. R. A. (N. S.) 689; Howard v. Winters, 3 Nev. 539. **N. Y.**—Lane v. Brooklyn Heights R. Co., 85 App. Div. 85, 82 N. Y. Supp. 1057; Bove v. Croton Falls Const. Co., 82 Misc. 202, 143

N. Y. Supp. 1004; Levy v. Hatch, 92 N. Y. Supp. 287; Pierson v. Hughes, 88 N. Y. Supp. 1065. **Tenn.**—Louisville, etc. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018. **Tex.**—Johnson v. Flint, 75 Tex. 379, 12 S. W. 1120; Allyn & Co. v. Willis, 65 Tex. 65. **Vt.**—Wilkins' Admr. v. Brock, 81 Vt. 332, 70 Atl. 572. **Can.**—McDonald v. McKay, 46 Nova Scotia 448; White v. McKay, 43 U. C. Q. B. 226.

2. See *infra*, II, H, 3, h.

3. **Mass.**—Troeder v. Hyams, 153 Mass. 536, 27 N. E. 775. **N. Y.**—Friedland v. General Fish Co., 147 N. Y. Supp. 881. **Tex.**—Flynn v. J. M. Radford Grocery Co. (Tex. Civ. App.), 174 S. W. 302. **Utah.**—Rydalch v. Anderson, 37 Utah 99, 107 Pac. 25.

4. O'Malley v. Illinois Pub. & Printing Co., 194 Ill. App. 544.

5. State v. Lowell, 123 Iowa 427, 99 N. W. 125; State v. Armstrong, 48 La. Ann. 314, 19 So. 146.

[a] The court will, however, consider the character of the alleged newly discovered evidence, also the circumstances under which the affidavit as to the alleged new evidence was made, and will refuse the motion for a new trial if the evidence is (1) improbable (People v. Poole, 127 App. Div. 122, 111 N. Y. Supp. 258), (2) too indefinite (Alexander v. State, 49 Tex. Crim. 93, 90 S. W. 1112), or (3) the circumstances of the affidavit too suspicious. Smith v. People, 39 Colo. 202, 88 Pac. 1072, where the affidavit confessing to the sole commission of the crime was made at a point (El Paso, Tex.) suspiciously near the boundary of the United States.

[b] **Another Person Indicted.**—The mere fact, however, that subsequently to the conviction of the accused another person has been indicted for the murder of the same person, is not ground for a new trial. Jones v. State, 135 Ga. 357, 69 S. E. 527.

[c] **Affidavit of Co-Defendant.**—The

accused, without the facts upon which the opinion is based, is not.⁶

b. *Must Be Relevant*.—The newly discovered evidence must also be relevant to the issue.⁷ Evidence based upon matters not embraced within the issues,⁸ or inconsistent with the evidence adduced on the former trial,⁹ cannot be considered.

affidavit of a co-defendant, serving a sentence in jail, that he alone committed the crime, and that his co-defendant, now moving for a new trial, had nothing to do with the crime, is held insufficient for a new trial. *Biard v. State* (Tex. Crim.), 100 S. W. 937.

6. *Lewis v. State*, 106 Ga. 362, 32 S. E. 342; *Wright v. State*, 91 Ga. 80, 16 S. E. 259.

7. *U. S.*—*Silvey v. United States*, 7 Ct. Cl. 305. *Ala.*—*Alabama Midland R. Co. v. Johnson*, 123 Ala. 197, 26 So. 160. *Cal.*—*Howland v. Oakland Consol. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983; *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935. *Canal Zone*.—*Fitzpatrick v. Panama R. Co.*, 2 Canal Zone 111. *Ga.*—*Poullain v. Poullain*, 79 Ga. 11, 4 S. E. 81; *Charleston & W. C. R. Co. v. Thompson*, 13 Ga. App. 528, 80 S. E. 1097. *Ind.*—*Miller v. Cook*, 124 Ind. 238, 24 N. E. 750; *Rich v. Starbuck*, 56 Ind. 126. *Ia.*—*Nichols-Shepard Co. v. Ringler*, 120 N. W. 640; *Johnson v. Waterloo*, 140 Iowa 670, 119 N. W. 70; *Royce v. Barrager*, 116 Iowa 671, 88 N. W. 940; *Manson v. Ware*, 63 Iowa 345, 19 N. W. 275. *Minn.*—*Graves v. Bonness*, 104 Minn. 135, 116 N. W. 209. *Mo.*—*Bryant v. Lazarus*, 235 Mo. 606, 139 S. W. 558; *De Lassus v. Winn*, 174 Mo. 636, 74 S. W. 635. *Neb.*—*McNeal v. Hunter*, 72 Neb. 579, 101 N. W. 236; *Keiser v. Decker*, 29 Neb. 92, 45 N. W. 272. *Nev.*—*Whise v. Whise*, 36 Nev. 16, 131 Pac. 967, 44 L. R. A. (N. S.) 689. *N. Y.*—*Brown v. Newell*, 132 App. Div. 548, 116 N. Y. Supp. 965; *Solomon v. Alexander*, 128 App. Div. 441, 122 N. Y. Supp. 779; *Haight v. Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193; *Chester v. Jumel*, 56 Hun 640, 10 N. Y. Supp. 57, 30 N. Y. St. 319; *Healy v. Healy*, 32 Misc. 342, 66 N. Y. Supp. 741. *Okla.*—*Board of Education of Lawton v. School Dist. No. 49*, 28 Okla. 221, 114 Pac. 742. *R. I.*—*Chapin v. Stone*, 32 R. I. 309, 79 Atl. 788. *Va.*—*Richmond v. Poore*, 109 Va. 313, 63 S. E. 1014; *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457. *Wis.*—*Beery v. Chicago & N. W. Ry. Co.*, 73 Wis. 197, 40

N. W. 687. *Can.*—*Barton v. Dundas*, 24 U. C. Q. B. 273.

8. *Ga.*—*Clafin & Co. v. Briant*, 58 Ga. 414. *Ind.*—*Davis v. Cleveland, C. & St. L. Ry. Co.*, 140 Ind. 468, 39 N. E. 495; *Swift v. Wakeman*, 9 Ind. 552. *Ia.*—*Welch v. Browning*, 115 Iowa 690, 87 N. W. 430. *Ky.*—*Eccles v. Shackleford*, 1 Litt. 35. *Compare Mason v. Meloan*, 165 Ky. 582, 177 S. W. 435. *La.*—*Devot & Co. v. Marx*, 19 La. Ann. 491; *Long v. Robinson*, 5 La. Ann. 627. *N. Y.*—*Fowler v. Kelly*, 11 Jones & S. 350. *Pa.*—*Marsh v. Moser*, 1 Woodw. Dec. 218. *R. I.*—*McDonald v. Rhode Island Co.*, 26 R. I. 467, 59 Atl. 391. *Va.*—*Cody v. Conly*, 27 Gratt. (68 Va.) 313. *W. Va.*—*Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Pridemore*, 55 W. Va. 451, 47 S. E. 258. *Wis.*—*Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773.

[a] **Newly Discovered Matter Not Within Issues**.—Where newly discovered matter, as distinguished from newly discovered evidence, that is, matter not within the issues of the former trial, is discovered after the trial, the remedy is not a new trial, but a review of the judgment, since such newly discovered matter would not be admissible under the issues tried. *Rich v. Starbuck*, 50 Ind. 126; *Nelson v. Johnson*, 18 Ind. 329.

9. *Conn.*—*Wildman v. Wildman*, 72 Conn. 262, 44 Atl. 224. *Ga.*—*Huntington v. Bonds*, 68 Ga. 23. *Ill.*—*Chicago, B. & Q. R. Co. v. Sullivan*, 17 N. E. 460. *Kan.*—*Haughton v. Bilson*, 84 Kan. 129, 132, 113 Pac. 400. *Ky.*—*Chesapeake & O. Ry. Co. v. Friel*, 19 Ky. L. Rep. 152, 39 S. W. 704. But see *Mason v. Meloan*, 165 Ky. 582, 177 S. W. 435, where a physician who defended a malpractice suit on evidence that the wound would have healed but for the patient's lack of care, was granted a new trial on evidence that a subsequently discovered cancerous condition prevented it from healing. *La.*—*Erwin's Exrs. v. Trion*, 2 La. 305; *Sorrel v. St. Julien*, 4 Mart. O. S. 508. *N. Y.*—*Guyot v. Butts*, 4 Wend. 579;

c. *Must Be Admissible*.—The evidence proposed must, likewise, be admissible under the rules of evidence.¹⁰

d. *Must go to Merits*.—The newly discovered evidence must go to the merits of the case.¹¹ It will not be considered if its nature is such that it merely impeaches a former witness,¹² although such wit-

Gerard v. McCormick, 16 Daly 40, 8 N. Y. Supp. 860, 29 N. Y. St. 709, affirmed in 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234.

10. Ala.—Lowery v. State, 98 Ala. 45, 13 So. 498. Cal.—People v. Voll, 43 Cal. 166. Ga.—Taylor v. State, 132 Ga. 235, 63 S. E. 1116; Perry v. Mulligan, 58 Ga. 479; Lynes v. State, 46 Ga. 208. Ind.—Rinkard v. State, 157 Ind. 534, 6 N. E. 14; Rater v. State, 49 Ind. 507. Ia.—State v. Burge, 7 Iowa 255. La. State v. Jones, 112 La. 980, 36 So. 825. Mo.—State v. Bauerle, 145 Mo. 1, 46 S. W. 609. N. Y.—People v. Walker, 40 Misc. 521, 83 N. Y. Supp. 207, 17 N. Y. Crim. 318. N. C.—Sikes v. Parker, 95 N. C. 232. Tex.—Graham v. State, 73 Tex. Crim. 28, 163 S. W. 726; McGaughey v. State, 74 Tex. Crim. 529, 169 S. W. 287; Walling v. State, 55 Tex. Crim. 254, 116 S. W. 813; Tyler v. State, 48 Tex. Crim. 611, 90 S. W. 33.

Removal of incompetency subsequent to trial, see *infra*, II, H, 4, a.

11. Ga.—Perry v. Mulligan, 58 Ga. 479; Clark v. Carter, 12 Ga. 500, 53 Am. Dec. 485. Ill.—Wilder v. Greenlee, 49 Ill. 253. Kan.—Parker v. Bates, 29 Kan. 537. N. J.—Van Riper v. Dundee Mfg. Co., 33 N. J. L. 152.

12. U. S.—Carr v. Gale, 1 Curt. 384, 5 Fed. Cas. No. 2,433; Brooke v. Peyton, 1 Cranch C. C. 128, 4 Fed. Cas. No. 1,934. Alaska.—Chase v. Alaska Fish, etc. Co., 2 Alaska 82. Ark.—Hudspeth v. State, 55 Ark. 323, 18 S. W. 183; Minkwitz v. Steen, 36 Ark. 260. Cal.—People v. Holmes, 126 Cal. 462, 58 Pac. 917; Baker v. Joseph, 16 Cal. 173. Conn.—Shields v. State, 45 Conn. 266; Parsons v. Platt, 37 Conn. 563; Tappin v. Clarke, 32 Conn. 367. Ga.—Broadhurst v. Hill, 140 Ga. 211, 78 S. E. 838; Betts Co. v. Hancock, 139 Ga. 198, 77 S. E. 77; Lang v. Yearwood, 127 Ga. 155, 56 S. E. 305. Ill.—Graham v. Hagmann, 270 Ill. 252, 110 N. E. 337; Bemis v. Horner, 165 Ill. 347, 46 N. E. 277; Jacobson v. Gunzburg, 150 Ill. 135, 37 N. E. 229. Ind.—Hutchins v. State, 151 Ind. 667, 52 N. E. 403;

Jackson v. Swope, 134 Ind. 111, 33 N. E. 909; Blackburn v. Crowder, 110 Ind. 127, 10 N. E. 933. Kan.—Schriber v. Maxwell, 92 Kan. 306, 140 Pac. 865; Morgan v. Bell, 41 Kan. 345, 21 Pac. 255. Ky.—South Covington, etc. R. Co. v. Lee, 153 Ky. 621, 156 S. W. 99; McBurnie v. Stelsly, 29 Ky. L. Rep. 1191, 97 S. W. 42. Mass.—Hopcraft v. Kittredge, 162 Mass. 1, 37 N. E. 768; Hammond v. Wadhams, 5 Mass. 353. Minn.—Sivertson v. Moorhead, 119 Minn. 467, 138 N. W. 674; Strand v. Great Northern R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Northrup v. Hayward, 99 Minn. 299, 109 N. W. 241. Mo.—Neff v. Cameron, 213 Mo. 350, 111 S. W. 1139, 127 Am. St. Rep. 606; State v. Johnson, 139 Mo. 197, 40 S. W. 767; Stahlman v. United R. Co., 183 Mo. App. 144, 166 S. W. 312. Mont.—Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; Garfield Min. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153. N. M.—Armstrong v. Aragon, 13 N. M. 19, 79 Pac. 291. N. Y.—Pospisil v. Kane, 73 App. Div. 457, 77 N. Y. Supp. 307; Corley v. New York & H. R. Co., 12 App. Div. 409, 42 N. Y. Supp. 941; Moran v. Friedman, 88 Hun 515, 34 N. Y. Supp. 911, 69 N. Y. St. 74. Okla.—Flersheim Merc. Co. v. Gilespeie, 14 Okla. 143, 77 Pac. 183. Tex.—Metzger v. Wendler, 35 Tex. 378; Glover v. Pfeuffer (Tex. Civ. App.), 163 S. W. 984; El Paso, etc. R. Co. v. Murtle, 49 Tex. Civ. App. 273, 108 S. W. 998. Va.—St. John's Exrs. v. Alderson, 32 Gratt. (73 Va.) 140. W. Va.—Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Pride-more, 55 W. Va. 451, 47 S. E. 258; Carder v. Bank of West Virginia, 34 W. Va. 38, 11 S. E. 716. Wis.—Birdsall v. Fraenzel, 154 Wis. 48, 142 N. W. 274; Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978; Knopke v. Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795. Eng.—Dickenson v. Blake, 7 Bro. P. C. 177, 3 Eng. Reprint 114.

Contra, Durant v. Philpot, 16 S. C. 116; Durant v. Ashmore, 2 Rich. L.

ness be the sole witness,¹³ nor if it merely contradicts a witness by negative testimony.¹⁴ The fact, however, that the alleged new evidence tends incidentally to impeach a witness, where it is not proposed for that purpose but is material and important, is no objection.¹⁵ Moreover, newly discovered evidence, although contradictory,

(S. C.) 184; *Levingsworth v. Fox*, 2 Bay (S. C.) 520.

[a] **Discovery of Hostility.**—That since the trial it has been learned that a witness for the state was hostile to the defendant is not sufficient cause for a new trial. *State v. Rohrer*, 34 Kan. 427, 8 Pac. 718.

13. *Hunt v. State*, 81 Ga. 140, 7 S. E. 142.

14. **U. S.**—*Lowry v. Mt. Adams & E. P. Incline Plane Ry. Co.*, 68 Fed. 827; *Brooke v. Peyton*, 1 Cranch C. C. 128, 4 Fed. Cas. No. 1,934; *United States v. Potter*, 6 McLean 182, 27 Fed. Cas. No. 16,077; *Carr v. Gale*, 1 Curt. 384, 5 Fed. Cas. No. 2,433. **Ala.**—*Southern R. Co. v. Wildmann*, 119 Ala. 565, 24 So. 764. **Cal.**—*Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92; *Chalmers v. Sheehy*, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62. **Ga.**—*Conant v. Jones*, 120 Ga. 568, 48 S. E. 234; *Martin v. Kendrick*, 94 Ga. 709, 21 S. E. 893; *Robinson v. Veal*, 79 Ga. 633, 7 S. E. 159. **Ill.**—*People v. McCullough*, 210 Ill. 488, 71 N. E. 602; *Chicago & E. I. R. Co. v. Stewart*, 203 Ill. 223, 67 N. E. 830; *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Conlan v. Mead*, 172 Ill. 13, 49 N. E. 720. **Ind.**—*Brown v. Grove*, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; *Pennsylvania Co. v. Nations*, 111 Ind. 203, 12 N. E. 309; *Michael v. State*, 57 Ind. App. 520, 108 N. E. 173. **Ia.**—*Grinnell Brick & T. Co. v. Booknau*, 167 Iowa 279, 149 N. W. 239; *Morrow v. Chicago, R. I. & P. R. Co.*, 61 Iowa 487, 16 N. W. 572; *Kline v. Kansas City, etc. R. Co.*, 50 Iowa 656. **Kan.**—*Elvin v. Blubaugh*, 89 Kan. 726, 132 Pac. 994; *Lee v. Birmingham*, 39 Kan. 320, 18 Pac. 218; *State v. Smith*, 35 Kan. 618, 11 Pac. 908. **Minn.**—*Jones v. Chicago, M. & St. P. Ry. Co.*, 42 Minn. 183, 43 N. W. 1114; *Gilmore v. Brost*, 39 Minn. 190, 39 N. W. 139; *Cirkel v. Ellis*, 36 Minn. 323, 31 N. W. 513. **Mo.**—*Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943; *Liberty v. Burns*, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; *Shotwell v. McElhinney*,

101 Mo. 677, 14 S. W. 754. **N. Y.**—*Fleming v. Hollenback*, 7 Barb. 271; *Kalashen v. Till*, 136 App. Div. 632, 121 N. Y. Supp. 393; *Rubenfeld v. Rabiner*, 33 App. Div. 374, 54 N. Y. Supp. 68; *Reiffeld v. Delaware & H. Canal Co.*, 20 App. Div. 635, 47 N. Y. Supp. 226. **N. C.**—*Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748. **R. I.**—*Blake v. Rhode Island Co.*, 32 R. I. 213, 78 Atl. 834, Ann. Cas. 1912D, 852; *Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876. **Tex.**—*Russell v. Nall*, 79 Tex. 664, 15 S. W. 635; *Fears v. Albea*, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78. **Va.**—*Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457. **W. Va.**—*Carder v. Bank of West Virginia*, 34 W. Va. 38, 11 S. E. 716; *Bloss v. Hull*, 27 W. Va. 503; *Gillilan v. Ludington*, 6 W. Va. 128. **Wis.**—*Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377. **Eng.**—*Pistrucci v. Turner*, 5 Wkly. Rep. 85. **Can.**—*Smith v. Neill*, 9 N. Brunsw. 105.

15. **Ga.**—*Orr v. State*, 5 Ga. App. 76, 62 S. E. 676; *Saylors v. State*, 9 Ga. App. 227, 70 S. E. 975. **Ind.**—*Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933; *Rains v. Ballow*, 54 Ind. 79. **Ia.**—*Murray v. Weber*, 92 Iowa 757, 60 N. W. 492; *Alger v. Merritt*, 16 Iowa 121. **Ky.**—*Tyree v. Com.*, 160 Ky. 706, 170 S. W. 33. **Me.**—*Stackpole v. Perkins*, 85 Me. 298, 27 Atl. 160. **Miss.**—*Watson v. State*, 96 Miss. 369, 50 So. 627. See *Turner v. State*, 89 Misc. 621, 42 So. 165. **Mo.**—*State v. Spiritus*, 191 Mo. 24, 90 S. W. 459. **Neb.**—*Bailey v. State*, 36 Neb. 808, 55 N. W. 241. **Nev.**—*Manning v. Gignoux*, 23 Nev. 322, 46 Pac. 886. **N. Y.**—*Kalashen v. Till*, 136 App. Div. 632, 121 N. Y. Supp. 393; *Hess v. Sloane*, 47 App. Div. 585, 62 N. Y. Supp. 666; *Keister v. Rankin*, 34 App. Div. 288, 54 N. Y. Supp. 274 reversing 29 App. Div. 539, 51 N. Y. Supp. 634. **Pa.**—*Com. v. Robins*, 7 Kulp 108; *Com. v. Yot Sing*, 7 Kulp 349. **Tex.**—*Houston, etc. R. Co. v. Forsyth*, 49 Tex. 171; *Carter v. State*, 75 Tex. Crim. 110, 170 S. W. 739; *Cyrus v. State*, 74

may be sufficient for a new trial where it shows material admissions, confessions, or declarations made by the prevailing party,¹⁶ or by his witnesses,¹⁷ inconsistent with their testimony at the trial.

e. *Admissions by Prevailing Party.*—Admission by the prevailing party made, before or during the trial, under such circumstances that the applicant had no reason to believe they had been made, may constitute newly discovered evidence,¹⁸ and, in some jurisdictions so may admissions made after the trial.¹⁹

Tex. Crim. 437, 169 S. W. 679. Wis. Smith v. Smith, 51 Wis. 665, 8 N. W. 868.

16. Ia.—Alger v. Merritt, 16 Iowa 121. Me.—Inhabitants of Warren v. Inhabitants of Hope, 6 Me. 479. N. Y. Weber v. Weber, 5 N. Y. Supp. 178.

Contra, Goracke v. Hintz, 13 Neb. 390, 14 N. W. 379; Ogden v. State, 13 Neb. 436, 14 N. W. 165.

17. Colo.—Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Conn.—Tappin v. Clarke, 32 Conn. 367.

Ia.—Murray v. Weber, 92 Iowa 757, 60 N. W. 492; First Nat. Bank of Shenandoah v. Wabash, St. L. & P. Ry. Co., 61 Iowa 700, 17 N. W. 48.

Kan. Herrald v. Paris, 89 Kan. 131, 130 Pac. 684; Houghton v. Bilson, 84 Kan. 129, 132, 113 Pac. 400; Morgan v. Bell, 41 Kan. 345, 21 Pac. 255.

Me.—Stackpole v. Perkins, 85 Me. 298, 27 Atl. 160.

Mass.—Sherman v. Collingwood, 221 Mass. 8, 108 N. E. 508; Chatfield v. Lathrop, 6 Pick. 417.

Mo.—Vandeventer Furniture Co. v. Warren Comm., etc. Co., 127 Mo. App. 312, 105 S. W. 653.

N. Y.—Jaquish v. Kelly, 165 App. Div. 847, 151 N. Y. Supp. 187; Hansen v. Vogelsang, 139 App. Div. 759, 124 N. Y. Supp. 487; Miller v. Breitenbecker, 140 N. Y. Supp. 293.

Pa.—O'Bryan v. Bowers, 10 Pa. Co. Ct. 254; Struthers v. Wagner, 6 Phila. 262.

R. I.—Hughes v. Rhode Island Co., 67 Atl. 450.

Wis. Birdsell v. Fraenzel, 154 Wis. 48, 142 N. W. 274.

18. Cal.—Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511.

Ga.—Andrews v. Mitchell, 92 Ga. 629, 18 S. E. 1017; Gregory v. Harrell, 88 Ga. 170, 14 S. E. 186; Girardey v. Bessman, 62 Ga. 654.

Ill.—Schweyer v. Anstett, 2 Ill. App. 365.

Ind.—Rains v. Ballou, 54 Ind. 79; Humphries v. Marshall's Admrs., 12 Ind. 609.

Ia.—Sullivan v. Chicago, etc. R. Co., 119 Iowa 464, 93 N. W. 367; Mally v. Mally, 114 Iowa 369, 86 N. W. 262; Bullard v. Bullard, 112 Iowa 423, 84 N. W. 513.

Kan.

Missouri Pac. Ry. Co. v. Lovelace, 57 Kan. 195, 45 Pac. 590.

Ky.—Owsley v. Owsley, 117 Ky. 47, 77 S. W. 597; Adams Oil Co. v. Stout, 19 Ky. L. Rep. 758, 41 S. W. 563.

Me.—Foye v. Turner, 91 Me. 286, 39 Atl. 998; Strout v. Stewart, 63 Me. 227; Warren v. Hope, 6 Me. 479.

Minn.—Cairns v. Keith, 50 Minn. 32, 52 N. W. 267; Hosford v. Rowe, 41 Minn. 245, 42 N. W. 1018.

Miss.—Kane v. Burrus, 2 Smed. & M. 213.

Mo.—Standard Inv. Co. v. Hoyt, 164 Mo. 124, 63 S. W. 1093; Jones v. H. Martini Furnishing Co., 77 Mo. App. 474.

Nev.—Wall v. Trainor, 16 Nev. 131.

N. Y.—Conlon v. Mission of Immaculate Virgin, 87 App. Div. 165, 84 N. Y. Supp. 49; Wilson v. Clancy, 6 App. Div. 449, 39 N. Y. Supp. 658.

Ohio. Toledo v. Strasel, 31 Ohio Cir. Ct. 432, 12 Ohio Cir. Ct. (N. S.) 212.

Tex. Houston, etc. R. Co. v. Forsyth, 49 Tex. 171; Welch v. Nasboe, 8 Tex. 189; Missouri, etc. R. Co. v. Clark, 35 Tex. Civ. App. 189, 79 S. W. 827.

Vt. Myers v. Brownell, 2 Aiken 407, 16 Am. Dec. 729.

Va.—Preston v. Otey, 83 Va. 491, 14 S. E. 68.

Wash.—Lafond v. Smith, 8 Wash. 26, 35 Pac. 404.

Wis.—Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656; Smith v. Grover, 74 Wis. 171, 42 N. W. 112.

When merely cumulative, see *infra*, II, H, 3, f, (II).

[a] Diligence in endeavoring to discover such evidence, must appear. Morrison v. Carey, 129 Ind. 277, 28 N. E. 697.

19. Ga.—Collins v. Loyd, 31 Ga. 128.

Nev.—Wall v. Trainor, 16 Nev. 131.

Tex.—Welch v. Nasboe, 8 Tex. 189.

Contra, Sullivan v. O'Conner, 77 Ind. 149; Crow v. Brunson, 1 Ind. App. 268, 27 N. E. 507; Herrman v. Altman, 139 App. Div. 930, 124 N. Y. Supp. 39.

See Bauwens v. Goethals, 187 Ill. App. 563, admissions that he had not been damaged, not sufficient.

As to facts transpiring after trial, see *infra*, II, G, 4, b.

f. *Cumulative Evidence*.—(I.) *In General*.—If the newly discovered evidence be merely cumulative, a new trial will be denied.²⁰ In this general rule, the use of the term “merely” is important, and the statement often met with, namely, that a new trial will not be granted if the evidence is cumulative, requires, in most jurisdictions, some modification. For, although it has been said that the rule will be relaxed with great caution,²¹ and that cumulative evidence even though

20. **U. S.**—Wright *v.* Southern Express Co., 80 Fed. 85; Flint, etc. R. Co. *v.* Marine Ins. Co., 71 Fed. 210. **Ark.**—Arkadelphia Lumber Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127; St. Louis Southwestern R. Co. *v.* Byrne, 73 Ark. 377, 84 S. W. 469; Arkansas Southern R. Co. *v.* Loughridge, 65 Ark. 300, 45 S. W. 907; White *v.* State, 17 Ark. 404. **Cal.**—Cahill *v.* E. B. & A. L. Stone Co., 167 Cal. 126, 138 Pac. 712; Wood *v.* Moulton, 146 Cal. 317, 80 Pac. 92; People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136. **Ga.**—Broadhurst *v.* Hill, 140 Ga. 211, 78 S. E. 838; Georgia R. & B. Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409; Somers *v.* State, 116 Ga. 535, 42 S. E. 779. **Ill.**—People *v.* McCullough, 210 Ill. 488, 71 N. E. 602; Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720. **Ind.**—Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619; Smith *v.* State, 143 Ind. 685, 42 N. E. 913; McDonald *v.* Coryell, 134 Ind. 493, 34 N. E. 7. **Ia.**—Smith *v.* Suechting, 156 Iowa 712, 137 N. W. 905; Hemmer *v.* Burger, 127 Iowa 614, 103 N. W. 957; State *v.* Blain, 118 Iowa 466, 92 N. W. 650. **Kan.**—Daly *v.* Gregg, 91 Kan. 506, 138 Pac. 614; Strong *v.* Moore, 75 Kan. 437, 89 Pac. 895; State *v.* Nelson, 59 Kan. 776, 52 Pac. 868. **Ky.**—Major *v.* Garrott, 157 Ky. 468, 163 S. W. 463; Mercer *v.* Mercer's Admr., 87 Ky. 21, 7 S. W. 307; Williams *v.* Com., 13 Ky. L. Rep. 753, 18 S. W. 364. **Me.**—Mitchell *v.* Emmons, 104 Me. 76, 71 Atl. 321; Fitch *v.* Sidelinger, 96 Me. 70, 51 Atl. 241; Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394. **Mass.**—Sawyer *v.* Merrill, 10 Pick. 16. **Mich.**—Hoover *v.* Detroit, G. H. & M. Ry. Co., 188 Mich. 313, 154 N. W. 94; Branch *v.* Klatt, 173 Mich. 31, 138 N. W. 263; Morin *v.* Robarge, 132 Mich. 337, 93 N. W. 886. **Minn.**—Erdman *v.* Watab R. Power Co., 112 Minn. 175, 127 N. W. 487, 128 N. W. 454; Strand *v.* Great Northern R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; State *v.* Barrett, 40 Minn. 65, 41 N. W. 459. **Mo.** State *v.* Allen, 171 Mo. 562, 71 S. W. 1000; St. Joseph Folding Bed Co. *v.* Kansas City, etc. R. Co., 148 Mo. 478, 50 S. W. 85; State *v.* Johnson, 139 Mo. 197, 40 S. W. 767. **Neb.**—Kraus *v.* Clark, 81 Neb. 575, 116 N. W. 164; Norbury *v.* Harper, 70 Neb. 389, 97 N. W. 438; Matoushek *v.* Dutcher, 67 Neb. 627, 93 N. W. 1049. **Nev.**—Pinschowers *v.* Hanks, 18 Nev. 99, 1 Pac. 454; Howard *v.* Winters, 3 Nev. 539. **N. Y.** Cheever *v.* Scottish Union & Nat. Ins. Co., 86 App. Div. 331, 83 N. Y. Supp. 732 (*affirmed* in 180 N. Y. 551, 73 N. E. 1121); Pospisil *v.* Kane, 73 App. Div. 457, 77 N. Y. Supp. 307; People *v.* Hovey, 30 Hun 354, 1 N. Y. Crim. 324. **Pa.**—Com. *v.* Flanagan, 7 Watts & S. 415; Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203; Slaterry *v.* Supreme Tent, etc., 19 Pa. Super. Ct. 108. **Tex.**—Conwill *v.* Gulf, C. & S. F. Ry. Co., 85 Tex. 96, 19 S. W. 1017; Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Adler *v.* State (Tex. Crim.), 50 S. W. 358. **Va.**—Richmond *v.* Poore, 109 Va. 313, 63 S. E. 1014; Norfolk *v.* John-akin, 94 Va. 285, 26 S. E. 830; Tate *v.* Tate, 85 Va. 205, 7 S. E. 352. **W. Va.** State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553; Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721; White *v.* Ward, 35 W. Va. 418, 14 S. E. 22. **Wis.**—Dibbert *v.* Metropolitan Inv. Co., 160 Wis. 329, 151 N. W. 802; Luebke *v.* Salzwedel, 157 Wis. 601, 147 N. W. 831; Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795. **Can.**—Inch *v.* Flewelling, 30 N. Brunsw. 19.
- See 3 ENCY. OF EV. 937.
- Contra*, Durant *v.* Philpot, 16 S. C. 116.
21. Irwin *v.* Morell, Dud. (Ga.) 72.
- [a] It is not an absolute and unqualified rule that a new trial will not be granted under any circumstances upon newly acquired cumulative testimony. Parsons *v.* Lewiston, B. & B. St. Ry., 96 Me. 503, 52 Atl. 1006.

it be material is not sufficient,²² yet it is held that if newly discovered evidence, although technically cumulative, has a distinct and independent bearing on the issue,²³ or if it would make clear what was before doubtful,²⁴ especially where the issue was close and the evidence sharply conflicting,²⁵ or if the application of the rule would tend to defeat substantial justice,²⁶ particularly in cases where a defeated party was surprised by the evidence,²⁷ or if, as a general summary, it would probably change the result,²⁸ or is of a decisive or conclusive

22. *McGavock v. Brown*, 4 Humph. (Tenn.) 251; *Kirby v. Waterford*, 14 Vt. 414.

23. *Stineman v. Beath*, 36 Iowa 73.

24. *Conn.*—*Waller v. Graves*, 20 Conn. 305. *Ky.*—*Cincinnati, etc. R. Co. v. Cecil*, 164 Ky. 377, 175 S. W. 654. *Miss.*—*Louisville, N. O. & T. Ry. Co. v. Crayton*, 69 Miss. 152, 12 So. 271. *Neb.*—*Hoffine v. Ewing*, 60 Neb. 729, 84 N. W. 93; *Hill v. Helman*, 33 Neb. 731, 51 N. W. 128; *Brooks v. Dutcher*, 22 Neb. 644, 36 N. W. 128. *Vt.*—*Barker v. French*, 18 Vt. 460; *Myers v. Brownell*, 2 Aik. 407, 16 Am. Dec. 729.

25. *Vollkommer v. Nassau Electric R. Co.*, 23 App. Div. 88, 48 N. Y. Supp. 372; *Schnitzler v. Oriental Metal Bed Co.*, 47 Misc. 356, 93 N. Y. Supp. 1119.

26. *N. Y.*—*Powell v. Jones*, 42 Barb. 24, 30. *Tex.*—*Wolf v. Mahan*, 57 Tex. 171; *Mitchell v. Bass*, 26 Tex. 372, 377. *Wash.*—*Brennan v. Seattle*, 39 Wash. 640, 81 Pac. 1092.

27. *Ky.*—*Millar v. Field*, 3 A. K. Marsh. 104. See *Butts v. Christy*, 23 Ky. L. Rep. 2355, 67 S. W. 377. *N. Y.*—*Parshall v. Klineck*, 43 Barb. 203. *Tex.*—*Wolf v. Mahan*, 57 Tex. 171; *Horne v. Stockton (Tex. Civ. App.)*, 178 S. W. 962.

28. *U. S.*—*Flannelly v. Delaware, etc. Co.*, 165 Fed. 350. *Ariz.*—*Charles T. Hayden Milling Co. v. Lewis*, 3 Ariz. 277, 32 Pac. 263. *Ark.*—*Berry v. Elliott*, 25 Ark. 89. *Cal.*—*Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 133 Pac. 172; *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *Oberlander v. Fixen*, 129 Cal. 690, 62 Pac. 254; *Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005. *Conn.*—*Husted v. Mead*, 58 Conn. 55, 19 Atl. 233; *Waller v. Graves*, 20 Conn. 305. *Ga.*—*Cone v. Cone*, 138 Ga. 606, 75 S. E. 644; *Windom v. State*, 114 Ga. 36, 39 S. E. 949; *Hanye v. Candler*, 99 Ga. 214, 25 S. E. 606; *Ogden v. Dodge*, 97 Ga. 461, 25 S. E. 321. *Ill.*—*Chicago & N. W. Ry. Co. v. Calumet Stock*

Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Sterling v. Merrill*, 124 Ill. 522, 17 N. E. 6. *Ind.*—*Smith v. State*, 143 Ind. 685, 42 N. E. 913; *Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909; *Fleming v. McClafin*, 1 Ind. App. 537, 27 N. E. 875. *Ia.*—*Clesle v. Frerichs*, 95 Iowa 83, 63 N. W. 581. See also *White v. Nafus*, 84 Iowa 350, 51 N. W. 5. *Kan.*—*Douglass v. Anthony*, 45 Kan. 439, 25 Pac. 853; *Morgan v. Bell*, 41 Kan. 345, 21 Pac. 255. *Ky.*—*Cincinnati, etc. R. Co. v. Cecil*, 164 Ky. 377, 175 S. W. 654; *Cahill v. Mullins*, 31 Ky. L. Rép. 72, 101 S. W. 336; *Butts v. Christy*, 23 Ky. L. Rep. 2355, 67 S. W. 377. *La.*—*State v. Albert*, 109 La. 201, 33 So. 196. *Me.*—*Parsons v. Lewiston, B. & B. St. Ry. Co.*, 96 Me. 503, 52 Atl. 1006; *Dodge v. Dodge*, 86 Me. 393, 30 Atl. 14. *Mass.*—*Keet v. Mason*, 167 Mass. 154, 45 N. E. 81. *Miss.*—*Louisville, etc. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271. *Mo.*—*Donovan v. Ryan*, 35 Mo. App. 160. *Neb.*—*Beatrice German Nat. Bank v. Edwards*, 63 Neb. 604, 88 N. W. 657; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *Keiser v. Decker*, 29 Neb. 92, 45 N. W. 272. *Nev.*—*McCafferty v. Flinn*, 32 Nev. 269, 107 Pac. 225, 228; *Wall v. Trainor*, 16 Nev. 131. *N. Y.*—*Lee v. Supreme Council C. B. Legion*, 64 App. Div. 622, 72 N. Y. Supp. 274; *Hess v. Sloane*, 47 App. Div. 585, 62 N. Y. Supp. 666; *Kring v. New York Cent. & H. R. R. Co.*, 45 App. Div. 373, 60 N. Y. Supp. 1114. *Pa.*—*Kenderline v. Phelin*, 1 Phila. 343; *Com. v. Moss*, 6 Kulp 31. *B. I.*—*Shepard v. New York, etc. R. Co.*, 27 R. I. 155, 61 Atl. 42; *McDonald v. Rhode Island Co.*, 26 R. I. 467, 59 Atl. 391; *Heaton v. Manhattan F. Ins. Co.*, 7 R. I. 502. *S. C.*—*Durant v. Philpot*, 16 S. C. 116. *S. D.*—*Sluman v. Dolan*, 24 S. D. 32, 123 N. W. 72; *Wilson v. Seaman*, 15 S. D. 103, 87 N. W. 577. *Tenn.*—*King v. State*, 91 Tenn. 617, 20 S. W. 169. *Tex.*—*Wolf*

character²⁹ then it may warrant a new trial. However, as in all other cases of newly discovered evidence, the applicant must have shown diligence in procuring the evidence for the trial, otherwise it will not be considered.³⁰

(II.) What Constitutes Cumulative Evidence. — Cumulative evidence is additional evidence of the same kind to the same point.³¹ If, however,

r. Mahan, 57 Tex. 171; *Ziegler v. Stefanek*, 31 Tex. 29; *Stewart v. Hamilton*, 19 Tex. 96; *Hickman v. State* (Tex. Crim.), 25 S. W. 126; *Screws v. State* (Tex. Crim.), 23 S. W. 796. **Vt.** *Thayer v. Central Vermont R. Co.*, 60 Vt. 214, 13 Atl. 859; *Gilman v. Nichols*, 42 Vt. 313; *Burr v. Palmer*, 23 Vt. 244. **Va.**—*Cody v. Conly*, 27 Gratt. (68 Va.) 313. **W. Va.**—*Carder v. Bank of West Virginia*, 34 W. Va. 38, 11 S. E. 716.

[a] **To Establish an Alibi.**—In *State v. Stowe*, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609, the court said: "It is urged that the newly discovered testimony is cumulative and therefore not sufficient to command a new trial; but this rule governing cumulative evidence must be received with some modification, and given a common sense construction, and, whatever may be its application to other character of testimony, we do not think it applies where the object of the evidence is to prove an alibi. In *Pinckford v. State*, 13 Tex. App. 468, the court says: 'That evidence is cumulative, where the object sought is to prove an alibi, is no reason for its exclusion; on the contrary, the greater the number of witnesses to the facts establishing it, the stronger, ordinarily, would be our reliance upon and conviction of its truth.' The same doctrine was laid down in *Smythe v. State*, 17 Tex. App. 244; also *Lawson v. State*, 13 Tex. App. 264; *Tyler v. State*, 13 Tex. App. 205."

29. *Coggin v. Parks*, 85 Ga. 516, 11 S. E. 840; *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385; *Lilly v. People*, 148 Ill. 467, 36 N. E. 95; *Bingham v. Spruill*, 97 Ill. App. 374.

30. See *infra*, II, H, 5.

31. **U. S.**—*Aiken v. Bemis*, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109. **Ark.** *Arkansas Cent. R. Co. v. Fain*, 85 Ark. 532, 109 S. W. 514; *Robins v. Fowler*, 2 Ark. 133. **Cal.**—*In re Doolittle's Estate*, 153 Cal. 29, 94 Pac. 240; *Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225; *Williamson v. Tobey*, 86 Cal. 497, 25

Pac. 65. **Conn.**—*Hart v. Brainerd*, 68 Conn. 50, 35 Atl. 776; *Andersen v. State*, 43 Conn. 514, 21 Am. Rcp. 669; *Waller v. Graves*, 20 Conn. 305. **Ga.** *McKinnon v. Henderson*, 145 Ga. 373, 89 S. E. 415; *Saylors v. State*, 9 Ga. App. 227, 70 S. E. 975. **Ill.**—*Schlencker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100. **Ind.**—*De Hart v. Aper*, 107 Ind. 460, 8 N. E. 275; *Hines v. Driver*, 100 Ind. 315. **Ia.**—*Smith v. Smith*, 160 Iowa 111, 140 N. W. 659; *Schnee v. Dubuque*, 122 Iowa 459, 98 N. W. 298. **Kan.** *Dent v. Simpson*, 81 Kan. 217, 221, 105 Pac. 542; *Hornor v. Schinstock*, 77 Kan. 663, 96 Pac. 143. **Ky.**—*Jones v. Whitaker*, 141 Ky. 484, 133 S. W. 223; *Hall v. Wilson*, 116 S. W. 244. **Me.**—*Mitchell v. Emmons*, 104 Me. 76, 71 Atl. 321; *Berry v. Ross*, 94 Me. 270, 47 Atl. 512. **Mass.**—*Gardner v. Gardner*, 2 Gray 434; *Parker v. Hardy*, 24 Pick. 246. **Minn.**—*Layman v. Minneapolis St. R. Co.*, 66 Minn. 452, 69 N. W. 329; *Nininger v. Knox*, 8 Minn. 140. **Miss.**—*Williams v. State*, 99 Miss. 274, 54 So. 857; *Vardeman v. Byrne*, 7 How. 265. **Mo.**—*St. Joseph Folding Bed Co. v. Kansas City, etc. R. Co.*, 148 Mo. 478, 50 S. W. 85; *Howland v. Reeves*, 25 Mo. App. 458. **Nev.**—*Pinschowers v. Hanks*, 18 Nev. 99, 1 Pac. 454. **N. J.** *Hoban v. Sandford & Stillman Co.*, 64 N. J. L. 426, 45 Atl. 819; *Corkery v. Cent. R. R. of New Jersey* (N. J. L.), 43 Atl. 655. **N. Y.**—*People ex rel. Oelricks v. Superior Court of New York*, 10 Wend. 286, 294; *Grafton v. Ball*, 164 App. Div. 70, 149 N. Y. Supp. 447; *Wilcox Silver Plate Co. v. Barclay*, 48 Hun 54, 14 N. Y. Civ. Proc. 211, 14 N. Y. St. 879. **Pa.**—*Ruddy v. Ruddy*, 6 Kulp 297. **Tenn.**—*Tabler v. Connor*, 1 Baxt. 195; *McGavock v. Brown*, 4 Humph. 251. **Tex.**—*Houston, etc. R. Co. v. Forsyth*, 49 Tex. 171; *Owens v. State* (Tex. Crim.), 89 S. W. 837; *Harlan v. Texas Fuel, etc. Co.* (Tex. Civ. App.), 160 S. W. 1142. **Vt.**—*Lawson v. Crane*, 83 Vt. 115, 74 Atl. 641; *Bradish v. State*, 35 Vt. 452. **Va.**—*St. John's Exrs. v. Alderson*, 32 Gratt. (73

it is of a different kind on the same point, or of the same kind on a different point, it is not cumulative.³² The old and new facts may tend to prove the same point, yet be so different in kind as not to be cumulative,³³ and whether or not newly discovered evidence is cumulative is to be determined by its character rather than by its effect.³⁴ Consequently, although the newly discovered evidence may tend to establish the same claim, yet it is not cumulative if it relate to distinct and independent facts of a different character,³⁵ or to a different transaction,³⁶ even though it tends to establish one and the same ultimate

Va.) 140. **W. Va.**—Grogan v. Chesapeake & O. Ry. Co., 39 W. Va. 415, 19 S. E. 563. **Wis.**—Finch v. Phillips, 41 Wis. 387.

As to what constitutes cumulative evidence, see 3 ENCY. OF EV. 915.

32. **Conn.**—Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669. **Ga.**—Hart v. Jackson, 77 Ga. 493, 3 S. E. 1; Long v. State, 54 Ga. 564. **Ind.**—Dennis v. State, 103 Ind. 142, 2 N. E. 349; Houston v. Bruner, 39 Ind. 376; Cooper v. Ellis, 3 Ind. App. 142, 29 N. E. 444. **Ia.**—Means v. Yeager, 96 Iowa 694, 65 N. W. 993. **Kan.**—State v. Tyson, 56 Kan. 686, 44 Pac. 609. **Minn.**—Layman v. Minneapolis St. Ry. Co., 66 Minn. 452, 69 N. W. 329. **N. J.**—Corkery v. Central R. R. (N. J. L.), 43 Atl. 655. **N. Y.**—People v. Shea, 16 Misc. 111, 38 N. Y. Supp. 821, 11 N. Y. Crim. 307. *Compare*, Wilson v. Heath, 68 Hun 209, 22 N. Y. Supp. 833, 52 N. Y. St. 109. **Tex.**—Riojas v. State, 36 Tex. Crim. 182, 36 S. W. 268. **Vt.**—Bradish v. State, 35 Vt. 452. **Wis.**—Keeler v. Jacobs, 87 Wis. 545, 58 N. W. 1107.

33. Wynne v. Newman's Admr., 75 Va. 811; St. John's Exrs. v. Alderson, 32 Gratt. (73 Va.) 140; Grogan v. Chesapeake & O. Ry. Co., 39 W. Va. 415, 19 S. E. 563.

34. Building & Loan Assn. v. McMullen, 59 Kan. 493, 53 Pac. 481.

[a] Evidence to a contrary effect is not cumulative. Haughton v. Bilson, 84 Kan. 129, 113 Pac. 400, citing 3 ENCY. OF EV. 924. See further, Davis v. Sim, 92 Kan. 264, 110 Pac. 851.

[b] Whether evidence is cumulative may be determined on demurrer to the petition. Haughton v. Bilson, 84 Kan. 129, 113 Pac. 400.

35. **U. S.**—Aiken v. Bemis, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109. **Ala.**—West Virginia Land Co. v. May, 166 Ala. 127, 52 So. 315. **Conn.**—Knowles

v. Northrop, 53 Conn. 360, 4 Atl. 269; Waller v. Graves, 20 Conn. 305. **Ga.**—Fellows v. State, 114 Ga. 233, 39 S. E. 885; Georgia S. & F. R. Co. v. Zarks, 108 Ga. 800, 34 S. E. 127. **Idaho.**—Twin Springs Placer Co. v. Upper Boise Hydraulic Min. Co., 6 Idaho 687, 59 Pac. 535. **Ill.**—Fletcher v. People, 117 Ill. 184, 7 N. E. 80; Protection L. Ins. Co. v. Dill, 91 Ill. 174. **Ind.**—Blackburn v. Crowder, 110 Ind. 127, 10 N. E. 933; Richter v. Meyer, 5 Ind. App. 33, 31 N. E. 582. **Ia.**—Mally v. Mally, 114 Iowa 309, 86 N. W. 262; Means v. Yeager, 96 Iowa 694, 65 N. W. 993. **Kan.**—Haughton v. Bilson, 84 Kan. 129, 113 Pac. 400; Winfield Bldg., etc. Assn. v. McMullen, 59 Kan. 493, 53 Pac. 481. **Me.**—Glidden v. Dunlap, 28 Me. 379. **Mass.**—Chatfield v. Lathrop, 6 Pick. 417. **Minn.**—Layman v. Minneapolis St. Ry. Co., 66 Minn. 452, 69 N. W. 329; Nininger v. Knox, 8 Minn. 140. **Miss.**—Williams v. State, 99 Miss. 274, 54 So. 857; Vardeman v. Byrne, 7 How. 365. **Mo.**—O'Keefe Bros. Grocery Co. v. Northwest Nat. Ins. Co. (Mo. App.), 176 S. W. 1055; Longdon v. Kelly, 51 Mo. App. 572; Howland v. Reeves, 25 Mo. App. 458. **Neb.**—Casey v. State, 20 Neb. 138, 29 N. W. 264; Lincoln v. Holmes, 20 Neb. 39, 28 N. W. 851. **Nev.**—Wall v. Trainor, 16 Nev. 131. **N. J.**—Corkey v. Central R. R. (N. J. L.), 43 Atl. 655. **N. Y.**—People v. O'Brien, 110 App. Div. 26, 96 N. Y. Supp. 1045; Wilcox Silver Plate Co. v. Barelay, 48 Hun 54, 14 N. Y. Civ. Proc. 211, 14 N. Y. St. 879. **Tex.**—Day v. Goodman, 17 S. W. 475; Galveston, H. & S. A. R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573. **Vt.**—Clark v. Gallagher, 74 Vt. 331, 52 Atl. 539; Gilman v. Nichols, 42 Vt. 313. **Wis.**—Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N. W. 788.

36. Means v. Yeager, 96 Iowa 694, 65 N. W. 993.

fact.³⁷ Newly discovered evidence as to relevant facts concerning which no proof was offered at all,³⁸ such as declarations or admissions of a party inconsistent with the case made by him,³⁹ or admissions or declarations of a prosecuting witness, when offered and admissible in behalf of the defendant,⁴⁰ or, in a prosecution for homicide, evidence of threats of the deceased,⁴¹ or evidence in contradiction of testimony which was wholly on one side, at the trial,⁴² or as to which the only evidence favorable to the moving party was that brought out on cross-examination of the adverse party's witnesses,⁴³ is not cumulative.

*Where the evidence on the trial is wholly circumstantial, and the evidence newly discovered is positive and direct, it should not be adjudged cumulative.⁴⁴ Nor, is circumstantial evidence cumulative of direct evidence to establish the same fact.⁴⁵

Newly discovered opinion evidence is not ground, usually, for a new trial since such evidence may cumulate to an infinite degree,⁴⁶ although

37. *Able & Co. v. Frazier*, 43 Iowa 175.

38. *Clark v. Gallagher*, 74 Vt. 331, 52 Atl. 539.

39. *Cal.*—*Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225. *Ga.*—*Mills v. May*, 42 Ga. 623. *Idaho.*—*Flannagan v. Newberg*, 1 Idaho 78. *Ill.*—See *Schweyer v. Anstett*, 2 Ill. App. 365. *Ind.*—*Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933. *Ia.*—*Bullard v. Bullard*, 112 Iowa 423, 84 N. W. 513. *Kan.*—*Klopp v. Jill*, 4 Kan. 482. *Ky.* *Adams Oil Co. v. Stout*, 19 Ky. L. Rep. 758, 41 S. W. 563. *Me.*—*Strout v. Stewart*, 63 Me. 227. *Mass.*—*Watts v. Howard*, 7 Mete. 478. *Nev.*—*Wall v. Trainor*, 16 Nev. 131. *N. Y.*—*Guyot v. Butts*, 4 Wend. 579; *Fowler v. Kelly*, 11 Jones & S. 380; *Tripler v. Ehehalt*, 5 Robt. 609.

As to admissions generally, see *supra*, II, G, 3, e.

40. *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80; *Com. v. Yot Sing*, 7 Kulp 349. But see *Sweat v. State*, 90 Ga. 315, 17 S. E. 273; *Higginbotham v. State* (Tex. Crim.), 20 S. W. 360.

41. *State v. Bailey*, 94 Mo. 311, 7 S. W. 425.

42. *Kan.*—*Davis v. Sim*, 92 Kan. 264, 140 Pac. 851. *Neb.*—*Lincoln v. Holmes*, 20 Neb. 39, 28 N. W. 851. *N. Y.*—*Powell v. Jones*, 42 Barb. 24; *Cole v. Fall Brook Coal Co.*, 61 Hun 623, 16 N. Y. Supp. 789, 40 N. Y. St. 834. *Tex.*—*Day v. Goodman*, 17 S. W. 475; *Wolf v. Mahan*, 57 Tex. 171. *W. Va.*—*Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953.

[a] Illustration.—In an action for

damages from a flood, alleged to have been caused by the breaking of a dam, witnesses for the defendants testified that they saw the dam still standing after the time when the injury was done. The plaintiff produced no evidence to the contrary, but asked a new trial on the ground that he had subsequently discovered eye witnesses who could contradict this testimony. It was held that the new evidence was not cumulative, and was of such importance that its effect should be passed upon by the jury, and that the diligence shown by the plaintiff was sufficient to entitle him to a new trial. *Davis v. Sim*, 92 Kan. 264, 140 Pac. 851.

43. *White v. Nafus*, 84 Iowa 350, 51 N. W. 5.

44. *Ind.*—*Humphries v. Marshall's Admr.*, 12 Ind. 609. *Ia.*—*Mally v. Mally*, 114 Iowa 309, 86 N. W. 262; *German v. Maquoketa Sav. Bank*, 38 Iowa 368; *Stineman v. Beath*, 36 Iowa 73. *Kan.*—*Dent v. Simpson*, 81 Kan. 217, 221, 105 Pac. 542. *N. J.*—*Van Riper v. Dundee Mfg. Co.*, 33 N. J. L. 152. *N. Y.*—*Guyot v. Butts*, 4 Wend. 579. See also *Platt v. Munroe*, 34 Barb. 291. *Tex.*—*Thompson v. State*, 25 Tex. App. 161, 7 S. W. 589; *West v. State*, 2 Tex. App. 209. *Wis.* *Dierolf v. Winterfeld*, 26 Wis. 175.

45. *Mally v. Mally*, 114 Iowa 309, 86 N. W. 262; *German v. Maquoketa Sav. Bank*, 38 Iowa 368.

46. *Ia.*—*Whittlesey v. Burlington, etc. R. Co.*, 121 Iowa 597, 90 N. W. 516, 97 N. W. 66. *Kan.*—*Manwell v. Turner*, 25 Kan. 426. *Ky.*—*Taylor Sons Co. v. Hunt*, 163 Ky. 120, 173

direct evidence is not cumulative to opinion evidence.⁴⁷

In criminal cases the rules are generally the same as in civil cases,⁴⁸ though it has been said that in a criminal case a new trial should be granted for newly discovered cumulative evidence which would raise a reasonable doubt of defendant's guilt.⁴⁹

g. Credibility of Evidence.—The proposed new evidence must be credible.⁵⁰ Upon the hearing, the witnesses by whom the newly discovered evidence is to be proved may be impeached,⁵¹ and if it appears that the nature of the new evidence, or the character of the proposed witnesses, be such as to make the alleged new evidence improbable or untrustworthy, a new trial will not be granted.⁵²

S. W. 333. **Me.**—*Hunter v. Randall*, 69 Me. 183; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478. **N. Y.**—*Sullivan v. Dahlman*, 1 City Ct. Rep. 475. **Tenn.** *Kannon v. Galloway*, 2 Baxt. 230. **Wash.**—*Moore v. Saunders*, 88 Wash. 602, 153 Pac. 329. **Can.**—*Moser v. Snarr*, 45 U. C. Q. B. 428.

[a] **Expert on Handwriting.**—*Manwell v. Turner*, 25 Kan. 426.

47. **Conn.**—*Knowles v. Northrop*, 53 Conn. 360, 4 Atl. 269. **Kan.**—*Bousman v. Stafford*, 71 Kan. 648, 81 Pac. 184. **Miss.**—*Vardeman v. Byrne*, 7 How. 365. **N. Y.**—*Platt v. Munroe*, 34 Barb. 291; *Cole v. Cole*, 50 How. Pr. 59, *affirmed* in 12 Hun 373.

48. See criminal cases cited throughout the preceding discussion, and *Adams v. People*, 47 Ill. 376; *Shaw v. State*, 27 Tex. 750; *White v. State*, 10 Tex. App. 167. But see *People v. O'Connor*, 37 Misc. 754, 76 N. Y. Supp. 511, 16 N. Y. Crim. 445.

[a] **To Establish Alibi.**—See *State v. Stowe*, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609. Compare *infra*, note 95.

49. *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669.

50. **U. S.**—*Macy v. De Wolf*, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8,933. **Ga.**—*Patterson v. Collier*, 77 Ga. 292, 3 S. E. 119. **Ky.**—*Mercer v. Mercer's Admr.*, 87 Ky. 21, 7 S. W. 307. **Me.**—*Greenleaf v. Grounder*, 84 Me. 50, 24 Atl. 461. **Mo.**—*State v. Beard*, 126 Mo. 548, 29 S. W. 592. **Mont.**—*Butte & B. Min. Co. v. Sloan*, 16 Mont. 97, 40 Pac. 217. **N. Y.**—*Cole v. Cole*, 50 How. Pr. 59; *People v. Shea*, 16 Misc. 111, 38 N. Y. Supp. 821, 11 N. Y. Crim. 307. **Tex.**—*Jernigan v. Wainer*, 12 Tex. 189; *Taylor v. State*, 32 Tex. Crim. 110, 22 S. W. 148.

[a] It must come from sources that presume its credibility. *Tovey v.*

Public Service Ry. Co. (N. J. L.), 95 Atl. 265. See also *Nall v. Lancaster*, 19 Ky. L. Rep. 350, 40 S. W. 242; *Kosmerl v. Mueller*, 91 Minn. 196, 97 N. W. 660.

51. **U. S.**—*Macy v. De Wolf*, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8,933. **Ga.**—*McNatt v. McRae*, 117 Ga. 898, 45 S. E. 248. **Kan.**—*Kansas State Agr. College v. Linscott*, 30 Kan. 240, 1 Pac. 81. **Ky.**—*Mercer v. Mercer's Admr.*, 87 Ky. 21, 7 S. W. 307. **Me.** *Greenleaf v. Grounder*, 84 Me. 50, 24 Atl. 461. **Mass.**—*Parker v. Hardy*, 24 Pick. 246. **Minn.**—*Wherry v. Duluth, etc. R. Co.*, 64 Minn. 415, 67 N. W. 223. **Mo.**—*Mackin v. People's St. Ry. & Elect. L. & P. Co.*, 45 Mo. App. 82. **N. Y.**—*Fleming v. Hollenback*, 7 Barb. 271; *Hagen v. New York Cent. & H. R. R. Co.*, 100 App. Div. 218, 91 N. Y. Supp. 914 (*reversing* 44 Misc. 540, 90 N. Y. Supp. 125); *Cameron v. Leonard*, 17 App. Div. 127, 45 N. Y. Supp. 155. **Pa.**—*Kenderdine v. Phelin*, 1 Phila. 343. **Tex.**—*San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App. 341, 59 S. W. 920. **Can.**—*Connell v. Miller*, 4 N. Brunsw. 433.

52. **U. S.**—*Boiakosky v. Philadelphia, etc. R. Co.*, 126 Fed. 230; *United States v. Bellaire First Nat. Bank*, 86 Fed. 861; *Griffith v. Baltimore, etc. R. Co.*, 44 Fed. 574; *Macy v. De Wolf*, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8,933. **Cal.**—*Thompson v. Thompson*, 88 Cal. 110, 25 Pac. 962; *Burritt v. Gibson*, 3 Cal. 396. **Conn.**—*Knowles v. Northrop*, 53 Conn. 360, 4 Atl. 269. **Ga.**—*Tipton v. State*, 119 Ga. 304, 46 S. E. 436; *Webb v. Wright & Weslosky Co.*, 112 Ga. 432, 37 S. E. 710; *Grace v. McKinney*, 112 Ga. 425, 37 S. E. 737; *Herndon v. State*, 110 Ga. 313, 35 S. E. 154; *Harmon v. Charleston & S. Ry. Co.*, 88 Ga. 261, 14 S. E. 574.

h. Must Affect Result.—Lastly, the newly discovered evidence must be such that, if a new trial were granted on its account, the result would probably be changed.⁵³ While there has been, and is, some fluctuation of judicial expression as to the requisite weight of the new evidence, such, for example, as “if it appears that it may change the verdict;”⁵⁴ “so decisive that it will produce an opposite result;”⁵⁵ “plainest proof of its sufficiency to lead to a different result;”⁵⁶ “must with considerable certainty control the verdict;”⁵⁷ “must be conclusive;”⁵⁸ “reasonably certain to bring about a different result;”⁵⁹ “calculated to produce a substantial change in the verdict;”⁶⁰ “must preponderate greatly;”⁶¹ and, “clearly appears that it would change the result,”⁶² yet the great majority of cases base the sufficiency upon a probable change in the result.⁶³

Ind.—*Miller v. Miller*, 61 Ind. 471; *Rich v. Starbuck*, 50 Ind. 126; *First Nat. Bank v. Gibbons*, 7 Ind. App. 629, 35 N. E. 31. **Ia.**—*Barber v. Maden*, 126 Iowa 402, 102 N. W. 120; *Trimble v. Tantlinger*, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; *State v. Stevenson*, 104 Iowa 50, 73 N. W. 360. **Kan.**—*Cuba v. Mulvane*, 66 Kan. 143, 71 Pac. 273. **Ky.**—*Mercer v. Mercer's Admr.*, 87 Ky. 21, 7 S. W. 307; *Nall v. Lancaster*, 19 Ky. L. Rep. 350, 40 S. W. 242. **La.**—*Stone v. Clifford*, 5 La. 10. **Me.**—*Greenleaf v. Grounder*, 84 Me. 50, 24 Atl. 461. **Mich.**—*Bosek v. Detroit U. R. Co.*, 175 Mich. 8, 12, 140 N. W. 978. **Minn.**—*Kosmerl v. Mueller*, 91 Minn. 196, 97 N. W. 660; *Jones v. Chicago, etc. R. Co.*, 42 Minn. 183, 43 N. W. 1114; *Schacherl v. St. Paul City R. Co.*, 42 Minn. 42, 43 N. W. 837; *Eldridge v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 253, 20 N. W. 151. **Mo.**—*Schmitt v. Missouri Pac. R. Co.*, 160 Mo. 43, 60 S. W. 1043; *Denney v. Crohn*, 64 Mo. App. 79. **Mont.**—*In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439; *Holland v. Huston*, 20 Mont. 84, 49 Pac. 390. **N. Y.**—*Powell v. Jones*, 42 Barb. 24; *Cameron v. Leonard*, 17 App. Div. 127, 45 N. Y. Supp. 155; *People v. Mayhew*, 19 Misc. 313, 44 N. Y. Supp. 206, 12 N. Y. Crim. 404; *People v. Seiden-shner*, 152 N. Y. Supp. 595. **Pa.**—*Sweigert v. Finley*, 144 Pa. 266, 22 Atl. 702; *Kenderdine v. Phelin*, 1 Phila. 343. **R. I.**—*Shepard v. New York, etc. R. Co.*, 27 R. I. 135, 61 Atl. 42. **S. D.**—*Deindorfer v. Bachmor*, 12 S. D. 285, 81 N. W. 297. **Tenn.**—*Harbour v. Rayburn*, 7 Yerg. 432. **Tex.**—*El Paso & Ft. Dearborn Nat. Bank*, 74 S. W. 21; *Traylor v. Townsend*, 61 Tex. 144;

Walker v. Graham, 17 Tex. 262; *Rogers v. State (Tex. Crim.)*, 69 S. W. 507. **Wis.**—*Grace v. McArthur*, 76 Wis. 641, 45 N. W. 518. **Can.**—*Molson's Bank v. Bates*, 7 U. C. C. P. 312.

53. See *infra*, this section.

As to materiality of the evidence, see *supra*, II, H, 3, a.

54. *Durand v. Craig*, 43 Ga. 444; *Clark v. Carter*, 12 Ga. 500, 58 Am. Dec. 485.

55. **Ill.**—*Paris v. Morrell*, 52 Ill. App. 121. **N. J.**—*Nichols v. Mechanic's Fire Ins. Co.*, 16 N. J. L. 410. **N. Y.**—*Schultz v. Third Ave. R. Co.*, 15 Jones & S. 285. **Utah.**—*Turner v. Stevens*, 8 Utah 75, 30 Pac. 24. **W. Va.**—*Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953.

56. *Buerk v. Imhaeuser*, 4 Fed. Cas. No. 2,107a.

57. *Moore v. Ewings*, 44 Ga. 354.

58. *Edgmon v. Ashelby*, 76 Ill. 161; *Champion v. Ulmer*, 70 Ill. 322; *Drum v. Doepheide*, 83 Ill. App. 146; *Blumke v. Dailey*, 67 Ill. App. 381; *Chicago v. Edson*, 43 Ill. App. 417.

59. *Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909.

60. *Millard v. Singer*, 2 G. Gr. (Iowa) 144.

61. *Allen v. Perry*, 6 Bush (Ky.) 85; *Finley v. Tyler*, 3 Mon. (Ky.) 400.

62. *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

[a] Unless it is clear that if the newly discovered evidence had been introduced on the trial a different decision would have resulted, a new trial will not be granted. *Board of Regents v. Linseott*, 30 Kan. 240, 1 Pac. 81.

63. **U. S.**—See *Boardman v. McKinnon*, 169 Fed. 496; *Williams v. United*

It has also been held that if the court, upon considering the proposed new evidence, is in doubt as to its sufficiency to change the result, a new trial should be granted.⁶⁴ A change in the result means

States, 137 U. S. 113, 11 Sup. Ct. 43, 34 L. ed. 590; *Brown v. Evans*, 17 Fed. 912, 8 Sawy. 488; *White v. Arleth*, 1 Bond 319, 29 Fed. Cas. No. 17,536. Ark. *White v. State*, 17 Ark. 404; *Holeman v. State*, 13 Ark. 105. Cal.—*Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 138 Pac. 712; *Kuhlman v. Burns*, 117 Cal. 469, 49 Pac. 585; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513, 42 Pac. 983; *Childs v. Lanterman*, 95 Cal. 369, 30 Pac. 553; *People v. Stanford*, 64 Cal. 27, 28 Pac. 106. Conn. *Allen v. Pearson*, 89 Conn. 401, 94 Atl. 277; *Button v. Button*, 80 Conn. 157, 67 Atl. 478; *Hart v. Brainerd*, 68 Conn. 50, 35 Atl. 776. Ga.—*Pullin v. McGee*, 143 Ga. 184, 84 S. E. 443; *Betts Co. v. Hancock*, 139 Ga. 198, 77 S. E. 77; *Armsby Co. v. Shumake*, 113 Ga. 1086, 39 S. E. 473; *Young v. State*, 56 Ga. 403; *Peterson v. State*, 50 Ga. 142. Ind.—*Ellis v. Hammond*, 157 Ind. 267, 61 N. E. 565; *Hines v. Driver*, 100 Ind. 315; *Suman v. Cornelius*, 78 Ind. 506; *Rainey v. State*, 53 Ind. 278. Ia. *Crull v. Louisa County*, 169 Iowa 199, 151 N. W. 88; *Rockwell v. Ketchum*, 149 Iowa 507, 128 N. W. 940; *Thrush v. Graybill*, 110 Iowa 585, 81 N. W. 798; *State v. Burge*, 7 Iowa 255. Kan. *Brock v. Corbin*, 94 Kan. 542, 146 Pac. 1150; *Shores v. United Surety Co.*, 84 Kan. 592, 114 Pac. 1062; *Wilkes v. Wolback*, 30 Kan. 375, 2 Pac. 508; *Board of Regents v. Linscott*, 30 Kan. 240, 1 Pac. 81. Ky.—*Weaks v. McDowell Constr. Co.*, 153 Ky. 691, 156 S. W. 127; *South Covington, etc. R. Co. v. Lee*, 153 Ky. 621, 156 S. W. 99; *Owsley v. Owsley*, 117 Ky. 47, 77 S. W. 397; *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563. Me.—*Cobb v. Cogswell*, 111 Me. 336, 89 Atl. 137; *Mitchell v. Emmons*, 104 Me. 76, 71 Atl. 321; *Parsons v. Lewiston, B. & B. St. Ry.*, 96 Me. 503, 52 Atl. 1006; *State v. Stain*, 82 Me. 472, 20 Atl. 72. Minn.—*Greenhut Cloak Co. v. Oreck*, 130 Minn. 304, 153 N. W. 613; *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966; *Schacherl v. St. Paul City R. Co.*, 42 Minn. 42, 43 N. W. 837. Mo.—*Schmitt v. Missouri Pac. R. Co.*, 160 Mo. 43, 60 S. W. 1043; *St.*

Joseph Folding-Bed Co. v. Kansas City, etc. R. Co., 148 Mo. 478, 50 S. W. 85; *State v. Locke*, 26 Mo. 603; *Stahman v. United R. Co.*, 183 Mo. App. 144, 166 S. W. 312. Neb.—*City Sav. Bank v. Carlon*, 87 Neb. 266, 127 N. W. 161; *Kraus v. Clark*, 81 Neb. 575, 116 N. W. 164; *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482; *Smith v. Mount*, 38 Neb. 111, 56 N. W. 793. N. J. *Tovey v. Public Service Ry. Co. (N. J. L.)*, 95 Atl. 265. N. Y.—*Rammauro v. Illinois Surety Co.*, 163 App. Div. 26, 148 N. Y. Supp. 35; *Romaine v. Spring Valley*, 120 App. Div. 501, 105 N. Y. Supp. 256; *Ware v. Guatemalan & M. Mahogany & E. Co.*, 119 App. Div. 262, 104 N. Y. Supp. 520; *O'Hara v. Brooklyn Heights R. Co.*, 102 App. Div. 398, 92 N. Y. Supp. 777. Pa. *Schmidt v. Lieberum*, 51 Pa. Super. 591; *Prior v. Craig*, 5 Serg. & R. 44; *Moore v. Philadelphia Bank*, 5 Serg. & R. 41; *Taylor v. Lyon Lumber Co.*, 13 Pa. Co. Ct. 235. R. I.—*Reagan v. Tinkham*, 74 Atl. 1096; *McDonald v. Lawton Spinning Co.*, 67 Atl. 451; *Lee v. Rhode Island Co.*, 66 Atl. 835; *Shepard v. New York, etc. R. Co.*, 27 R. I. 135, 61 Atl. 42. Tex.—*Texas, etc. R. Co. v. Seaborough*, 101 Tex. 436, 108 S. W. 804; *Allyn & Co. v. Willis & Bro.*, 65 Tex. 65; *Mott v. Spring Garden Ins. Co. (Tex. Civ. App.)*, 154 S. W. 658; *Moore v. State*, 18 Tex. App. 212. Wis.—*Andrews v. United States Casualty Co.*, 159 Wis. 604, 150 N. W. 947; *Ziebell v. Fraternal Reserve Assn.*, 158 Wis. 612, 149 N. W. 475; *Weichman v. Kast*, 157 Wis. 316, 147 N. W. 369; *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N. W. 274.

[a] Illinois.—It is held, however, in Illinois that the fact that the newly discovered evidence would probably affect the result is not sufficient. The new evidence must be of such a character as to make a different result conclusive. *Miller v. Potter*, 102 Ill. App. 483; *Drum v. Doeppheide*, 83 Ill. App. 146. See also *Grossfeld & Roe Co. v. Gross*, 165 Ill. App. 275; *Lerna v. Wood*, 122 Ill. App. 542; *Watson v. Roth*, 91 Ill. App. 111, affirmed in 191 Ill. 382, 61 N. E. 65.

64. *Mackin v. People's St. Ry. &*

the general result and not a mere lessening of the amount of damages,⁶⁵ unless the new evidence shows the amount so excessive that a new trial would be granted on that account.⁶⁶

4. The Discovery.—a. *In General.*—The evidence upon which the application for a new trial is based must have been discovered since the former trial,⁶⁷ or, in other words, it must have been unknown to the movant during the time of the trial,⁶⁸ and both the movant and

Elect. L. & P. Co., 45 Mo. App. 82; Wilcox Silver Plate Co. v. Barclay, 48 Hun 54, 14 Civ. Proc. 211, 14 N. Y. St. 879.

65. U. S.—Wilson v. Freedley, 129 Fed. 835, reversed on other grounds in 136 Fed. 586, 69 C. C. A. 360. **Ark.**—Dickie v. Henderson, 95 Ark. 78, 128 S. W. 561. **Ill.**—Chicago City Ry. Co. v. Bohnow, 108 Ill. App. 346; Schlencker v. Risley, 4 Ill. 483, 38 Am. Dec. 100. **Ia.**—Manix v. Malony, 7 Iowa 81. **Ky.**—Roots v. Brown, 1 Bibb 354; Louisville, etc. Packet Co. v. Mulligan, 25 Ky. L. Rep. 1287, 77 S. W. 704; Louisville v. Walter's Admx., 25 Ky. L. Rep. 893, 76 S. W. 516. **Minn.**—Peck v. Small, 35 Minn. 465, 29 N. W. 69. **N. Y.**—Cheever v. Scottish Union & Nat. Ins. Co., 86 App. Div. 331, 83 N. Y. Supp. 732, affirmed in 180 N. Y. 551, 73 N. E. 1121. **R. I.**—Dexter v. Handy, 13 R. I. 474. **Tex.**—Ham v. Taylor, 22 Tex. 225; Missouri, etc. R. Co. v. Gist, 31 Tex. Civ. App. 662, 73 S. W. 857; Gulf, C. & S. F. Ry. Co. v. Brown, 16 Tex. Civ. App. 93, 40 S. W. 608.

66. Mo.—St. Joseph Folding-Bed Co. v. Kansas City, etc. R. Co., 148 Mo. 478, 50 S. W. 85. **N. Y.**—See Chaet v. Goldberg, 110 N. Y. Supp. 817. **R. I.**—Whipple v. New York, etc. R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796; Burlingame v. Cowee, 16 R. I. 40, 12 Atl. 234; Geer v. Rhode Island Suburban R. Co., 67 Atl. 449.

67. U. S.—United States v. Smith, 1 Sawy. 277, 27 Fed. Cas. No. 16,341; Palmer v. Fiske, 2 Curt. 14, 18 Fed. Cas. No. 10,691. **Ark.**—White v. State, 17 Ark. 404; Olmstead v. Hill, 2 Ark. 346. **Ga.**—Burgess v. State, 93 Ga. 304, 20 S. E. 331; O'Barr v. Alexander, 37 Ga. 195. **Ill.**—Chicago City Ry. Co. v. Bohnow, 108 Ill. App. 346. **Kan.**—State v. Nimerick, 74 Kan. 658, 87 Pac. 722. **Ky.**—Williams v. Com., 152 Ky. 610, 153 S. W. 961. **Minn.**—Knoblauch v. Kronschnabel, 18 Minn. 300. **Mo.**—State v. Whitsett, 232 Mo. 511,

134 S. W. 555; State v. Rippey, 228 Mo. 342, 128 S. W. 726; State v. Estes, 209 Mo. 288, 107 S. W. 1059. **N. Y.**—Hatfield v. Macy, 52 How. Pr. 193; Messenger v. Fourth Nat. Bank, 48 How. Pr. 542; People v. Pindar, 148 N. Y. Supp. 937; People v. Schover, 140 N. Y. Supp. 427. **Tex.**—Madrid v. State, 71 Tex. Crim. 420, 161 S. W. 93; Coleman v. State, 58 Tex. Crim. 451, 126 S. W. 573; San Antonio & A. P. Ry. Co. v. Moore, 31 Tex. Civ. App. 371, 72 S. W. 226; State v. Zanco's Heirs, 18 Tex. Civ. App. 127, 44 S. W. 527. **Wash.**—State v. Gray, 61 Wash. 549, 112 Pac. 641. **W. Va.**—Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953. **Wis.**—Curran v. A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

[a] **Actual Discovery Necessary.** The evidence must be actually discovered. A mere intimation or belief that new evidence exists, or a suggestion of a discovery, do not amount to a discovery. The fact of the discovery must be established. *Alger v. Merritt*, 16 Iowa 121; *Hinds v. Terry*, Walk. (Miss.) 80.

68. U. S.—Wiggin v. Coffin, 3 Story 1, 29 Fed. Cas. No. 17,624; Whetmore v. Murdock, 3 Woodb. & M. 380, 29 Fed. Cas. No. 17,509; Fikes v. Bentley, Hempst. 61, 9 Fed. Cas. No. 4,785a. **Ark.**—Chandler v. Lazarus, 55 Ark. 312, 18 S. W. 181; Merrick v. Britton, 26 Ark. 496. **Cal.**—Converse v. Ferguson, 166 Cal. 1, 134 Pac. 977. See *Olaine v. McGraw*, 164 Cal. 424, 129 Pac. 460. **Ga.**—Norman v. Goode, 121 Ga. 499, 49 S. E. 268; McNatt v. McRae, 117 Ga. 898, 45 S. E. 248; Newman v. Malsby, 108 Ga. 339, 33 S. E. 997. **Ill.**—Dyk v. De Young, 133 Ill. 82, 24 N. E. 520; Allison v. Electric Coal Co., 151 Ill. App. 55; Bracewell v. Self, 109 Ill. App. 140. **Ia.**—Hand v. Langland, 67 Iowa 185, 25 N. W. 122; Bailey v. Landingham, 52 Iowa 415, 3 N. W. 460; Sully v. Kuehl, 30 Iowa 275. **Kan.**—Morgan v. Bell, 41 Kan. 345, 21 Pac.

his counsel must have been ignorant of its existence, the ignorance of counsel alone not being sufficient.⁶⁹ Conversely, if the evidence was known to a party,⁷⁰ or, if known to the party's agent or servant who testified in the case, or who represented the party in the cause,⁷¹ or

255; *Kansas State Agricultural College v. Linscott*, 30 Kan. 240, 1 Pac. 81. **Me.**—*Coolidge v. Smith*, 112 Me. 556, 91 Atl. 433; *Fitch v. Sidelinger*, 96 Me. 70, 51 Atl. 241; *Thompson v. Morse*, 94 Me. 359, 47 Atl. 900. **Mich.**—*Branch v. Klatt*, 173 Mich. 31, 138 N. W. 263; *Canfield v. Jackson*, 112 Mich. 120, 70 N. W. 444. **Mo.**—*Southern Express Co. v. Moeller*, 85 Mo. 208; *Goff v. Mulholland*, 33 Mo. 203; *Carlton v. Monroe*, 135 Mo. App. 172, 115 S. W. 1057. **N. Y.**—*Grafton v. Ball*, 164 App. Div. 70, 149 N. Y. Supp. 447; *Hagen v. New York Cent. & H. R. Co.*, 100 App. Div. 218, 91 N. Y. Supp. 914, reversing 44 Misc. 540, 90 N. Y. Supp. 125. **R. I.**—*Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876; *Riley v. Shannon*, 19 R. I. 503, 34 Atl. 989. **Tex.**—*Texas & P. R. Co. v. Crump*, 102 Tex. 250, 115 S. W. 26; *Richards v. Smith*, 67 Tex. 610, 4 S. W. 571; *Clemmons v. Johnson* (Tex. Civ. App.), 167 S. W. 1103. **Wis.**—*Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377; *Wilson v. Plank*, 41 Wis. 94. **Can.**—*Hurrell v. Simpson*, 22 U. C. Q. B. 65; *Rowe v. Grand Trunk R. Co.*, 16 U. C. C. P. 500.

But see section following.

Effort to introduce evidence discovered during trial, see *infra*, II, H, 5, b.

69. **U. S.**—*Fikes v. Bentley*, Hempst. 61, 9 Fed. Cas. No. 4,785a. **Kan.**—*Morgan v. Bell*, 41 Kan. 345, 21 Pac. 255. **Minn.**—*Broat v. Moor*, 44 Minn. 463, 47 N. W. 55.

70. **U. S.**—*Fikes v. Bentley*, Hempst. 61, 9 Fed. Cas. No. 4,785a. **Ga.**—*Robinson v. Veal*, 79 Ga. 633, 7 S. E. 159; *Gibson v. Williams*, 39 Ga. 660; *O'Barr v. Alexander*, 37 Ga. 195. **Ill.**—*Johnson v. Fairbank Co.*, 156 Ill. App. 381. **Ia.**—*State v. Stanley*, 104 N. W. 284; *Robins v. Modern Woodmen of America*, 127 Iowa 444, 103 N. W. 375; *State v. Morgan*, 80 Iowa 413, 45 N. W. 1070; *Hand v. Langland*, 67 Iowa 185, 25 N. W. 122. **Kan.**—*Thisher v. Miller*, 53 Kan. 515, 36 Pac. 1060, 42 Am. St. Rep. 302; *Morgan v. Bell*, 41 Kan.

345, 21 Pac. 255; *Comstock-Castle Stove Co. v. Galland*, 6 Kan. App. 833, 49 Pac. 692. **Ky.**—*Butler v. Sloss*, 9 Ky. L. Rep. 357. **Mo.**—*Madden v. Paroneri Realty Co.*, 75 Mo. App. 358. **Neb.**—*Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709. **N. Y.**—*Lane v. Brooklyn Heights R. Co.*, 178 N. Y. 623, 70 N. E. 1101; *Biddeseomb v. Cameron*, 58 App. Div. 42, 68 N. Y. Supp. 568; *Haight v. Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193; *Huse & Loomis Ice & Transp. Co. v. Wielar*, 86 N. Y. Supp. 24. **R. I.**—*Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876. **S. C.**—*Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719. **Tenn.**—*Nashville, C. & St. L. Ry. v. Jones*, 100 Tenn. 512, 45 S. W. 681. **Tex.**—*Russell v. Oliver*, 78 Tex. 11, 14 S. W. 264; *Griffith's Heirs v. Eliot*, 60 Tex. 334; *King v. Hill* (Tex. Civ. App.), 75 S. W. 550; *City of San Antonio v. Kreusel*, 17 Tex. Civ. App. 594, 43 S. W. 615. **Vt.**—*Brainard v. Morse*, 47 Vt. 320. **Va.**—*Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. 830.

[a] **One of Joint Parties.**—Likewise if the alleged newly discovered evidence was known to one of two or more joint parties, it cannot be accepted as newly discovered. *Lee-Kinsey Implement Co. v. Jenks*, 13 Colo. App. 265, 57 Pac. 191; *Pemberton v. Johnson*, 113 Ind. 538, 15 N. E. 801.

71. **Ga.**—*Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219; *Canfield v. Jones*, 97 Ga. 334, 22 S. E. 908; *Aetna Ins. Co. v. Sparks*, 62 Ga. 187. **Ind.**—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459; *Martin v. Garver*, 40 Ind. 351. **Kan.**—*Ott v. Anderson*, 9 Kan. App. 320, 61 Pac. 330. **Ky.**—*Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63; *Interstate Petroleum Co. v. Adams*, 21 Ky. L. Rep. 768, 53 S. W. 26. **Neb.**—*Burlington, etc. R. Co. v. Kittridge*, 52 Neb. 16, 71 N. W. 986. **N. Y.**—*Melver v. Hallen*, 50 App. Div. 441, 64 N. Y. Supp. 26; *Weston v. New York El. R. Co.*, 10 Jones & S. 156, affirmed in 73 N. Y. 595. **N. C.**—*Wilkie v. Raleigh, etc. R. Co.*, 127 N. C. 203, 37 S. E. 204. **Wis.**—*Scott v. Hobe*, 108 Wis. 239, 84 N. W. 181.

if known to counsel, and not introduced,⁷² it cannot be considered newly discovered evidence. It is no excuse that the party did not know the evidence was material,⁷³ or that it was deemed unnecessary,⁷⁴ or that it was supposed, if the evidence were presented, the witness would prove hostile,⁷⁵ or would claim his privilege although now willing to waive it,⁷⁶ or that an incompetent witness has subsequently become competent,⁷⁷ except, perhaps, in a criminal case.⁷⁸ It may, however, be a sufficient excuse for not producing evidence known to exist, that it was concealed until after trial, without fault of the movant.⁷⁹

b. *Facts Transpiring Since Trial.*—It has been held that newly discovered evidence means evidence in existence at the time of the trial, but which could not, by reasonable diligence have been procured in time for the trial,⁸⁰ and, consequently, that facts transpiring since the verdict are not sufficient for a new trial on the ground of newly discovered evidence.⁸¹ There is, however, authority to con-

72. *Wilcox v. Joslin*, 56 Hun 645, 10 N. Y. Supp. 342, 32 N. Y. St. 423; *Roediger v. Kraft*, 152 N. Y. Supp. 327; *Matthews v. Joyce*, 85 N. C. 258.

[a] *One of Several Counsel.*—If evidence was known to one of several counsel of a party it cannot be made the basis of newly discovered evidence. *Herron v. Allen*, 32 S. D. 301, 143 N. W. 283, 47 L. R. A. (N. S.) 1048.

73. *O'Barr v. Alexander*, 37 Ga 195.

74. *U. S.*—*Dickson v. Mathers*, Hempst. 65, 7 Fed. Cas. No. 3,898a; *Codman v. Vermont & C. R. Co.*, 17 Blatchf. 1, 5 Fed. Cas. No. 2,936. *Ga.* *Newman v. Malsby*, 108 Ga. 339, 33 S. E. 997; *O'Barr v. Alexander*, 37 Ga. 195; *Wright v. Central R., etc. Co.*, 21 Ga. 345. *Ind.*—*Test v. Larsh*, 100 Ind. 562. *Mich.*—*Canfield v. Jackson*, 112 Mich. 120, 70 N. W. 444. *Mo.*—*Southern Express Co. v. Moeller*, 85 Mo. 208; *Hanley v. Life Assn. of America*, 69 Mo. 380, *affirming* 4 Mo. App. 253. *N. Y.*—*Smith v. Rentz*, 73 Hun 195, 25 N. Y. Supp. 914, 56 N. Y. St. 128; *Price v. Price*, 33 Hun 432, 1 How. Pr. (N. S.) 142.

75. *U. S.*—*Nyback v. Champagne Lumb. Co.*, 130 Fed. 784, *affirmed* in 130 Fed. 1021, 64 C. C. A. 615. *Ind.* *Richter v. Meyer*, 5 Ind. App. 33, 31 N. E. 582. *Ky.*—*Gratz v. Worden*, 26 Ky. L. Rep. 721, 82 S. W. 395. *N. Y.* *Conable v. Smith*, 64 Hun 638, 19 N. Y. Supp. 446, 46 N. Y. St. 2. *S. C.* *See Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719. *Tex.*—*San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App.

341, 59 S. W. 920. *Va.*—*Norfolk & W. R. Co. v. Draper*, 90 Va. 245, 17 S. E. 883.

76. *Liverpool & London & Globe Ins. Co. v. Wright*, 166 Ky. 159, 179 S. W. 49.

77. *Franklin Bank v. Pratt*, 31 Me. 501; *Sawyer v. Merrill*, 10 Pick. (Mass.) 16.

78. *Cavanah v. State*, 56 Miss. 299; *Com. v. Manson*, 2 Ashm. (Pa.) 31. *Contra*, *United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204; *Lander v. United States*, 14 Fed. Cas. No. 8,039, an acquitted joint defendant.

79. *See Kilby v. Erwin*, 84 Vt. 266, 78 Atl. 1021, and *infra*, II, H, 4, b.

80. *Cassidy v. Johnson*, 41 Ind. App. 696, 84 N. E. 835.

81. *Cassidy v. Johnson*, 41 Ind. App. 696, 84 N. E. 835; *Crow v. Brunson*, 1 Ind. App. 268, 27 N. E. 507. *See also Herrman v. Altman*, 139 App. Div. 930, 124 N. Y. Supp. 39.

[a] Thus, in an action for an injunction for the removal of obstructions placed in a natural water course, a new trial was sought on evidence that after the trial heavy rains had caused an overflow on plaintiff's land on account of the objectionable obstructions. It was held that this was not newly discovered evidence, since the facts were not in existence at the time of the trial. *Cassidy v. Johnson*, 41 Ind. App. 696, 84 N. E. 835.

As to admissions after trial, see *supra*, II, G, 3, e.

trary.⁸² And the temporary concealment⁸³ or loss⁸⁴ of evidence known to exist and made available after trial may be ground for a new trial.

5. Diligence.—a. *In General.*—Another requisite in connection with newly discovered evidence is that the party must have used diligence to procure it on the former trial,⁸⁵ and in the statutory enumerations of the ground for new trial this essential is usually ex-

82. Ga.—Collins v. Loyd, 31 Ga. 128.
Nev.—Wall v. Trainor, 16 Nev. 131.
Tex.—Welsh v. Nasboe, 8 Tex. 189.

See also *infra*, II, H, 5, b.

[a] Physical Condition Revealed After Trial.—In an action for personal injuries brought by a young married woman, the expert evidence tended to show that certain surgical operations, rendered necessary by the accident, made it impossible that she should ever bear children. After a verdict and judgment in her favor for \$7,000, a new trial was sought on the ground that she had since given birth to a child. In holding that a new trial should have been granted on the discovery of this fact, the court said that, from the very nature of the case, it was impossible for the defendant to have contradicted the evidence that the accident and succeeding operation had made it impossible for her to bear children. Anshutz v. Louisville Ry. Co., 152 Ky. 741, 154 S. W. 13, 45 L. R. A. (N. S.) 87. See also Mason v. Meloan, 165 Ky. 582, 177 S. W. 435.

[b] Defective Construction Revealed After Trial.—In an action for the contract price of a concrete wall across the mouth of defendant's cove, evidence of the defective construction of the wall, revealed by time and tide after trial, was held newly discovered evidence, existing at the time of trial, and supporting motion for a new trial. It was argued that this evidence did not exist at the time of the trial, but it was held that the testimony showed that it did exist but could not at that time be seen. Giles v. Robinson, 114 Me. 552, 96 Atl. 745.

83. See *infra*, this note.

[a] Evidence Temporarily Concealed. Thus, in an action for damages by fire to a sugar tree farm, it was material to have a plan made of the farm as a matter of evidence showing the injury. A heavy fall of snow prevented, however, any examination of the place, and the snow remained on the ground until after the term in which the case

was tried. Defendant who desired this evidence moved for a continuance which was denied. It was held that a petition for a new trial for newly discovered evidence was within the spirit of the rule, and a new trial was granted. Kilby v. Erwin, 84 Vt. 266, 78 Atl. 1021.

84. Goddard v. Latta, 152 Ky. 533, 153 S. W. 737 (loss and subsequent discovery of written contract); Katz v. Atfield, 1 Misc. 217, 20 N. Y. Supp. 892, 49 N. Y. St. 923, receipts.

As to the diligence necessary to discover or produce known evidence, see *infra*, II, H, 5; and *supra*, II, E, 2, k, (I).

Effort to produce secondary evidence, see *infra*, II, H, 5, b.

[a] Must Affect Result.—Where in the absence of the original evidence, secondary evidence has been introduced, the later discovery of the original evidence will not be a ground for a new trial unless it appears that the introduction of it would affect the result. Freeman v. Coleman, 88 Ga. 421, 14 S. E. 551.

85. U. S.—Wright v. Southern Express Co., 80 Fed. 85; Flint & P. M. R. Co. v. Marine Ins. Co., 71 Fed. 210.
Ala.—Girardino v. Birmingham Southern R. Co., 179 Ala. 420, 60 So. 871; Jernigan v. Clark, 134 Ala. 313, 32 So. 686.
Ariz.—Charles T. Hayden Milling Co. v. Lewis, 3 Ariz. 277, 32 Pac. 263.
Ark.—Williams v. Williams, 112 Ark. 507, 166 S. W. 552; Arkadelphia Lumber Co. v. Posey, 74 Ark. 377, 85 S. W. 1127.
Cal.—Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 Pac. 712; Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681.
Colo.—Outcalt v. Johnston, 9 Colo. App. 519, 49 Pac. 1058.
Ga.—Dennard v. Lewis, 142 Ga. 171, 82 S. E. 558; Chambless v. Melton, 127 Ga. 414, 56 S. E. 414; Somers v. State, 116 Ga. 535, 42 S. E. 779; Tyre v. State, 112 Ga. 224, 37 S. E. 374.
Ill.—Pronskévitch v. Chicago & A. R. Co., 232 Ill. 136, 83 N. E. 545; McDonald v. People, 222 Ill. 325, 78 N. E. 609;

pressly set forth.⁸⁶ Moreover, in the application, or supporting evidence, it must be positively shown that such diligence was exercised, and that the movant was not guilty of any neglect or laches,⁸⁷ since

Lilly v. People, 148 Ill. 467, 36 N. E. 95. **Ind.**—*Zimmerman v. Weigel*, 158 Ind. 370, 63 N. E. 566; *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935. **Ia.**—*Mayer v. Hamre*, 162 Iowa 662, 144 N. W. 234; *Robins v. Modern Woodmen of America*, 127 Iowa 444, 103 N. W. 375; *State v. Oeder*, 80 Iowa 72, 45 N. W. 543. **Kan.**—*Daly v. Gregg*, 91 Kan. 506, 138 Pac. 614; *Strong v. Moore*, 75 Kan. 437, 89 Pac. 895; *State v. Nelson*, 59 Kan. 776, 52 Pac. 868. **Ky.** *Dunn v. Blue Grass Realty Co.*, 163 Ky. 384, 173 S. W. 1122; *Johnson v. Stivers*, 95 Ky. 128, 23 S. W. 957; *Mareum v. Com.*, 8 Ky. L. Rep. 418, 1 S. W. 727. **Me.**—*Cobb v. Cogswell*, 111 Me. 336, 89 Atl. 137; *Thompson v. Morse*, 94 Me. 359, 47 Atl. 900. **Mich.**—*Branch v. Klatt*, 173 Mich. 31, 138 N. W. 263; *Edwards v. Foote*, 129 Mich. 121, 88 N. W. 404. **Minn.**—*Peterson v. Phelps*, 123 Minn. 319, 143 N. W. 793, Ann. Cas. 1915A, 257; *Humphrey v. Monida & Y. Stage Co.*, 120 Minn. 94, 139 N. W. 132; *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957. **Mo.**—*King v. Gilson*, 206 Mo. 264, 104 S. W. 52; *State v. Allen*, 171 Mo. 562, 71 S. W. 1000; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *Barton v. Faeth*, 193 Mo. App. 402, 186 S. W. 52, 55. **N. J.** *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36, 42 Atl. 1061. **N. Y.** *Hagen v. New York Cent. & H. R. R. Co.*, 100 App. Div. 218, 91 N. Y. Supp. 914 (*reversing* 44 Misc. 540, 90 N. Y. Supp. 125); *Conlon v. Mission of Immaculate Virgin*, 87 App. Div. 165, 84 N. Y. Supp. 49. **N. C.**—*Wilkie v. Raleigh, etc. R. Co.*, 127 N. C. 203, 37 S. E. 204. **Pa.**—*Kambeitz v. Harrisburg Traction Co.*, 9 Pa. Dist. 750, 24 Pa. Co. Ct. 453; *Wilson v. Talheimer*, 20 Pa. Co. Ct. 203. **S. D.**—*In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681, *modified* on rehearing, 21 S. D. 209, 111 N. W. 540. **Tenn.**—*Chicago Guaranty Fund Life Soc. v. Ford*, 104 Tenn. 533, 58 S. W. 239; *King v. State*, 91 Tenn. 617, 20 S. W. 169. **Tex.** *Texas, etc. R. Co. v. Scarborough*, 101 Tex. 436, 108 S. W. 804; *Gulf, C. & S. F. Ry. Co. v. Blanchard*, 96 Tex. 616, 75 S. W. 6 (*affirming* [Tex. Civ. App.], 73 S. W. 88); *Adler v. State*

(Tex. Crim.), 50 S. W. 358; *Little v. State* (Tex. Crim.), 35 S. W. 659. **Utah.** *Klopfenstein v. Hays*, 20 Utah 45, 57 Pac. 712. **Vt.**—*Thayer v. Central Vermont R. Co.*, 60 Vt. 214, 13 Atl. 859. **Va.**—*St. John's Exrs. v. Alderson*, 32 Gratt. (73 Va.) 140. **Wash.**—*Yamamoto v. Puget Sound Lumb. Co.*, 84 Wash. 411, 146 Pac. 861; *Stewart v. Bowen*, 70 Wash. 195, 126 Pac. 414. **Wis.**—*Wieting v. Millston*, 77 Wis. 523, 46 N. W. 879; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271. **Can.**—*Haren v. Lyon, Taylor (U. C. K. B.)* 370; *White v. McKay*, 43 U. C. Q. B. 226. 86. See the statutes.

[a] Both at Common Law and Under the Statute.—*Stucklager v. McKee*, 40 Iowa 212.

87. **U. S.**—*United States v. Smith*, 1 Sawy. 277, 27 Fed. Cas. No. No. 16,341. **Ala.**—*Lowery v. State*, 98 Ala. 45, 13 So. 498. **Ark.**—*Schmelzel v. Bradford*, 122 Ark. 611, 183 S. W. 771; *Olmstead v. Hill*, 2 Ark. 346. **Cal.**—*People v. Warren*, 130 Cal. 683, 63 Pac. 86; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261. **Colo.**—*Holland v. People*, 30 Colo. 94, 69 Pac. 519; *Liggett v. People*, 26 Colo. 364, 58 Pac. 144. **Ga.**—*Roy v. State*, 140 Ga. 223, 78 S. E. 846; *Taylor v. State*, 132 Ga. 235, 63 S. E. 1116; *Clark v. Carter*, 12 Ga. 500, 58 Am. Dec. 485. **Ill.**—*People v. Probst*, 237 Ill. 390, 86 N. E. 588; *Springer v. Schultz*, 205 Ill. 144, 68 N. E. 753; *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385. **Ind.**—*Ingle v. State*, 182 Ind. 198, 106 N. E. 373; *Spaulding v. State*, 162 Ind. 297, 70 N. E. 243. **Ia.**—*State v. Gulliver*, 163 Iowa 123, 142 N. W. 948; *State v. Pell*, 140 Iowa 655, 119 N. W. 154. **La.**—*State v. Edwards*, 135 La. 531, 65 So. 634; *State v. McQueen*, 108 La. 410, 32 So. 412. **Mo.**—*State v. Walker*, 250 Mo. 316, 157 S. W. 309; *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555; *Irwin v. Woodmansee*, 104 Mo. 403, 16 S. W. 486. **N. J.**—*Van Riper v. Dundee Mfg. Co.*, 33 N. J. L. 152. **N. Y.**—*Haight v. City of Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193; *Smith v. Rentz*, 73 Hun 195, 25 N. Y. Supp. 914, 56 N. Y. St. 123; *People v. Jones*, 115 N. Y. Supp. 800. **S. D.** *Gaines v. White*, 1 S. D. 434, 47 N. W.

in the absence of such a showing, or where it appears doubtful that due diligence was used, a new trial will not be granted.⁸⁸ The rule of necessary diligence is stringently enforced,⁸⁹ and applicants will be held to the strictest accountability for failing to obtain the evidence in the first instance.⁹⁰ Accordingly, where with reasonable diligence the supposed newly discovered evidence,⁹¹ or other evidence of the

524. **Tenn.**—*Ware v. State*, 108 Tenn. 466, 67 S. W. 853; *Vincent v. State*, 3 Heisk. 120. **Tex.**—*Little v. State* (Tex. Crim.), 178 S. W. 326; *Mosely v. State* (Tex. Crim.), 70 S. W. 546. **Vt.**—*State v. Sargood*, 80 Vt. 412, 68 Atl. 51, 130 Am. St. Rep. 992; *State v. Fogg*, 74 Vt. 62, 52 Atl. 272.

[a] **The application should show why** the evidence was not discovered in time for the former trial. A sufficient excuse or reason must appear. **Ill.**—*Laffin v. Herrington*, 17 Ill. 399. **Ind.**—*Pennsylvania Co. v. Nations*, 111 Ind. 203, 12 N. E. 309; *Harris v. Rupel*, 14 Ind. 209. **Minn.**—*Crowley v. Farley*, 129 Minn. 460, 152 N. W. 872. **Tex.**—*Russell v. Nall*, 79 Tex. 664, 15 S. W. 635; *Brady v. Cope* (Tex. Civ. App.), 187 S. W. 678; *Briggs v. Rush*, 1 Tex. Civ. App. 19, 20 S. W. 771. **Vt.**—*Thayer v. Central Vermont R. Co.*, 60 Vt. 214, 13 Atl. 859. **Wash.**—*Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740. **Wis.**—*Lewis v. Newton*, 93 Wis. 405, 67 N. W. 724.

88. **U. S.**—*Palmer v. Fiske*, 2 Curt. 14, 18 Fed. Cas. No. 10,691. **Ala.**—*Stewart Veneer Co. v. Windham & Co.*, 12 Ala. App. 642, 68 So. 516. **Ark.**—*Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181; *Bourland v. Skimnee*, 11 Ark. 671. **Conn.**—*Waller v. Graves*, 20 Conn. 305; *Lester v. State*, 11 Conn. 415. **Fla.**—*Milton v. Blackshear*, 8 Fla. 161. **Ga.**—*Patterson v. Collier*, 77 Ga. 292, 3 S. E. 119. **Ind.**—*Ft. Wayne, M. & C. R. Co. v. Fhalor*, 51 Ind. 485; *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305. **Ia.**—*Creighton v. Todhunter*, 47 Iowa 694; *Carman v. Roennan*, 45 Iowa 135. **Me.**—*Michaud v. Canadian Pac. Ry. Co.*, 88 Me. 381, 34 Atl. 172. **Minn.**—*Elmborg v. St. Paul City Ry. Co.*, 51 Minn. 70, 52 N. W. 969; *Nininger v. Knox*, 3 Minn. 140. **Mo.**—*Shaw v. Besch*, 58 Mo. 107; *Barry v. Blumenthal*, 32 Mo. 29. **Nev.**—*Howard v. Winters*, 3 Nev. 539. **N. Y.**—*Leavy v. Roberts*, 2 Hilt. 285, 8 Abb. Pr. 310. **Pa.**—*Ream v. Oldweiler*, 2 Leg. Gaz. 147. **S. D.**—*Demmon v. Mullen*, 6 S. D. 554,

62 N. W. 380. **Tex.**—*Jester v. Francis* (Tex. Civ. App.), 31 S. W. 245. **Wis.**—*Herman v. Mason*, 37 Wis. 273.

[a] **If it is left even doubtful that** the movant knew of the evidence, or that he might, but for negligence, have known of and produced it, he will not succeed in his application. *Florida East Coast Ry. Co. v. Knowles*, 68 Fla. 400, 67 So. 122.

89. *Huntington, White Lime Co. v. Mock*, 14 Ind. App. 221, 42 N. E. 761.

90. *Miller v. Whitson*, 40 Mo. 97.

91. **U. S.**—*Flint & P. M. Ry. Co. v. Marine Ins. Co.*, 71 Fed. 210; *Chandler v. Thompson*, 30 Fed. 38. **Ala.**—*Smith v. Birmingham Ry., Light & Power Co.*, 147 Ala. 702, 41 So. 307; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114. **Ark.**—*Arkadelphia Lumb. Co. v. Posey*, 74 Ark. 377, 85 S. W. 1127; *Files v. Reynolds*, 66 Ark. 314, 50 S. W. 509. **Ga.**—*Macon v. Small*, 108 Ga. 309, 34 S. E. 152; *Thompson v. Ray*, 92 Ga. 540, 17 S. E. 903. **Ind.**—*Lockwood v. Rose*, 125 Ind. 538, 25 N. E. 710; *Ward v. Voris*, 117 Ind. 363, 20 N. E. 261. **Ia.**—*McBride v. McClintock*, 108 Iowa 326, 79 N. W. 83; *Stone v. Moore*, 83 Iowa 186, 49 N. W. 76. **Kan.**—*Cudahy Packing Co. v. Hays*, 74 Kan. 124, 85 Pac. 811; *Board of Regents v. Lincott*, 30 Kan. 240, 1 Pac. 81. **Ky.**—*Johnson v. Carter*, 23 Ky. L. Rep. 591, 63 S. W. 485; *Interstate Petroleum Co. v. Adams*, 21 Ky. L. Rep. 708, 53 S. W. 26. **Me.**—*Emmet v. Perry*, 100 Me. 139, 60 Atl. 872; *Stewart v. Pattangall*, 91 Me. 172, 39 Atl. 474. **Minn.**—*Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966. **Mo.**—*James v. Mutual Reserve Fund Life Assn.*, 148 Mo. 1, 49 S. W. 978; *Tall v. Chapman*, 66 Mo. App. 581. **N. Y.**—*Thompson v. Welde*, 27 App. Div. 186, 50 N. Y. Supp. 618; *Wheeling Corrugating Co. v. Armstrong*, 97 N. Y. Supp. 960. **Okla.**—*Flersheim Merc. Co. v. Gillespie*, 14 Okla. 143, 77 Pac. 183. **Tenn.**—*Chicago Guaranty Fund Life Soc. v. Ford*, 104

same kind or character that might have been sufficient,⁹² could have been obtained, a new trial will not be granted.

b. *What Constitutes Diligence.*—The diligence required to procure and produce evidence is usually specified to be a reasonable diligence, or sometimes described as due diligence, proper diligence, or active diligence. From the very nature of the requirement, no specific rule can be laid down as to what constitutes diligence, since it must necessarily depend upon the circumstances of each case. There are general principles, however, which can be applied to all cases. Thus, it is the duty of a party or his counsel to make every reasonable search for witnesses in the preparation of his case,⁹³ and due inquiry should

Tenn. 533, 58 S. W. 239. **Tex.**—Saunders v. Saunders, 62 S. W. 797; Russell v. Nall, 79 Tex. 664, 15 S. W. 635; Pippen v. Sherman, S. & S. Ry. Co. (Tex. Civ. App.), 58 S. W. 961. **Va.**—St. John's Exrs. v. Alderson, 32 Gratt. (73 Va.) 140. **W. Va.**—Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953; Dower v. Church, 21 W. Va. 23.

92. **Conn.**—Travelers' Ins. Co. v. Savage, 43 Conn. 187. **Ga.**—Norman v. Goode, 121 Ga. 449, 49 S. E. 268; Lamb v. Murray, 54 Ga. 218. **Ill.**—Dyk v. De Young, 133 Ill. 82, 24 N. E. 520; Crozier v. Cooper, 14 Ill. 139. **Ia.**—Whittlesey v. Burlington, etc. R. Co., 121 Iowa 597, 90 N. W. 516, 97 N. W. 66. **Ky.**—Whitaker v. First Nat. Bank, 163 Ky. 623, 174 S. W. 47; Louisville Ins. Co. v. Hoffman, 24 Ky. L. Rep. 980, 70 S. W. 403. **La.**—Valega v. Broussard, 3 La. Ann. 145. **Miss.**—Bledsoe v. Doe *ex dem.* Little, 4 How. 13. **Mo.**—Hanley v. Life Assn. of America, 69 Mo. 380, *affirming* 4 Mo. App. 253. **N. J.**—Hoban v. Sandford, etc. Co., 64 N. J. L. 426, 45 Atl. 819. **N. Y.**—Matter of Rose, 153 App. Div. 263, 137 N. Y. Supp. 1079; Boyd v. Boyd, 130 App. Div. 161, 114 N. Y. Supp. 361. **Pa.**—Slattery v. Supreme Tent, etc., 19 Pa. Super. 108. **Tenn.**—Kannon v. Galloway, 2 Baxt. 230. **Tex.**—Johnson v. Brown (Tex. Civ. App.), 65 S. W. 485; Davis v. Zumwalt, 1 White & W. Civ. Cas., §596. **Wis.**—Ketchum v. Breed, 66 Wis. 85, 26 N. W. 271; Herman v. Mason, 37 Wis. 273. **Can.**—Hurrell v. Simpson, 22 U. C. Q. B. 65.

93. **Ark.**—Arkadelphia Lumb. Co. v. Posey, 74 Ark. 377, 85 S. W. 1127. **Cal.**—Butler v. Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040; Koskela v. Albion Lumber Co., 25 Cal. App. 12, 142 Pac. 851. **Ill.**—Dyk v.

De Young, 133 Ill. 82, 24 N. E. 520; Saxton v. Drake, 191 Ill. App. 322. **Ind.**—Pemberton v. Johnson, 113 Ind. 538, 15 N. E. 801; Allen v. Boud, 112 Ind. 523, 14 N. E. 492. **Ia.**—Benjamin v. Flitton, 106 Iowa 417, 76 N. W. 737; Searcy v. Martin Woods Co., 93 Iowa 420, 61 N. W. 934. **Ky.**—Russell v. Ashland, 159 Ky. 223, 166 S. W. 971; Louisville Ins. Co. v. Hoffman, 24 Ky. L. Rep. 980, 70 S. W. 403. **Me.**—Michaud v. Canadian Pac. R. Co., 88 Me. 381, 34 Atl. 172. **Minn.**—Wherry v. Duluth, etc. R. Co., 64 Minn. 415, 67 N. W. 223; Elmborg v. St. Paul City Ry. Co., 51 Minn. 70, 52 N. W. 969. **Mo.**—Bresnan v. Grogan, 74 Mo. App. 587; Sturdy v. St. Charles Land, etc. Co., 33 Mo. App. 44. **N. J.**—Servis v. Cooper, 33 N. J. L. 68; Sheppard v. Sheppard, 10 N. J. L. 250. **N. Y.**—Lyon v. Wilcox, 85 App. Div. 617, 83 N. Y. Supp. 332; Simonowitz v. Schwartz, 73 App. Div. 489, 77 N. Y. Supp. 209. **N. C.**—Sikes v. Parker, 95 N. C. 232. **Tex.**—Conwill v. Gulf, C. & S. F. Ry. Co., 85 Tex. 96, 19 S. W. 1017; Sabine, etc. R. Co. v. Wood, 69 Tex. 679, 7 S. W. 372; Ringo v. State, 54 Tex. Crim. 561, 114 S. W. 119. **Va.**—Becker v. Johnson, 111 Va. 245, 249, 68 S. E. 986. **W. Va.**—Carder v. Bank of West Virginia, 34 W. Va. 38, 11 S. E. 716; Sayre v. King, 17 W. Va. 562. **Wis.**—Dingman v. State, 48 Wis. 485, 4 N. W. 668; Edmiston v. Garrison, 18 Wis. 594. **Eng.**—Thurtell v. Beaumont, 1 Bing. 339, 8 E. C. L. 538, 2 L. J. C. P. (O. S.) 4, 130 Eng. Reprint 136.

[a] "Reasonable diligence" does not necessarily involve an effort by the party to discover evidence proving, or tending to prove, a given fact, unless he has sufficient grounds to believe it exists, or, at least, to put him on in-

be made concerning persons who might reasonably be supposed to be able to testify concerning the facts.⁹⁴ Not only should witnesses be sought, but efforts should be made to ascertain what witnesses know concerning the facts in issue.⁹⁵ Moreover, there must be an honest endeavor to produce the testimony at the trial.⁹⁶ The fact that a party, or his counsel, forgot to produce the evidence,⁹⁷ or to call a

quiry. *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233.

94. **Colo.**—*Colorado Springs Electric Co. v. Soper*, 38 Colo. 126, 88 Pac. 161. **Ga.**—*Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219; *Canfield v. Jones*, 97 Ga. 334, 22 S. E. 908. **Ind.**—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459; *Toney v. Toney*, 73 Ind. 34. **Ia.**—*Smith v. Wagaman*, 58 Iowa 11, 11 N. W. 713. **Kan.**—*Ott v. Anderson*, 9 Kan. App. 320, 61 Pac. 330. **Ky.**—*Russell v. Ashland*, 159 Ky. 223, 166 S. W. 971; *Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63. **Mont.**—*Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714. **N. Y.**—*McIver v. Hallen*, 50 App. Div. 441, 64 N. Y. Supp. 26; *American Surety Co. v. Crow*, 17 App. Div. 634, 45 N. Y. Supp. 279. **N. C.**—*Wilkie v. Raleigh*, etc. R. Co., 127 N. C. 203, 37 S. E. 204. **Tex.**—*Burnley v. Rice*, *Adams & Co.*, 21 Tex. 171; *Haley v. Cusenbary* (Tex. Civ. App.), 30 S. W. 587. **Wis.**—*Scott v. Hobe*, 108 Wis. 239, 84 N. W. 181.

[a] **Members of Movant's Family and His Employees.**—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459.

[b] **Persons living near crossing where accident happened.** *Chicago & E. I. R. Co. v. McKeehan*, 5 Ind. App. 124, 31 N. E. 831.

95. **Ala.**—*Hoskins v. Hight*, 95 Ala. 284, 11 So. 253. **Ark.**—*Little v. State*, 111 Ark. 640, 165 S. W. 256. **Cal.**—*People v. Miller*, 33 Cal. 99. **Fla.**—*Gilbert v. State*, 61 Fla. 25, 55 So. 464. **Ga.**—*Park v. State*, 126 Ga. 575, 55 S. E. 489; *Ford v. State*, 91 Ga. 162, 17 S. E. 103; *Statham v. State*, 86 Ga. 331, 12 S. E. 640; *Lambert v. State*, 8 Ga. App. 206, 68 S. E. 882. **Ill.**—*People v. Hager*, 249 Ill. 603, 94 N. E. 979. **Ind.**—*Spaulding v. State*, 162 Ind. 297, 70 N. E. 243. **Ky.**—*Tyree v. Com.*, 160 Ky. 706, 170 S. W. 33; *Clair v. Com.*, 154 Ky. 711, 159 S. W. 523. **Mich.**—*Johnson v. Doon*, 131 Mich. 452, 91 N. W. 742. **Mo.**—*State v. Mahood*, 177 S. W. 371; *State v. Rippey*, 228 Mo. 342, 128 S. W. 726. **N. Y.**—*People*

v. Ferrara, 199 N. Y. 414, 92 N. E. 1054; *People v. Cameron*, 89 App. Div. 141, 85 N. Y. Supp. 63, 18 N. Y. Crim. 44. **N. D.**—*Josephson v. Sigfusson*, 13 N. D. 312, 100 N. W. 703. **P. I.**—*United States v. Palanca*, 5 Phil. Isl. 269. **Tex.**—*Love v. Breedlove*, 75 Tex. 649, 13 S. W. 222; *Edwards v. State*, 75 Tex. Crim. 647, 172 S. W. 227; *De Lerosa v. State*, 74 Tex. Crim. 604, 170 S. W. 312; *Drake v. State*, 62 Tex. Crim. 130, 136 S. W. 1064. **Utah.**—*See State v. Moore*, 41 Utah 247, 126 Pac. 322, Ann. Cas. 1915C, 976. **Wash.**—*Clemons v. Western*, 39 Wash. 290, 81 Pac. 824.

[a] **Witnesses To Prove Alibi.**—As a rule, defendant in a criminal prosecution knows at the time of the trial what witnesses, if any, could testify to an alibi, consequently alleged newly discovered evidence of this sort is viewed with much distrust and disfavor. **Ga.**—*Lynch v. State*, 84 Ga. 726, 11 S. E. 842. **Ill.**—*Bean v. People*, 124 Ill. 576, 16 N. E. 656. **Tenn.**—*Thompson v. State*, 5 Humph. 138. *Compare supra*, note 48.

96. *Mackin v. People's St. Ry. Elect. L. & P. Co.*, 45 Mo. App. 82.

97. **U. S.**—*Wilson v. Freedley*, 129 Fed. 835, *reversed* on other grounds in 136 Fed. 586, 69 C. C. A. 360. **Ind.**—*Pfaffenback v. Lake Shore & M. S. Ry. Co.*, 142 Ind. 246, 41 N. E. 530; *Richter v. Meyer*, 5 Ind. App. 33, 31 N. E. 582. **Kan.**—*Collins v. Belford*, 89 Kan. 92, 130 Pac. 662; *Mitchell v. Stillings*, 20 Kan. 276. **Ky.**—*Howton v. Roberts*, 20 Ky. L. Rep. 1331, 49 S. W. 340. **Mo.**—*Goff v. Mulholland*, 33 Mo. 203. **Mont.**—*Nicholson v. Metcalf*, 31 Mont. 276, 78 Pac. 483. **Neb.**—*Hoffine v. Ewings*, 60 Neb. 729, 84 N. W. 93; *Upton v. Levy*, 39 Neb. 331, 58 N. W. 95. **N. Y.**—*Hatfield v. Macy*, 52 How. Pr. 193; *Wileox v. Joslin*, 56 Hun 645, 10 N. Y. Supp. 342, 32 N. Y. St. 423. **Pa.**—*Fey v. Ryan*, 3 Phila. 406. **R. I.**—*Johnson v. Blanchard*, 5 R. I. 24. **Wis.**—*Wilson v. Johnson*, 74 Wis. 337, 43 N. W. 148. **Can.**—*Preston v. Appleby*, 27 N. Brunsw. 92.

witness at the trial,⁹⁸ or did not call a witness because he did not know to what the witness would testify,⁹⁹ or because a witness was not present,¹ or that he did not anticipate his adversary's testimony,² or that he was surprised at the testimony of other adverse witnesses,³ or that he was disappointed and surprised in the testimony of his own witnesses, and desires, by a new trial, to present other witnesses,⁴ cannot, usually, be made the basis of newly discovered evidence. Likewise, documentary evidence, such as books, papers, or letters, bearing on the case should be investigated.⁵ Particularly, when the documents were in the possession of the movant at the time of the trial.⁶ And public records, pertaining to the questions involved, should be examined.⁷ In personal injury cases, the character of the injuries received should be investigated.⁸ If witnesses fail to appear, or other evidence is not present in court as expected, proper post-

98. *Pfaffenback v. Lake Shore & M. S. Ry. Co.*, 142 Ind. 246, 41 N. E. 530.

99. **U. S.**—*Nyback v. Champagne Lumb. Co.*, 130 Fed. 784, *affirmed*, 130 Fed. 1021, 64 C. C. A. 615. **La.**—*Doiron v. Baker-Wakefield Cypress Co.*, 131 La. 618, 59 So. 1010. **Minn.**—*Taylor v. Mueller*, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199. **N. Y.**—*Gautier v. Douglass Mfg. Co.*, 52 How. Pr. 325 (*affirmed* in 13 Hun 514); *Conable v. Smith*, 64 Hun 638, 19 N. Y. Supp. 446, 46 N. Y. St. 2.

1. *Hartman v. Morning Journal Assn.*, 19 N. Y. Supp. 401, 46 N. Y. St. 403.

2. *Hawxhurst v. Hennion*, 9 N. Y. Supp. 542, 30 N. Y. St. 917.

3. *Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714.

Surprise as ground of new trial, see *supra*, II, E.

Surprise at unexpected testimony as ground for new trial, see *supra*, II, E, 2, k, (VII).

4. *Adam v. Hay*, 7 N. C. 149; *Carder v. Bank of West Virginia*, 34 W. Va. 38, 11 S. E. 716. Compare II, E, 2, k, (VII), (A).

5. **Ala.**—*Prestwood v. Eldridge*, 119 Ala. 72, 24 So. 729. **Cal.**—*Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. **Conn.**—*Selleck v. Head*, 77 Conn. 15, 58 Atl. 224. **Ill.**—*Reardon v. Steep*, 74 Ill. App. 162. **Kan.**—*Mattern v. Suddarth*, 65 Kan. 862, 70 Pac. 874. **Wash.**—*Collins v. Bacon*, 38 Wash. 80, 80 Pac. 268.

[a] Where, before the trial, plaintiffs diligently searched for and were unable to find certain delivery re-

ceipts material to their case, the discovery of them after the trial constitutes newly discovered evidence. *Katz v. Atfield*, 1 Misc. 217, 20 N. Y. Supp. 892, 49 N. Y. St. 923. See also *Godard v. Latta*, 152 Ky. 538, 153 S. W. 737, where a written contract was found after trial, diligence having previously been used to discover it.

6. **U. S.**—*Cheaney v. Nebraska & C. Stone Co.*, 41 Fed. 740; *Coote v. United States Bank*, 3 Cranch C. C. 95, 6 Fed. Cas. No. 3,204. **Ala.**—*Prestwood v. Eldridge*, 119 Ala. 72, 24 So. 729. **Ga.**—*Richards v. Hunt*, 65 Ga. 342; *Boehm, Bendheim & Co. v. Juchter*, 62 Ga. 580. **Kan.**—*Carson v. Henderson*, 34 Kan. 404, 8 Pac. 727. **Mo.**—*James v. Mutual Reserve Fund Life Assn.*, 148 Mo. 1, 49 S. W. 978; *Tilford v. Ramsey*, 43 Mo. 410. **Mont.**—*Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714. **N. Y.**—*Rammauro v. Illinois Surety Co.*, 163 App. Div. 26, 148 N. Y. Supp. 35; *Quinn v. Lloyd*, 1 Sweeney 253, *reversed* on other grounds in 41 N. Y. 349. **N. C.**—*Matthews v. Joyce*, 85 N. C. 258. **R. I.**—*Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777. **Tex.**—*Schramm v. Owens Lumb. Co.* (Tex. Civ. App.), 163 S. W. 1016. **Wis.**—*Schmitt v. Northern Pac. R. Co.*, 129 Wis. 397, 98 N. W. 202. **Eng.**—*Shedden v. Atty.-Gen.*, L. R. 1 H. L. (S.) 470, 545, 22 L. T. N. S. 631; *Dixon v. Graham*, 5 Dow 267, 3 Eng. Reprint 1324. **Can.**—*Murray v. Canada Cent. R. Co.*, 7 Ont. App. 646.

7. See *infra*, II, H, 5, c.

8. *Rose v. Stephens & Condit Transp. Co.*, 19 Fed. 808, 20 Blatchf. 465.

ponements or continuances should be requested,⁹ and if evidence be discovered during the trial, but after the regular time for its introduction, application should be made to the court for its introduction out of its order.¹⁰ If documentary evidence has been lost, effort should be made to prove the same by secondary evidence, otherwise the after discovery of the papers will not constitute new evidence.¹¹

The question of whether diligence has been shown is largely within the discretion of the court,¹² and either the application or the sus-

9. Ark.—Blakely *v. State*, 73 Ark. 218, 83 S. W. 948. Fla.—Robinson *v. State*, 50 Fla. 115, 39 So. 465. Idaho. State *v. Cook*, 13 Idaho 45, 88 Pac. 240. Ia.—Dunbauld *v. Thompson*, 109 Iowa 199, 80 N. W. 324. La.—State *v. Ferguson*, 114 La. 70, 38 So. 23; State *v. Albert*, 109 La. 201, 33 So. 196; State *v. Lamothe*, 37 La. Ann. 43. Tex. Howe *v. State*, 77 Tex. Crim. 108, 177 S. W. 497; Nickelson *v. State*, 53 Tex. Crim. 631, 111 S. W. 414; San Antonio Foundry Co. *v. Drish*, 38 Tex. Civ. App. 214, 85 S. W. 440; Texas & P. Ry. Co. *v. Kingston*, 30 Tex. Civ. App. 24, 68 S. W. 518. Va.—Dix *v. Com.*, 110 Va. 907, 67 S. E. 344. Wash.—Dumontier *v. Stetson & Post Mill Co.*, 39 Wash. 264, 81 Pac. 693.

See also *supra*, II, E, 2, k, (I).

10. Ga.—O'Neal *v. State*, 47 Ga. 229. Ky.—Higden *v. Higden*, 2 A. K. Marsh. 42. N. Y.—People *v. Vermilyea*, 7 Cow. 369.

[a] If the evidence was known to a party before close of argument, and no effort was made to introduce it, a new trial will not be granted. Nashville, C. & St. L. Ry. *v. Jones*, 100 Tenn. 512, 45 S. W. 681; City of San Antonio *v. Kreusel*, 17 Tex. Civ. App. 594, 43 S. W. 615.

11. Ala.—Stewart Veneer Co. *v. Windham & Co.*, 12 Ala. App. 642, 68 So. 516. Cal.—Smith *v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. Ga. Nixon *v. Christie*, 84 Ga. 469, 10 S. E. 1087; Wimpy *v. Gaskill*, 79 Ga. 620, 7 S. E. 156. Ill.—Reardon *v. Steep*, 74 Ill. App. 162. Ind.—Chapman *v. Moore*, 107 Ind. 223, 8 N. E. 80. Mont.—Quigley *v. Birdseye*, 11 Mont. 439, 28 Pac. 741. N. Y.—See Baily *v. Hornthal*, 1 App. Div. 44, 36 N. Y. Supp. 1082. Pa.—Conrad *v. Conrad*, 9 Phila. 510. S. C.—Hinson *v. Catoe*, 10 S. C. 311. Can.—Cyr *v. Hartt*, 15 N. Brunsw. 71.

Loss of evidence as ground for new trial, see *supra*, II, H, 4, b.

12. Olathe *v. Horner*, 38 Kan. 312,

16 Pac. 468; McMullen *v. Winfield Bldg. & L. Assn.*, 4 Kan. App. 459, 46 Pac. 410.

[a] Sufficient Diligence Shown.—See the following cases: Cal.—Blewett *v. Miller*, 131 Cal. 149, 63 Pac. 157. Conn. Waller *v. Graves*, 20 Conn. 305. Ga. Hays *v. Westbrook*, 96 Ga. 219, 22 S. E. 893. Ind.—Kochel *v. Bartlett*, 88 Ind. 237; Humphries *v. Marshall's Admrs.*, 12 Ind. 609. Ia.—Woerdhoff *v. Muekel*, 131 Iowa 300, 108 N. W. 533; Schnee *v. City of Dubuque*, 122 Iowa 459, 98 N. W. 298; Mally *v. Mally*, 114 Iowa 309, 86 N. W. 262; Bullard *v. Bullard*, 112 Iowa 423, 84 N. W. 513; Feister *v. Kent*, 92 Iowa 1, 60 N. W. 493; Murray *v. Weber*, 92 Iowa 757, 60 N. W. 492. Ky.—Owsley *v. Owsley*, 117 Ky. 47, 77 S. W. 397; Collins *v. Burge*, 20 Ky. L. Rep. 992, 47 S. W. 444. Minn.—Humphrey *v. Havens*, 9 Minn. 318; Shaw *v. Henderson*, 7 Minn. 480. Mo.—Longdon *v. Kelly*, 51 Mo. App. 572. N. Y.—Beers *v. West Side R. Co.*, 101 App. Div. 308, 91 N. Y. Supp. 957. S. D.—Waite *v. Fish*, 17 S. D. 215, 95 N. W. 928. Tex. Douglas *v. Walker*, 42 Tex. Civ. App. 213, 92 S. W. 1026. Vt.—Clark *v. Gallagher*, 74 Vt. 331, 52 Atl. 539. Wis.—Carroll *v. More*, 30 Wis. 574.

[b] Insufficient Diligence Shown. See the following cases: U. S.—Farrell *v. West Chicago Park Comrs.*, 181 U. S. 404, 21 Sup. Ct. 609, 45 L. ed. 916, 924; Wright *v. Southern Exp. Co.*, 80 Fed. 85. Ala.—McClendon *v. McKissack*, 143 Ala. 188, 38 So. 1020; Prestwood *v. Eldridge*, 119 Ala. 72, 24 So. 729. Cal.—Smith *v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Harralson *v. Barrett*, 99 Cal. 607, 34 Pac. 342. Conn.—Selleck *v. Head*, 77 Conn. 15, 58 Atl. 224. Ga.—Cunningham *v. Schley*, 41 Ga. 426. Ind.—Zimmerman *v. Weigel*, 158 Ind. 370, 63 N. E. 566; Morrison *v. Carey*, 129 Ind. 277, 28 N. E. 697; Test *v. Larsh*, 100 Ind. 562. Ia. Renshaw *v. Dignan*, 128 Iowa 722, 105

taining affidavits must show the facts constituting the diligence, since a mere averment that diligence, or reasonable diligence, was used, is not sufficient.¹³ For example, where the diligence used is alleged to have consisted of inquiries, the time and place and circumstances must be stated.¹⁴ On the question of reasonable diligence, the knowledge and diligence of counsel are to be considered, and the same rules apply as in relation to the knowledge and diligence of the party.¹⁵ Moreover, the physical and pecuniary condition of a party, his knowledge as to the essential facts of the case, and the difficulty of establishing such facts by proper evidence, are likewise considered.¹⁶

c. *Matter of Public Record*.—As a general rule, a new trial will not be granted for alleged newly discovered evidence that was at the time of the trial a matter of public record, since it is negligence not to examine such records, always open and accessible to the parties, for information affecting the question in issue.¹⁷ Where, however, all

N. W. 209; *Norris v. Hix*, 74 Iowa 524, 38 N. W. 395. **Kan.**—*Mattern v. Sudarth*, 65 Kan. 862, 70 Pac. 874; *Hindman v. Askwew Saddlery Co.*, 9 Kan. App. 98, 57 Pac. 1050; *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. 875. **Ky.**—*Crigler v. Newman*, 29 Ky. L. Rep. 27, 91 S. W. 706; *Moore & Co. v. McAlpin*, 10 Ky. L. Rep. 724. **Me.**—*Damon v. Randall*, 69 Me. 183. **Mass.**—*Damon v. Carrol*, 167 Mass. 198, 45 N. E. 85. **Mich.**—*Grand Rapids Electric Co. v. Walsh Mfg. Co.*, 142 Mich. 4, 105 N. W. 1. **Minn.**—*Wherry v. Duluth, M. & N. Ry. Co.*, 64 Minn. 415, 67 N. W. 223; *Austin v. Northern Pac. R. Co.*, 34 Minn. 351, 25 N. W. 798. **Miss.**—*Grubbs v. Collins*, 54 Miss. 485. **Mo.**—*Devoy v. St. Louis Transit Co.*, 192 Mo. 197, 91 S. W. 140; *Summers v. Metropolitan Life Ins. Co.*, 90 Mo. App. 691. **Mont.**—*Martin v. Corseadden*, 34 Mont. 308, 86 Pac. 33; *In re Colbert's Estate*, 31 Mont. 461, 73 Pac. 971, 80 Pac. 248, 107 Am. St. Rep. 439. **N. Y.**—*Hagen v. New York Cent. & H. R. R. Co.*, 100 App. Div. 218, 91 N. Y. Supp. 914; *Bridenbecker v. Bridenbecker*, 75 App. Div. 6, 77 N. Y. Supp. 802; *Simonowitz v. Schwartz*, 73 App. Div. 489, 77 N. Y. Supp. 209; *Bath Gaslight Co. v. Claffy*, 18 App. Div. 155, 45 N. Y. Supp. 433. **Pa.**—*Slattery v. Supreme Tent of K. of M.*, 19 Pa. Super. 108. **S. D.**—*Grigsby v. Wolven*, 20 S. D. 623, 108 N. W. 250. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Blanchard*, 96 Tex. 616, 75 S. W. 6; *Missouri Pac. Ry. Co. v. White*, 80 Tex. 202, 15 S. W. 808; *Kenson v. Gage*, 34 Tex. Civ. App. 547, 79 S. W. 605. **Utah.**—*Monmouth Pot-*

tery Co. v. White, 27 Utah 236, 75 Pac. 622. **Wash.**—*Collins v. Bacon*, 38 Wash. 80, 80 Pac. 268; *Bullock v. White Star S. S. Co.*, 30 Wash. 448, 70 Pac. 1106; *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743. **Wis.**—*Scott v. Hobe*, 108 Wis. 239, 84 N. W. 181.

13. **Ind.**—*Hamm v. Romine*, 98 Ind. 77. **Kan.**—*Carson v. Henderson*, 34 Kan. 404, 8 Pac. 727; *Wilkes v. Wolback*, 30 Kan. 375, 2 Pac. 508. **Okla.**—*Flersheim Mercantile Co. v. Gillespie*, 14 Okla. 143, 77 Pac. 183; *Twine v. Kilgore*, 3 Okla. 640, 39 Pac. 388.

14. *Keisling v. Readle*, 1 Ind. App. 240, 27 N. E. 583.

15. *Ready Roofing Co. v. Taylor*, 15 Blatchf. 94, 20 Fed. Cas. No. 11,613.

16. *Aetna Ins. Co. v. Sparks*, 62 Ga. 187.

[a] **Physical Condition at Time of Trial**.—It would be hardly fair and just to require of a plaintiff in a personal injury action, who had been very severely injured, and whose physical and mental faculties were not fully restored at the time of the trial, the same degree of diligence in ascertaining testimony which might exist in his behalf as if he had not been laboring under such disadvantages. *Berberich v. Louisville Bridge Co.*, 20 Ky. L. Rep. 467, 46 S. W. 691.

17. **Cal.**—*Weimer v. Lowery*, 11 Cal. 104. **Ga.**—*Shiels v. Lamar*, 58 Ga. 590; *Beard v. Simmons*, 9 Ga. 4. **Ill.**—*Farrell v. West Chicago Park Comrs.*, 182 Ill. 250, 55 N. E. 325, *affirmed* in 181 U. S. 404, 21 Sup. Ct. 609, 645, 45 L. ed. 916, 924. **Ind.**—*Simpkins v. Wilson*, 11 Ind. 541. **Ky.**—*Howton v. Rob-*

possible diligence has been used and no record found, owing to circumstances or accidents involving no negligence or fault on the movant's part, a new trial should be granted.¹⁸

d. *Former Witnesses*.—As a rule, newly discovered evidence cannot be presented by means of witnesses who testified at the original trial,¹⁹ and a very strong case must be made out to justify a new trial by the additional testimony of such witnesses.²⁰ Evidence, moreover, cannot be said to be newly discovered which could have been elicited by cross-examination, since due diligence should have suggested the proper inquiry at the trial.²¹ That a witness when testifying forgot to state alleged important matters is not evidence which reasonable diligence could not have produced at the trial,²² and, especially,

erts, 20 Ky. L. Rep. 1331, 49 S. W. 340; *Ashcraft v. Barker*, 19 Ky. L. Rep. 222, 39 S. W. 510. Minn.—*Scott*, etc. *Lumber Co. v. Sharvey*, 62 Minn. 528, 64 N. W. 1132; *Walsh v. St. Paul*, 62 Minn. 145, 64 N. W. 147; *Laurel v. State Nat. Bank*, 25 Minn. 48. N. Y. *People v. Marks*, 10 How. Pr. 261, 2 Park. Crim. 673; *Grafton v. Ball*, 164 App. Div. 70, 149 N. Y. Supp. 447; *Luthy v. Regan*, 61 Hun 626, 16 N. Y. Supp. 400, 41 N. Y. St. 579. Pa.—*Marine Coal Co. v. Pittsburgh*, etc. R. Co., 246 Pa. 478, 92 Atl. 688. Tenn.—*Smith v. Winton*, 1 Overt. 230, 3 Am. Dec. 755. Tex.—*Johnson v. Flint*, 75 Tex. 379, 12 S. W. 1120; *Vardeman v. Edwards*, 21 Tex. 737; *Wagner v. Geiselman* (Tex. Civ. App.), 156 S. W. 524; *Simonton v. Perry* (Tex. Civ. App.), 62 S. W. 1090. Vt.—*Morgan v. Houston*, 25 Vt. 570.

18. Ia.—*Grotte v. Schmidt*, 80 Iowa 454, 45 N. W. 771, papers found after trial in janitor's room instead of being in auditor's room, their proper place. Ky.—*Cox v. Prewitt*, 16 Ky. L. Rep. 130, 26 S. W. 589 (surveyor's book not turned over to his successor in office); *Elliott v. Harris*, 81 Ky. 470, record of conveyances mutilated, and indexes destroyed, during the civil war. Minn.—*Shaw v. Henderson*, 7 Minn. 480, discovery after trial of deed filed for record affecting question of priority of title of abstract used in former trial. Miss.—*Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351, irregular entry on stock subscription book not discoverable by reasonable search.

19. Alaska.—*United States v. Richards*, 1 Alaska 613. Ia.—*State v. Dimmitt*, 88 Iowa 551, 55 N. W. 531; *Fanning v. McCraney*, 1 Morris 398. Ky.

Hays v. Com., 140 Ky. 184, 130 S. W. 987. La.—*State v. Walker*, 137 La. 197, 68 So. 407. Neb.—*Von Dorn v. Mengedocht*, 41 Neb. 525, 59 N. W. 800; *Fitzgerald v. Brandt*, 36 Neb. 683, 54 N. W. 992. R. I.—See *State v. Kemp*, 37 R. I. 572, 94 Atl. 429. Tex.—*Henson v. State*, 74 Tex. Crim. 277, 168 S. W. 89; *Williams v. State* (Tex. Crim.), 34 S. W. 271. Va.—*Wheeler v. Com.*, 86 Va. 658, 10 S. E. 924. W. Va.—*State v. Barriack*, 60 W. Va. 576, 55 S. E. 652.

20. *Grinnell Brick & Tile Co. v. Booknau*, 167 Iowa 279, 149 N. W. 239; *Marengo Sav. Bank v. Kent*, 135 Iowa 386, 112 N. W. 767.

[a] **Witness Not Disclosing Facts**. But where a witness examined in the first trial did not, however, disclose certain important facts in his possession till after the trial, good ground exists for a new trial. *Buford v. Bostick*, 50 Tex. 371.

21. Ala.—*McClendon v. McKissack*, 143 Ala. 188, 38 So. 1020. Ga.—*Poullain v. Poullain*, 79 Ga. 11, 4 S. E. 81. Ind.—*Zimmerman v. Weigel*, 158 Ind. 370, 63 N. E. 566; *Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697. Ia.—*Brennan v. Goodfellow*, 96 N. W. 962. Kan.—*Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. 875. See, however, *Continental Ins. Co. v. Hillmer*, 42 Kan. 275, 287, 21 Pac. 1044, witness concealing material evidence unknown to defeated party's attorney. Mich.—*Bosek v. Detroit United Ry.*, 175 Mich. 8, 140 N. W. 978. Mo.—*Neff v. Cameron*, 213 Mo. 350, 111 S. W. 1139, 127 Am. St. Rep. 606, 18 L. R. A. (N. S.) 320. Tex.—*Missouri, K. & T. R. Co. v. Rack*, 21 Tex. Civ. App. 667, 52 S. W. 988.

22. U. S.—See *Palmer v. Fiske*, 2 Curt. 14, 18 Fed. Cas. No. 10,691. Cal.

where a new trial is asked because a witness was not questioned on certain points.²³ A verdict obtained through the mistaken testimony of a witness has been set aside on the ground of newly discovered evidence where the mistake was discovered after the trial,²⁴ but that a witness committed perjury and will admit it on a new trial is held, in a civil case, not ground for a new trial,²⁵ although in criminal cases where the defendant was convicted by perjured testimony, the discovery of such perjury after the trial is held a sufficient cause for a new trial on the ground of newly discovered evidence.²⁶

III. PROCEDURE TO OBTAIN NEW TRIAL. — A. METHOD.

1. In General.—In most jurisdictions, at the present time, applications for new trials are made either by motion or by petition. The details of procedure vary in the different states, and are often gov-

Moran v. Abbey, 63 Cal. 56; *Arnold v. Skaggs*, 35 Cal. 684. **Ga.**—*Greer v. Raney*, 120 Ga. 290, 47 S. E. 939; *Richards v. Hunt*, 65 Ga. 342; *Archer v. Heidt*, 55 Ga. 200. **Ill.**—*McDonald v. People*, 222 Ill. 325, 78 N. E. 609, *affirming* 123 Ill. App. 346. **Ind.**—*Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697; *Union Cent. L. Ins. Co. v. Loughmiller*, 33 Ind. App. 309, 69 N. E. 264. **Ia.**—*Buswell v. Buswell*, 146 Iowa 52, 124 N. W. 770; *Marengo Sav. Bank v. Kent*, 135 Iowa 386, 112 N. W. 767; *Barber v. Maden*, 126 Iowa 402, 102 N. W. 120. **Kan.**—*Mitchell v. Stillings*, 20 Kan. 276. **Ky.**—*Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63; *Howton v. Roberts*, 20 Ky. L. Rep. 1331, 49 S. W. 340. **Mo.**—*Porter v. St. Joseph Stock Yards Co.*, 213 Mo. 372, 111 S. W. 1136; *Tilford v. Ramsey*, 43 Mo. 410; *Karriger v. Greb*, 42 Mo. 44. **N. Y.**—*Fleming v. Hollenback*, 7 Barb. 271; *Huse & Loomis Ice & Transp. Co. v. Wielar*, 86 N. Y. Supp. 24. **R. I.**—*Johnson v. Blanchard*, 5 R. I. 24. **Tex.**—*Gregg v. Bankhead*, 22 Tex. 245; *Cochrane v. Middleton*, 13 Tex. 275; *Neal v. Whitlock*, 45 Tex. Civ. App. 457, 101 S. W. 284. **W. Va.**—*Bloss v. Hull*, 27 W. Va. 503. **Wis.**—*Andrews v. United States Casualty Co.*, 159 Wis. 604, 150 N. W. 947.

Compare supra, II, E, 2, k, (VIII), (D).

[a] A want of recollection of fact, which by due attention might have been remembered, is not a ground for a new trial. For want of recollection may always be pretended, and may be hard to be disproved. *Parsons, C. J.*, in *Bond v. Cutler*, 7 Mass. 205.

23. Ind.—*Richie v. State*, 58 Ind. 355. **Ia.**—*Lindauer v. Hay*, 61 Iowa 663, 17 N. W. 98. **Mo.**—*State v. Ernest*, 150 Mo. 347, 51 S. W. 688; *State v. Cantlin*, 118 Mo. 100, 23 S. W. 1091. **Neb.**—*Fitzgerald v. Brandt*, 36 Neb. 683, 54 N. W. 992. **N. Y.**—*People v. Baker*, 27 App. Div. 597, 50 N. Y. Supp. 771; *Smith v. Clews*, 14 Abb. N. C. 465. **Tex.**—*Green v. State*, 49 Tex. Crim. 204, 91 S. W. 585; *Wynne v. State (Tex. Crim.)*, 51 S. W. 909; *Cunningham v. State (Tex. Crim.)*, 43 S. W. 988. **Can.**—*Reg. v. St. John*, 4 Newfoundl. 598; *Reg. v. Fitzgerald*, 20 U. C. Q. B. 546.

24. *Seofield Rolling Mill Co. v. State*, 54 Ga. 635; *Inhabitants of Warren v. Inhabitants of Hope*, 6 Greenl. (Me.) 479. *Contra*, *Dennehy v. Crohn*, 64 Mo. App. 79. *Compare* II, E, 2, k, (VI), (A).

25. *Loucheim v. Strause*, 49 Wis. 623, 6 N. W. 360. See *supra*, II, H, 3, d. *Compare supra*, II, E, 2, k, (VI), (B).

26. Ark.—*Bussey v. State*, 69 Ark. 545, 64 S. W. 268. **Ga.**—*Morgan v. State*, 16 Ga. App. 559, 85 S. E. 827. **Ia.**—*State v. Gulliver*, 163 Iowa 123, 142 N. W. 948. **Kan.**—*State v. Chadwell*, 94 Kan. 302, 146 Pac. 420; *State v. Mounkes*, 91 Kan. 653, 138 Pac. 410. **Miss.**—*Tuberville v. State*, 38 So. 333; *Bates v. State*, 32 So. 915. **Mo.**—*State v. Mahood*, 177 S. W. 371. **N. M.**—*United States v. Biena*, 8 N. M. 99, 42 Pac. 70. **Tex.**—*Mann v. State*, 44 Tex. 642; *Carter v. State*, 75 Tex. Crim. 110, 170 S. W. 739; *Piper v. State*, 57 Tex. Crim. 605, 124 S. W. 661. **Wash.**—*State v. Powell*, 51 Wash. 372, 98 Pac. 741.

erned by local statutes.²⁷ The method provided by the statute must be followed.²⁸

2. Rule Nisi, or Rule To Show Cause.—Under the former common law practice in England, when the prevailing party moved for judgment, the court entered a rule that judgment would be entered within four days, unless ("nisi"), meanwhile, cause to the contrary should be shown. This was known as "judgment nisi," or "the rule nisi."²⁹ This gave rise to the further rule that a motion for a new trial must be made within this time, namely, four days,³⁰ otherwise, judgment would be entered.³¹ A party desiring a new trial would thereupon apply to the court for a rule that the prevailing party should show cause why a new trial should not be granted. This was known as "the rule to show cause," or also, as before, "the rule nisi."³² Upon the hearing, after proper notice, the rule was made "absolute" or was "discharged," according as the new trial was granted or denied.³³ By strict common law procedure, a rule to show cause may be appropriate at the present time,³⁴ and, in some jurisdictions, the practice seems to be still followed.³⁵

3. Motion.—In most jurisdictions, at the present time, an application for a new trial, in most cases, is made by motion.³⁶

Can.—Thomey v. Forward, 7 Newfoundl. 119.

Compare *supra*, II, E, 2, k, (VI), (B).

27. See the statutes.

28. Cal.—Kelly v. Larkin, 47 Cal. 58. Mont.—State v. Second Judicial District Court, 28 Mont. 123, 72 Pac. 412. S. C.—Durant v. Philpot, 16 S. C. 116.

Right of court of its own motion to grant new trial although statute provides for new trial on application of aggrieved party, see *infra*, III, B, 7.

29. Young v. McPherson, 3 N. J. L. 895, 897; Scott v. Crecer, 11 Ont. (Can.) 541. See Tidd's Pr., 913, 914.

[a] **Present English Practice.**—At the present time, in England, the modern Judicature Acts have greatly changed the old practice, all motions for new trials now being heard by way of appeal. See R. S. C. Ord. 39, r. 1; Laws of England, tit. "Practice and Procedure," Vol. 23, p. 192.

30. See Chitty's Gen. Pr., Vol. 4, p. 84.

31. See *infra*, this note.

[a] **Unless under particular circumstances**, in which case the court could, in its discretion, allow a new trial to be moved for at any time before judgment shall have been actually signed. Birt v. Barlow, 1 Doug. 171, 99 Eng. Reprint 113; R. v. Gough, 2 Doug. 791, 99 Eng. Reprint 503.

32. Karl v. Diamond, 77 N. J. L. 167, 71 Atl. 46. See Vernon v. Hankey, 2 T. R. 113, 120, 100 Eng. Reprint 62; Chitty's Gen. Pr., Vol. 4, p. 87.

33. Tidd, 912; Steph., Com. Laws of Eng., Vol. 3, p. 680.

34. Georgia R. & Bkg. Co. v. Usry, 82 Ga. 54, 8 S. E. 186, 14 Am. St. Rep. 140; Karl v. Diamond, 77 N. J. L. 167, 71 Atl. 46.

35. See N. J. Comp. Sts., 1910, p. 2017, §213, f.

[a] **Form of Rule to Show Cause.** See Finley v. Handley, 50 N. J. L. 503, 14 Atl. 585.

[b] **The movant must serve the opposite party with a copy of the rule nisi, unless it is waived.** McMullen v. Citizens' Bank, 123 Ga. 400, 51 S. E. 342; Shea v. Kelly, 96 Ga. 442, 23 S. E. 313.

36. See the statutes and Whaley v. Gleason, 40 Ind. 405; State *ex rel.* Barnes v. Kimes, 11 Ohio C. C. (N. S.) 77.

[a] **Civil and Criminal Cases.**—Motions for new trials are governed by the same rules in criminal as in civil cases. Grayson v. Com., 6 Gratt. (47 Va.) 712, 723.

[b] **Equity practice** as to method of obtaining a rehearing, see Covington v. Covington, 47 S. C. 263, 25 S. E. 193; Durant v. Philpot, 16 S. C. 116. See also State *ex rel.* Berndt v. Tem-

4. Petition.—In a few states, the proper form of application is by petition.³⁷

5. Motion and Petition.—In many states, the statutes provide for both motions and petitions; a motion being the usual method employed when the application is made during the term the verdict, report, or decision is rendered, and a petition being the designated method when the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report, or decision was rendered.³⁸

6. Bill in Equity.—In some jurisdictions, after the time has expired in which a motion for a new trial may be made in a court of law, a bill in equity may be filed to vacate the judgment and to obtain a new trial.³⁹

B. WHO MAY APPLY.—1. Party to the Action.—As a rule, only a party to the action can move for a new trial.⁴⁰

2. Aggrieved Party.—The applicant, moreover, must be "an aggrieved party," this term being frequently used in the statutes designating those who may apply for a new trial.⁴¹ However, both parties

pleton, 21 N. D. 470, 130 N. W. 1009; Law v. Smith, 34 Utah 394, 98 Pac. 300; and the title "Rehearing."

[c] **Under the Code** the procedure is the same in both. Ogle v. Potter, 24 Mont. 501, 62 Pac. 920.

[d] **Motion for Leave To Make a Motion.**—Where the time for filing a motion for a new trial had elapsed, counsel filed a motion for leave to file a motion for a new trial. In reviewing the case, the supreme court held that such a motion was unheard of and a nullity. Odell v. Sargent, 3 Kan. 80.

As to requisites of motion, see *infra*, III, E, 2.

37. **Ala.**—Code of 1907, §§5371, 5372. **Conn.**—Butler v. Barnes, 61 Conn. 399, 24 Atl. 328. **R. I.**—Elliott v. Benedict, 13 R. I. 463.

But see Zaleski v. Clark, 45 Conn. 397, 403.

38. **Ark.**—Dig. Sts., 1916, §7658. **Ind.**—Hines v. Driver, 100 Ind. 315; Webster v. Maiden, 41 Ind. 124. **Ia.** Mengel v. Mengel, 145 Iowa 737, 120 N. W. 72, 122 N. W. 899; Hunter v. Porter, 124 Iowa 351, 100 N. W. 53. **Kan.**—Odell v. Sargent, 3 Kan. 80. **Ky.** Rice v. Blair, 161 Ky. 280, 170 S. W. 657. **Mo.**—Jones v. Marble Head Lime Co., 128 Mo. App. 345, 107 S. W. 420. **N. H.**—Russell v. Dyer, 39 N. H. 528. **Ohio.**—Gen. Code, §11580; Fox v. Lima Nat. Bank, 11 Ohio Dec. (Reprint) 127; Stuckey v. Bloomer, 1 Ohio Cir. Dec.

631, 2 Ohio Cir. Ct. 541. **Tex.**—Spencer v. Kinnard, 12 Tex. 180; Kruegel v. Porter (Tex. Civ. App.), 136 S. W. 801.

See *infra* III, D, 3 and 12; III, E, 4. 39. See *infra*, III, D, 12.

40. **Ala.**—Marion v. Regenstein, 98 Ala. 475, 13 So. 384. **Cal.**—*In re Aveline's Estate*, 53 Cal. 259. **Ga.**—Jones v. Coney, 111 Ga. 843, 36 S. E. 321; Central R., etc. Co. v. Craig, 59 Ga. 185. **Ind.**—Brown v. Cody, 115 Ind. 484, 18 N. E. 9. **Mo.**—State v. Stratton, 110 Mo. 426, 19 S. W. 803. **W. Va.**—Strader v. Goff, 6 W. Va. 257. **Wis.**—Rogers v. Hoenig, 46 Wis. 361, 1 N. W. 17.

[a] **Citizens and taxpayers**, although publicly interested, as such, in the result of a case, have no right, where they are strangers to the suit, to petition for a new trial. The right to petition for "redress of grievances" applies only to political bodies, not to the courts. State v. Hansford, 43 W. Va. 773, 28 S. E. 791.

41. **U. S.**—Whiton v. Chicago, etc. R. Co., 2 Biss. 282, 29 Fed. Cas. No. 17,597. **Ga.**—White v. Barlow, 72 Ga. 887; Vale R. Mfg. Co. v. Bradley, 8 Ga. App. 483, 70 S. E. 36. **Me.**—Philbrook v. Burgess, 52 Me. 271. **Wyo.** See McManus v. McGrath, 20 Wyo. 500, 126 Pac. 44.

Who is aggrieved party under statutes governing appeal, see 2 STANDARD PROC. 200.

may at the same time move for a new trial of the case.⁴²

3. Deceased Party.—On the death of a party, the application may be made by his administrator.⁴³

4. Criminal Case.—In a criminal case, the accused is the only party who may apply, the right not being permitted to the state.⁴⁴

5. Joint Parties.—Parties who are jointly affected by the verdict or decision may jointly apply for a new trial,⁴⁵ but, in some jurisdictions, unless the joint application can be granted in favor of all, it will not be granted to any part of them.⁴⁶ Other cases hold, however, that, where the grounds are sufficient, a new trial may be granted to one or more of joint parties, and refused as to the others.⁴⁷

6. Waiver by Agreement.—The right to apply for a new trial may be waived in advance by agreement of the parties.⁴⁸

42. *Brainard v. Lane*, 26 Ohio St. 632; *Clallam v. Clump*, 15 Wash. 593, 47 Pac. 13.

43. *Conn.*—*Gates v. Treat*, 25 Conn. 71. *Ill.*—*Linn v. Brecher*, 90 Ill. App.

6. *Ky.*—*Turner v. Booker*, 2 Dana 334.

44. *U. S.*—*Fries' Case*, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5,126.

Cal.—*People v. Bangeneaur*, 40 Cal.

613. *N. J.*—*State v. Kanouse*, 20 N. J. L. 115. *Ore.*—See *State v. Reed*, 52

Ore. 377, 97 Pac. 627. *Pa.*—*Com. v. Pfueger*, 10 Pa. Dist. 717.

And see *supra*, I, B, 6, a, (II).

[a] A search and seizure proceeding against intoxicating liquors is a criminal proceeding, and in such an action the state cannot apply for a new trial. *State v. Robinson*, 49 Me. 285.

Right of court to grant new trial of its own motion, see *infra*, III, B, 7.

45. *Cal.*—*Boehmer v. Big Rock Creek Irr. Dist.*, 117 Cal. 19, 48 Pac. 908. *Ga.*

Western Assur. Co. v. Way, 98 Ga. 746, 27 S. E. 167; *Lee v. West*, 47 Ga.

311. *Ind.*—*Prescott v. Haughey*, 152 Ind. 517, 51 N. E. 1051; *Feeney v. Mazelin*, 87 Ind. 226; *First Nat. Bank*

v. Colter, 61 Ind. 153; *Kelley v. Kelley*, 8 Ind. App. 606, 34 N. E. 1009, 36 N.

E. 165. *Minn.*—*Bathke v. Krassin*, 78 Minn. 272, 80 N. W. 950; *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452.

N. Y.—*Berger v. Content*, 47 Misc. 390, 94 N. Y. Supp. 12. *W. Va.*—*Tracy v. Cloyd*, 10 W. Va. 19.

[a] **Joint and Several Motion.** Where three joint defendants give notice that they and each of them will move for a new trial, such a motion is a joint and several motion, all uniting in a motion as to all, and each as to himself. *Bathke v. Krassin*, 78

Minn. 272, 80 N. W. 950.

46. *U. S.*—*Albright v. McTighe*, 49 Fed. 817. *Ind.*—*Yeoman v. Shaeffer*, 155 Ind. 308, 57 N. E. 546; *Wolfe v. Kable*, 107 Ind. 565, 8 N. E. 559; *Jones v. Peters*, 28 Ind. App. 383, 62 N. E.

1019. *Minn.*—*Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452. *Mont.*—*Capital Lumber Co. v. Barth*, 33 Mont. 94,

81 Pac. 994. *Neb.*—*Harvey v. Harvey*, 75 Neb. 557, 106 N. W. 660; *Leonhardt v. Citizens' Bank*, 56 Neb. 38, 76

N. W. 452; *Cortelyou v. McCarthy*, 53 Neb. 479, 73 N. W. 921; *Minick v. Huff*,

41 Neb. 516, 59 N. W. 795. *Tex.*—*Martin v. Burr* (Tex. Civ. App.), 171 S. W. 1044. *Wyo.*—*McManus v. McGrath*,

20 Wyo. 500, 126 Pac. 44; *Shedd Ditch Co. v. Peterson*, 18 Wyo. 402, 108 Pac.

72; *Hogan v. Peterson*, 8 Wyo. 549, 59 Pac. 162.

47. *Cal.*—*Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 19, 48 Pac. 908. *Kan.*

Equitable Mtg. Co. v. Gray, 68 Kan. 100, 74 Pac. 614. *Wash.*—*Ex parte Lowman & Hanford S. & P. Co.*, 2

Wash. 427, 27 Pac. 232.

See *supra*, I, B, 6, d.

[a] Where a joint motion is made, and some of the parties disclaim, a new trial may be granted to those who do not disclaim. *Equitable Mtg. Co. v. Gray*, 68 Kan. 100, 74 Pac. 614.

48. *Colo.*—*McClellan v. Hurd*, 11 Colo. 126, 17 Pac. 288. *Ia.*—*Lundon v. Waddick*, 98 Iowa 478, 67 N. W.

388. *Mich.*—*Hackley v. Muskegon Cir. Judge*, 58 Mich. 454, 25 N. W. 462.

And see *T. Wilce Co. v. Kelley Shingle Co.*, 130 Mich. 319, 89 N. W. 957, holding that where the parties have agreed as to the rule of damages applicable to the case, and the case is submitted to the jury on such agreed theory, a new trial will not be granted on the

7. Court's Own Motion.—At common law, new trials may be granted by courts of general jurisdiction upon their own motion.⁴⁹ In some jurisdictions this rule applies to criminal as well as to civil cases.⁵⁰ Moreover, according to some authorities, the power may be exercised notwithstanding the statutes merely provide that new trials may be granted on the motion of an aggrieved party,⁵¹ and may be exercised regardless of the pendency of such a motion by a party,⁵²

ground that the direction of the court, in accord with the agreement was wrong. **Minn.**—*Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262. **Wis.**—*Ladd v. Hildebrandt*, 27 Wis. 135, 9 Am. Rep. 445. **Can.**—*Barnet v. Grand Trunk R. Co.*, 20 Ont. L. R. 390, 15 Ont. W. R. 401.

[a] This principle applies as well to a criminal as to a civil case. *State v. Hall*, 26 W. Va. 236, 238; *State v. Sutfin*, 22 W. Va. 771.

49. **U. S.**—*Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294. **Ala.**—*Ex parte Henry*, 24 Ala. 638, 648. **Ark.**—*Gould & Co. v. Tatum*, 21 Ark. 329. **Cal.**—*Duff v. Fisher*, 15 Cal. 375, 380; *Occidental Real Est. Co. v. Gantner*, 7 Cal. App. 727, 95 Pac. 1042. **Ia.**—*Allen v. Wheeler*, 54 Iowa 628, 7 N. W. 111. **La.**—*State v. Blackman*, 110 La. 266, 34 So. 438; *Hawkins v. New Orleans Prtg. & Pub. Co.*, 29 La. Ann. 134. **Mass.**—*McKinley v. Warren*, 218 Mass. 310, 105 N. E. 990; *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800. **Mich.**—*Ft. Wayne & B. I. Ry. Co. v. Donovan*, 110 Mich. 173, 68 N. W. 115. **Minn.**—*Stebbins v. Martin*, 121 Minn. 154, 140 N. W. 1029. **Mo.**—*State ex rel. Iba v. Ellison*, 256 Mo. 644, 165 S. W. 369; *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422; *E. O. Stanard Milling Co. v. White Line, etc. Co.*, 122 Mo. 258, 26 S. W. 704; *Williams v. Circuit Court*, 5 Mo. 248. **Neb.**—*Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35. **N. Y.**—*Scharmann & Sons v. Bard*, 60 App. Div. 449, 69 N. Y. Supp. 1033; *Schmidt v. Brown*, 80 Hun 183, 30 N. Y. Supp. 68, 61 N. Y. St. 831. **N. C.**—*Decker v. Norfolk So. R. Co.*, 167 N. C. 26, 83 S. E. 27. **Va.**—*Ivanhoe Furnace Corp. v. Crowder's Admr.*, 110 Va. 387, 66 S. E. 63. **Eng.**—*R. v. Holt*, 5 T. R. 436, 101 Eng. Reprint 245; *R. v. Morris*, 2 Burr. 1189, 97 Eng. Reprint 781.

[a] This common law power is inherent in courts of general jurisdiction as counterpart of the King's Bench in

England. *Gray v. Missouri Lumb. & Min. Co. (Mo.)*, 177 S. W. 595. See also *Hensley v. Davidson Bros. Co.*, 136 Iowa 106, 112 N. W. 227; *Allen v. Wheeler*, 54 Iowa 628, 7 N. W. 111.

[b] **Texas.**—Where the verdict is in proper form and responsive to the issues presented by the pleadings and submitted to them by the court, no discretionary power is vested in the court, to set that verdict aside upon its own motion, notwithstanding the verdict may be against the weight of the evidence, or in disregard of the instructions of the court; but the party aggrieved may, by his motion for a new trial, call forth the judicial power of the court to prevent wrong and secure the administration of the law. *Lloyd v. Brineck*, 35 Tex. 1.

[c] **Not by Appellate Court.**—*State v. Hall*, 26 W. Va. 236.

50. *Com. v. Gabor*, 209 Pa. 201, 58 Atl. 278; *Rex v. Holt*, 5 T. R. 436, 101 Eng. Reprint 245; *Rex v. Gough*, 2 Doug. (K. B.) 791, 99 Eng. Reprint 503. *Contra*, *State v. Whitbeck*, 134 La. 812, 64 So. 759, 52 L. R. A. (N. S.) 832; *State v. Williams*, 38 La. Ann. 960; *State v. Snyder*, 98 Mo. 555, 12 S. W. 369, all holding that this would violate the constitutional inhibition against putting the accused twice in jeopardy.

Only the accused may ask for a new trial, see *supra*, III, B, 4.

51. *Allen v. Wheeler*, 54 Iowa 628, 7 N. W. 111, a common law power. See also *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422, and cases in following notes.

[a] "It is one of the inherent powers of the court essential to the administration of justice." *Hensley v. Davidson Bros. Co.*, 135 Iowa 106, 112 N. W. 227.

Effect of statute limiting number of new trials, see *infra*, V, B.

52. *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800; *E. O. Stanard Milling*

and for reasons not stated in such a pending motion.⁵³ In fact, where the trial court is of the opinion that, for any legal reason, the trial was not fair, and that injustice has been done, it may, in its discretion, set aside the verdict and award a new trial.⁵⁴ In some states, however, it is held that the statutory method of application by a party is impliedly exclusive, and that a court is without power to grant a new trial upon its own motion.⁵⁵ Furthermore, the court's power in this respect is sometimes expressly limited by statute, to a plain case of disregard of the evidence or instructions.⁵⁶ According to some authorities this power may be exercised at any time during the term in which the verdict was rendered, but not after;⁵⁷ other cases, however, apparently limit the power to the time in which a party could make the motion.⁵⁸

C. TO WHOM APPLICATION MADE.—1. In General.—To what

Co. v. White Line, etc. Co., 122 Mo. 258, 26 S. W. 704.

53. Mass.—*Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800; *Bond v. Cutler*, 7 Mass. 205. Mo.—*E. O. Stanard Mill Co. v. White Line Central Transit Co.*, 122 Mo. 258, 26 S. W. 704; *Parker v. Britton*, 133 Mo. App. 270, 113 S. W. 259; *Lovell v. Davis*, 52 Mo. App. 342. Va.—*Ivanhoe Furnace Corp. v. Crowder's Admr.*, 110 Va. 387, 66 S. E. 63.

54. *Hawkins v. New Orleans Prtg. & Pub. Co.*, 29 La. Ann. 134 (bribery of jury); *Baughman v. National Waterworks Co.*, 58 Mo. App. 576; *Ensor v. Smith*, 57 Mo. App. 584, improper remarks of counsel.

[a] Power not limited to cases of error of the court or misconduct of the jury. *Ft. Wayne & B. I. R. Co. v. Donovan*, 110 Mich. 173, 68 N. W. 115. See also *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422.

55. *Long v. Kingfisher*, 5 Okla. 128, 47 Pac. 1063; *Scott v. Ford*, 52 Ore. 288, 97 Pac. 99, except, perhaps, where there is fraud on the court or collusion between the parties. See *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195.

[a] Only in Aggravated Case.—The statutory provisions for new trial impliedly forbid the granting of a new trial on the court's own motion, except in an aggravated case. *Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868.

56. Cal.—*Eades v. Trowbridge*, 143 Cal. 25, 76 Pac. 714; *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550. N. D. *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195; *Gould v. Duluth & Dak. Elev.*

Co., 2 N. D. 216, 50 N. W. 969. S. D. *Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126.

[a] In Colorado a statute prohibiting the court from granting a new trial on its own motion, has been repealed. See *Colo. Sts.*, 1915, p. 202.

57. *Gray v. Missouri Lumb. & Min. Co. (Mo.)*, 177 S. W. 595; *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422; *Jones v. Marble Head Lime Co.*, 128 Mo. App. 345, 107 S. W. 420; *Head v. Randolph*, 83 Mo. App. 284. See also *Gallegos v. Sandoval*, 15 N. M. 216, 106 Pac. 373.

[a] At Common Law.—“In *Rex v. Gough*, 2 Doug. 791, Lord Mansfield declared that, even though too late for a motion, if enough appeared, the court could grant a new trial, and in *Rex v. Atkinson*, 5 Term R. 437, note, is quoted as saying that, though too late for a motion, ‘if the court conceive a doubt that justice is not done, it is never too late to grant a new trial.’ In *Rex v. Holt*, 5 Term R. 426, Lord Kenyon said he well remembered *Rex v. Gough*, ‘where the objection to the verdict was taken by the court themselves,’ and Buller, J., observed in concurring, that ‘after four days the party could not be heard on motion for new trial, but only in arrest of judgment; but if, in the course of that address, it incidentally appear that justice has not been done, the court will interpose of themselves.’” *Hensley v. Davidson Bros. Co.*, 135 Iowa 106, 112 N. W. 227.

58. State ex rel. *Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438; *Culverhouse v. Marx*, 38 La. Ann. 667.

tribunal, or judge, an application for a new trial should be made, is a matter of practice that varies in the different jurisdictions, and has varied, from time to time, in the same jurisdiction.⁵⁹ New trial by special legislative act has been allowed.⁶⁰ Under some circumstances application is made to a court of equity.⁶¹

2. Trial Court or Judge.—Unless the statute provides otherwise,⁶² the motion for new trial must be made in the court in which trial took place.⁶³ Ordinarily the motion is made to the judge who tried the case,⁶⁴ including a judge acting *pro tempore*,⁶⁵ and also a special judge appointed, by provision of statute, to try a cause.⁶⁶ But such a motion is no part of the original trial, and it is not generally essential that the judge who tried the case should entertain the motion.⁶⁷ Accordingly, at common law, the application may be made to another judge of the same court, at the same term,⁶⁸ unless the statute otherwise

59. See discussion following.

60. See *infra*, this note.

[a] In the absence of constitutional restriction, a new trial may, by special act of the legislature, be given to a defendant in a criminal case. *People v. Frisbie*, 26 Cal. 135; *Calkins v. State*, 21 Wis. 501. Compare *Davis v. Menasha*, 21 Wis. 491.

[b] In colonial Connecticut, previous to the year 1762, new trials were granted only by the General Assembly, upon petition of the aggrieved party. *Zaleski v. Clark*, 45 Conn. 397.

61. See *infra*, III, C, 3; III, D, 12.

62. See the statutes.

[a] Under a statute providing for the transfer of a cause to another court when the judge of the former court becomes disqualified, a pending motion for a new trial is included and may be transferred. *Finn v. Spagnoli*, 67 Cal. 530, 7 Pac. 746. See generally the title "Transfer of Causes."

Motion in appellate court, see *infra* III, C, 4.

63. Conn.—*Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669. Del. *State v. Williams*, 9 Houst. 508, 18 Atl. 949. N. C.—*State v. Register*, 133 N. C. 746, 46 S. E. 21.

See *Ives v. Grand Trunk R. Co.*, 35 Fed. 176.

[a] Thus, where an action was commenced in a court of common pleas but, because of the disqualification of the judge, was set for trial in the circuit court, the motion for a new trial should be heard in the court of common pleas, the circuit judge having no jurisdiction. *Stinson v. State*, 32 Ind. 124.

64. U. S.—*Ives v. Grand Trunk R. Co.*, 35 Fed. 176. Ill.—*Chicago, P. & S. W. R. Co. v. Marseilles*, 107 Ill. 313; *Lowe v. Foulke*, 103 Ill. 58. Ky. *Louisville Ins. Co. v. Hoffman*, 24 Ky. L. Rep. 980, 70 S. W. 403. Me.—*State v. Gilman*, 70 Me. 329. Mo.—*Voullaire v. Voullaire*, 45 Mo. 602. Ore.—*State v. Becker*, 12 Ore. 318, 7 Pac. 329; *State v. Mackey*, 12 Ore. 154, 6 Pac. 648. S. C.—*State v. Cardoza*, 11 S. C. 195. Pa.—*Gray v. Com.*, 101 Pa. 380, 47 Am. Rep. 733.

See also *infra*, III, F, 8.

Statutes sometimes expressly so provide. See the statutes.

65. *Clayton & Co. v. Wallace*, 41 Ga. 268. See *Chandler v. Chandler*, 92 Kan. 355, 140 Pac. 858.

66. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. 1024.

67. *Magnus v. Buffalo Ry. Co.*, 24 App. Div. 449, 451, 48 N. Y. Supp. 490, 491.

68. Ala.—*Malone v. Eastin*, 2 Port. 182. Cal.—*Garton v. Stern*, 121 Cal. 347, 53 Pac. 904. Ill.—*Chicago, P. & S. W. R. Co. v. Marseilles*, 107 Ill. 313. Mass.—*Benson v. Hall*, 197 Mass. 517, 83 N. E. 1036. Minn.—*Noonan v. Spear*, 125 Minn. 475, 147 N. W. 654. Mont.—*Hill v. Nelson Coal Co.*, 40 Mont. 1, 104 Pac. 876. N. Y.—*Fleischmann v. Samuel*, 18 App. Div. 97, 45 N. Y. Supp. 404.

[a] New York.—The trial judge may, in his discretion, when the motion is made upon his minutes at the same term, hear and decide it himself, or he may refer it to the special term.

provides,⁶⁹ or the grounds be such that only the trial judge is able to pass upon them.⁷⁰ In case of the decease of the trial judge,⁷¹ or of the expiration of his term of office,⁷² the application is properly made to his successor, or, under some statutes, to another judge of the same district.⁷³

3. Court of Equity.—In a court of equity the application should be made to the court directing the issue,⁷⁴ but where the chancery court

Magnus v. Buffalo R. R. Co., 24 App. Div. 449, 451, 48 N. Y. Supp. 490, 491; *Stern v. Wabash R. Co.*, 101 N. Y. Supp. 181, 183.

[b] **Same Term.**—Although it is the general rule that the application must be made at the same term, yet where the term is made up of a "trial term," and "a special term," the latter being by the local practice set apart for the purpose of various motions, the motion for a new trial in such a case, may have to be made at "the special term." *Willson v. Manhattan Ry. Co.*, 2 Misc. 127, 20 N. Y. Supp. 852, 49 N. Y. St. 116, *affirmed*, 144 N. Y. 632, 39 N. E. 495; *Moore v. New York El. R. Co.*, 15 Daly 506, 8 N. Y. Supp. 329, judgment *reversed* in 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731; *Argall v. Jacobs*, 56 How. Pr. (N. Y.) 167; *Seeley v. Chittenden*, 10 Barb. (N. Y.) 303.

[c] **Statute permitting** application to another judge. See §466, N. Y. Penal Code.

69. See the statutes and *Noonan v. Spear*, 125 Minn. 475, 147 N. W. 654; *Fleischmann v. Samuel*, 18 App. Div. 97, 45 N. Y. Supp. 404, New York statute not applicable where ground is misconduct of juror. See also *McWhirter v. Bowen*, 103 App. Div. 447, 92 N. Y. Supp. 1039, *affirmed*, 187 N. Y. 516, 79 N. E. 1110.

70. See *infra*, this note.

[a] **A motion on the ground that the verdict was against the evidence**, can be decided only by the judge who tried the case. *Me.*—*State v. Smith*, 54 Me. 33. *N. C.*—*Alley v. Hampton*, 13 N. C. 11. *Wis.*—*Ohms v. State*, 49 Wis. 415, 5 N. W. 827. *Contra*, *Wilson v. California Cent. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685. And see *Ott v. McHenry*, 2 W. Va. 73.

71. *U. S.*—*Penn Mut. Life Ins. Co. v. Ashe*, 145 Fed. 593, 76 C. C. A. 283, *construing* U. S. Rev. St., §953, as amended by Act June 5, 1900, ch. 717, §1 St. at L. 270. *Cal.*—*Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649. *Ill.*

People v. McConnell, 155 Ill. 192, 40 N. E. 608. *Mo.*—*Hendrix v. Wabash R. Co.*, 107 Mo. App. 127, 80 S. W. 970. *Neb.*—*Union Pac. R. Co. v. Lotway*, 2 Neb. (Unof.) 348, 96 N. W. 527.

72. *U. S.*—*Brent v. Lilly Co.*, 202 Fed. 335; *New York Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949. *Cal.*—*Wilson v. California Cent. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685. *Colo.*—*Camelin v. Smith*, 53 Colo. 574, 128 Pac. 1125. *Ill.*—*People v. McConnell*, 155 Ill. 192, 40 N. E. 608; *McChesney v. Davis*, 86 Ill. App. 380. *Kan.*—*American Cent. Ins. Co. v. Neff*, 45 Kan. 457, 23 Pac. 606, holding that a motion continued till after a judge has gone out of office may be heard by his successor. *Mo.*—*Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *State ex rel. Cosgrove v. Perkins*, 139 Mo. 106, 40 S. W. 650; *Bailey v. Coe*, 106 Mo. App. 653, 79 S. W. 1158. *Neb.*—*Goos v. Fred Krug Brew. Co.*, 60 Neb. 783, 84 N. W. 258. *Va.*—*Southall v. Evans*, 114 Va. 461, 76 S. E. 929, Ann. Cas. 1914B, 1229, 43 L. R. A. (N. S.) 468.

[a] **The former judge has no jurisdiction** to hear the motion. *Griffing v. Danbury*, 41 Conn. 96.

[b] **Where the successor is unable, by reason of lack of information**, to pass upon the merits of the motion, it is his duty to grant a new trial. *Bass v. Swingley*, 42 Kan. 729, 22 Pac. 714. See, however, *Laws of Kan.*, 1913, ch. 243, §1.

73. *Noonan v. Spear*, 125 Minn. 475, 147 N. W. 654.

74. *U. S.*—*Watt v. Starke*, 101 U. S. 247, 25 L. ed. 826; *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271. *Ill.*—*Fanning v. Russell*, 94 Ill. 386. *N. Y.*—*Birdsall v. Patterson*, 51 N. Y. 43.

[a] **Under the English chancery practice** where the trial has been held before the court of chancery without a jury, the application may be made either to the judge before whom the trial was had, or to the court of ap-

directs a suit at law to be brought, the application for a new trial must be made to the court in which the action is pending.⁷⁵

4. Appellate Courts.—Appellate courts have no common law jurisdiction to entertain original motions for new trials,⁷⁶ yet by statute such power may be conferred upon them.⁷⁷

D. TIME FOR MAKING APPLICATION.—**1. Generally.**—Under the English practice, judgment was regularly entered four days after the entry of a rule for judgment, and, ordinarily, motions for a new trial had to be made within that four day period.⁷⁸ But in the United States, generally, the time depends either upon rules of court,⁷⁹ or, usually, upon the provisions of the statutes.⁸⁰ In absence of statute

peal in chancery. In all other cases, the application must be first made to the judge who directed the issue or question of fact, or question as to the amount of damages, to be tried. *Daniell's Chancery Pl. & Pr.* (6th Am. ed.), 1894, 1136.

When application made to court of equity, see *infra*, III, D, 12.

75. Ala.—*Alexander v. Alexander*, 5 Ala. 517. **N. Y.**—*Clayton v. Yarrington*, 33 Barb. 144; *Apthorp v. Comstock*, 2 Paige 482. **S. C.**—*Taylor v. Mayrant*, 4 Desaus. 505, 514; *Sinclair v. Price's Admr.*, Hill Eq. 431.

76. Conn.—*Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328; *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669. **Del.**—*State v. Williams*, 9 Houst. 508, 18 Atl. 949. **Ga.**—*Inter-Southern L. Ins. Co. v. Smith*, 16 Ga. App. 778, 86 S. E. 404. **Ill.**—*Penn v. Oglesby*, 89 Ill. 110. **Me.**—*State v. Intoxicating Liquors*, 80 Me. 57, 12 Atl. 794; *State v. Gilman*, 70 Me. 329. **N. Y.**—*Purchase v. Matteson*, 25 N. Y. 211; *Sawyer v. People*, 27 Hun 286. **N. C.**—*State v. Salisbury Ice, etc. Co.*, 166 N. C. 403, 81 S. E. 956, Ann. Cas. 1916C, 728, 52 L. R. A. (N. S.) 219; *Johnson v. Seaboard A. L. R. Co.*, 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B, 598. **R. I.**—*Hopkinton First Nat. Bank v. Greene*, 23 R. I. 238, 50 Atl. 381.

77. N. C.—*Daniels v. Fowler*, 123 N. C. 35, 31 S. E. 598, for newly discovered evidence. **N. D.**—*McKenzie v. Bismarck Water Co.*, 6 N. D. 361, 71 N. W. 608. **R. I.**—*Haggelund v. Oakdale Mfg. Co.*, 26 R. I. 520, 60 Atl. 106; *Clewley v. Rhode Island Co.*, 26 R. I. 485, 59 Atl. 391; *Markey v. Angell*, 22 R. I. 343, 47 Atl. 882; *Burrough v. Hill*, 15 R. I. 190, 2 Atl. 382. **Vt.**—*Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57; *Nelson v. Mar-*

shall, 77 Vt. 44, 58 Atl. 793; *Bradish v. State*, 35 Vt. 452.

78. Emma Silver Min. Co. v. Park, 14 Blatchf. 411, 8 Fed. Cas. No. 4,467; *Kirkman v. Marter*, 2 B. & Ald. 613, 1 Chit. Rep. 382, 18 E. C. L. 212, 106 Eng. Reprint 490; *Mason v. Clarke*, 1 C. & J. (Eng.) 411; *Tidd*, 912.

[a] Discretion of Court.—If not made within that time, the complaining party has no right to be heard later on the subject; and there is no difference in this respect between civil and criminal cases, though in the latter, where it appears that substantial justice has not been done, the courts have sometimes interposed after the regular time, and granted a new trial. *Tidd's Pr.* 912; *Rex v. Teal*, 11 East 307, 103 Eng. Reprint 1022; *Rex v. Holt*, 5 T. R. 436, 101 Eng. Reprint 245; *Birt v. Barlow*, 1 Doug. 171, 99 Eng. Reprint 113; *Rex v. Gough*, 2 Doug. 791, 99 Eng. Reprint 503; *Rex v. Bell*, 2 Str. 995, 93 Eng. Reprint 991.

79. United States v. Angney, 6 Mackey (D. C.) 66; *Goodwin v. Grimes*, 185 Mass. 80, 69 N. E. 1053. See *infra*, III, D, 7, b.

80. See the statutes and the following. **Cal.**—*California Imp. Co. v. BarotEAU*, 116 Cal. 136, 47 Pac. 1018. **Fla.**—*Tillman v. State*, 58 Fla. 113, 50 So. 675, 138 Am. St. Rep. 100; *Massey v. State*, 50 Fla. 109, 39 So. 790. **Ga.**—*Bell v. Herndon*, 89 Ga. 371, 15 S. E. 480. **Idaho.**—*State v. Davis*, 8 Idaho, 115, 66 Pac. 932; *State v. Dupuis*, 7 Idaho 614, 65 Pac. 65. **Ind.**—*Flatter v. State*, 182 Ind. 514, 107 N. E. 9; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557. **Minn.**—*Deering v. Johnson*, 33 Minn. 97, 22 N. W. 174; *State v. Heenan*, 8 Minn. 44. **Mo.**—*State v. Standley*, 232 Mo. 23, 132 S. W. 1122; *State v. Guer-*

or rule of court, the time within which the application can be made is largely discretionary with the court.⁸¹

Sometimes, the statutes permit a motion to be made at any time during the term,⁸² or before some specified stage in the proceedings.⁸³ More frequently, however, they specify a definite number of days after the verdict, decision, or trial.⁸⁴

2. Premature Motions.—A premature motion is unavailing.⁸⁵ Thus, a motion is premature, and of no avail, if made before a ver-

ringer, 265 Mo. 408, 178 S. W. 65; State v. Maddox, 153 Mo. 471, 55 S. W. 72. **Neb.**—Hubbard v. State, 72 Neb. 62, 100 N. W. 153; Davis v. State, 31 Neb. 240, 47 N. W. 851; Bradshaw v. State, 19 Neb. 644, 28 N. W. 323. **R. I.**—State v. Lynch, 28 R. I. 463, 68 Atl. 315. **Tex.**—Kindred v. State (Tex. Crim.), 68 S. W. 796. **Utah.**—State v. Mickle, 25 Utah 179, 70 Pac. 856; Thomas v. Morris, 8 Utah 284, 31 Pac. 446.

81. Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. 129; Conklin v. Hinds, 16 Minn. 457; Gorman v. McFarland, 13 Tex. 237.

[a] In criminal cases where the ground is newly discovered evidence, the time within which new trial can be granted is in the discretion of the court. Gourdain v. United States, 154 Fed. 453, 83 C. C. A. 309; United States v. Radford, 131 Fed. 378; State v. David, 14 S. C. 428.

82. See the statutes, and *infra*, III, D, 3.

[a] **New York.**—The trial judge may, in his discretion, entertain a motion made upon his minutes at the same term. Gilbert's Anno. Code, 1910, §999. This statute applies, however, only to jury trials. Knight v. Sackett & Wilhelms L. Co., 31 Abb. N. C. 373, 19 N. Y. Supp. 712, 46 N. Y. St. 866, 29 Jones & S. 219.

83. See the statutes, and *infra*, this note.

[a] **Before Judgment.**—Jones and Ad. Anno. Sts. (Ill.) 1913, §8614, p. 4896; N. Y. Pen. Code, §466. See also *infra*, III, D, 4, b.

[b] **Before Expiration of Time for Appeal.**—Kehrley v. Shafer, 92 Hun 196, 36 N. Y. Supp. 510, 71 N. Y. St. 539, 3 N. Y. Ann. Cas. 19; Heath v. New York Bldg. Loan Bkg. Co., 91 Hun 170, 36 N. Y. Supp. 213, 71 N. Y. St. 136.

[c] **Before execution of sentence of death.** N. Y. Pen. Code, §466; People v. O'Connor, 37 Misc. 754, 76 N. Y. Supp. 511 (*affirmed* 82 App. Div. 55, 81 N. Y. Supp. 555, 175 N. Y. 477, 517, 67 N. E. 1087); People v. Dwyer, 30 Misc. 283, 63 N. Y. Supp. 495, *affirmed* 65 App. Div. 615, 73 N. Y. Supp. 1143.

84. See the statutes and the following: **Colo.**—Denver & R. G. R. Co. v. Heckman, 45 Colo. 470, 101 Pac. 976. **Ga.**—New England Mtg. Sec. Co. v. Collins, 115 Ga. 104, 41 S. E. 270; Castellow v. Blanchard, 106 Ga. 97, 31 S. E. 801. **Idaho.**—State v. Davis, 8 Idaho 115, 66 Pac. 932. **Ind.**—State v. New, 165 Ind. 571, 76 N. E. 400. **Mo.** State v. Clinkenbeard, 232 Mo. 539, 134 S. W. 537; State v. Thomas, 232 Mo. 216, 134 S. W. 571; State v. Riley, 228 Mo. 431, 128 S. W. 731; State v. Fraser, 220 Mo. 34, 119 S. W. 389. See City of St. Joseph v. Robison, 125 Mo. 1, 28 S. W. 166. **Neb.**—*Ex parte* Holmes, 21 Neb. 324, 32 N. W. 69. **Ohio.**—Evans v. State, 23 Ohio Cir. Ct. 103. **Tex.** Gill v. Rodgers, 37 Tex. 628; Austin v. State, 51 Tex. Crim. 327, 101 S. W. 1162; Bullock v. State, 12 Tex. App. 42; White v. State, 10 Tex. App. 167.

[a] "Trial," as used in a statute requiring application within a specified time after trial, means an examination of the fact in issue, and ends with the rendition of the verdict. Castellow v. Blanchard, 106 Ga. 97, 31 S. E. 801.

How time is reckoned, see *infra*, III, D, 9.

When court may grant new trial of its own motion, see *supra*, III, A, 7.

85. **Cal.**—Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 Pac. 316. **Kan.**—See Atchison, T. & S. F. Ry. Co. v. Davis, 70 Kan. 578, 79 Pac. 130. **Mo.** City of St. Louis v. Boyce, 130 Mo. 572, 31 S. W. 594.

diet is rendered,⁸⁶ or before a referee's report or findings are filed.⁸⁷

3. During the Term.—In many jurisdictions, either by the common law rule, or express provision of statute, a motion for a new trial, except in certain cases, such as surprise, or newly discovered evidence, can be made only during the term in which the verdict or decision is rendered.⁸⁸ If made during vacation, the motion will be too late.⁸⁹ In other jurisdictions, however, either by force of statute, or judicial decision, the motion may be filed after the term.⁹⁰

4. With Respect to Other Proceedings.—*a. Generally.*—The proper time for making a motion for a new trial, so far as other motions relating to the verdict are concerned, has been previously considered.⁹¹ Attention, however, is here called to the rule that a motion made in arrest of judgment constitutes, in some jurisdictions, a waiver

86. *James v. Superior Court*, 78 Cal. 107, 20 Pac. 241.

87. *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773; *Careaga v. Fernald*, 66 Cal. 351, 5 Pac. 615; *Hinds v. Gage*, 56 Cal. 486; *Crowther v. Rowlandson*, 27 Cal. 376.

88. **U. S.**—See *United States v. Mayer*, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. ed. 129; *Sanderson v. United States*, 210 U. S. 168, 28 Sup. Ct. 661, 52 L. ed. 1007; *Sanford v. White*, 108 Fed. 928. But see *German Ins. Co. v. Town of Manning*, 100 Fed. 581. **Colo.**—*Robert E. Lee S. Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Clark v. Perry*, 17 Colo. 56, 28 Pac. 329; *Klink v. People*, 16 Colo. 467, 27 Pac. 1062. **Fla.**—*Massey v. State*, 50 Fla. 109, 39 So. 790; *Palatka & I. R. R. Co. v. State*, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395. **Ga.**—*Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Castellaw v. Blanchard*, 106 Ga. 97, 31 S. E. 801; *Benning v. Barlow*, 75 Ga. 870. **Ill.**—*Campbell v. Conover*, 26 Ill. 64. **Ind.**—*Allen v. Adams*, 150 Ind. 409, 50 N. E. 387; *Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694; *Evansville, etc. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511. **Iowa.**—*Ewaldt v. Farlon*, 62 Iowa 212, 17 N. W. 487. **Ky.**—*Wobble v. Finch*, 33 Ky. L. Rep. 588, 110 S. W. 808; *Ray v. Arnett*, 32 Ky. L. Rep. 562, 106 S. W. 828; *Lovelace v. Lovell*, 107 Ky. 676, 55 S. W. 549. **Mo.**—*State v. Fawcett*, 212 Mo. 729, 111 S. W. 562; *Honey v. Honey's Heirs*, 18 Mo. 466; *Griffin v. Wabash R. Co.*, 110 Mo. App. 221, 85 S. W. 111. **Neb.**—*Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632, 154 N. W. 217; *Harris v. Jennings*, 64 Neb. 80, 89 N. W.

625, 97 Am. St. Rep. 635; *Ex parte Holmes*, 21 Neb. 324, 32 N. W. 69. **N. J.**—*State v. Tolla*, 73 N. J. L. 249, 63 Atl. 338. **N. Y.**—*Ellis v. Hearn*, 132 App. Div. 207, 116 N. Y. Supp. 977. **N. C.**—*Chrisco v. Yow*, 153 N. C. 434, 69 S. E. 422; *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31. **Ohio.**—*Stuckey v. Bloomer*, 2 Ohio Cir. Ct. 541, 1 Ohio Cir. Dec. 631. **Tex.**—*Kruegel v. Bolanz* (Tex. Civ. App.), 103 S. W. 435; *Graham v. Coolidge*, 30 Tex. Civ. App. 273, 70 S. W. 231; *Wilson v. Woodward* (Tex. Civ. App.), 54 S. W. 385.

89. *Winkelmeyer Brew. Assn. v. Wolff*, 53 Kan. 323, 36 Pac. 711; *Glass Co. v. Bailey*, 51 Kan. 192, 32 Pac. 894; *Pratt v. Kelley*, 24 Kan. 111.

[a] **Considered as Made in Term.** See *Duggar v. East Tennessee, V. & G. Ry. Co.*, 85 Ga. 437, 11 S. E. 811; *Glover v. Rateliff*, 69 Kan. 428, 77 Pac. 89, where the motion did not actually come into the hands of the clerk until a few minutes after the announcement of the adjournment of the term.

90. *Frazer v. Chapin*, 112 Mich. 469, 70 N. W. 1042 (may be made at next following term); *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 Atl. 1045. See *Spanagel v. Dellinger*, 34 Cal. 476, under former practice.

[a] **Vermont.**—"The supreme court may grant a new trial in a cause determined by such court, or by a county court, on petition of either party, subsequent to the term of the court at which the original judgment was rendered." *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57.

Relief in equity after term, see *infra*, III, D, 12.

91. See *supra*, I, B, 7.

of a motion for a new trial,⁹² as does the taking of an appeal.⁹³

b. *Entry of Judgment.*—At common law, judgment was not entered, or signed, until the motions directed to the verdict had been heard and determined.⁹⁴ This practice is the basis of the rule that a motion for a new trial must be made before entry of judgment.⁹⁵ This rule is not observed, however, in the practice of many jurisdictions⁹⁶ and, in some has been rendered inoperative by statutes,⁹⁷ as where they provide that the motion may be made after entry of judgment.⁹⁸

5. **As Affected by Basis or Grounds of Motion.**—The time within which the motion may be made may, also, depend upon the alleged grounds for the new trial. For example, the statute may provide that for an "extraordinary" ground the motion may be made after the term.⁹⁹ In the case of newly discovered evidence, the discovery may not be made until after the entry of judgment, or after the end of the term, consequently for such cause a longer time is usually allowed for the application.¹

Minutes of the Court.—In some jurisdictions, motions made upon the minutes of the court must be made during the term in which the trial was held,² or within the time specially provided by the statute.³

6. **Criminal Cases.**—The statute may and sometimes does⁴ fix a

92. Ill.—Hall *v.* Nees, 27 Ill. 411. Ind.—Kelley *v.* Bell, 172 Ind. 590, 88 N. E. 58; Yazel *v.* State, 170 Ind. 535, 84 N. E. 972; Bepley *v.* State, 4 Ind. 264, 58 Am. Dec. 628. Mo.—McComas *v.* State, 11 Mo. 116; McKee *v.* Jones Dry Goods Co., 152 Mo. App. 241, 132 S. W. 1191; McReynolds *v.* Anderson, 56 Mo. App. 398. Tenn.—Pelican Assur. Co. *v.* American Feed & G. Co., 122 Tenn. 652, 126 S. W. 1085.

See *supra*, I, B, 7. Compare 2 STANDARD PROC. 982, 983.

93. Walker *v.* Hale, 16 Ala. 26; McArdle *v.* McArdle, 12 Minn. 122. See, however, Fricke *v.* State, 11 Tex. App. 6. See also Com. *v.* McElhaney, 111 Mass. 439.

94. Spanagel *v.* Dellinger, 34 Cal. 476; Heiskell *v.* Rollins, 81 Md. 397, 32 Atl. 249.

Entry pending motion for new trial, see 14 STANDARD PROC. 1006.

95. Syracuse Pit Hole Oil Co. *v.* Carothers, 63 Pa. 379. Lawrence *v.* Iscar, 27 S. C. 244, 3 S. E. 222. See *supra*, I, B, 7, c.

96. See *supra*, I, B, 7, c.

As to bill in equity after judgment, see *infra*, III, D, 12.

97. Ind.—Cox *v.* Baker, 113 Ind. 62, 14 N. E. 740. Mich.—Frazer *v.* Chapin, 112 Mich. 469, 70 N. W. 1042;

People *v.* Marble, 38 Mich. 309; People *v.* Vanderpool, 1 Mich. N. P. 157. Ore. Jennings *v.* Frazier, 46 Ore. 470, 80 Pac. 1011.

98. See the statutes. See also *supra*, III, D, 1, and State *ex rel.* Cohn *v.* District Court, 38 Mont. 119, 99 Pac. 139.

99. Atlantic Contracting Co. *v.* Hyde, 108 Ga. 799, 33 S. E. 995; Hudgins *v.* Veal, 98 Ga. 137, 26 S. E. 479; Hays *v.* Westbrook, 96 Ga. 219, 22 S. E. 893; Candler *v.* Hammond, 23 Ga. 493; McGregor *v.* Port Huron Engine, etc. Co. (Tex. Civ. App.), 120 S. W. 1128.

1. See the statutes, and *infra*, III, E, 4, e.

2. D. C.—Doddridge *v.* Gaines, 1 MacArthur 335. N. Y.—Thayer Mfg. Jewelry Co. *v.* Steinau, 58 How. Prac. 315; Twenty-third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807. S. C.—Molair *v.* Port Royal & A. Ry. Co., 31 S. C. 510, 10 S. E. 243; Hinson *v.* Catoe, 10 S. C. 311. Wis.—Hansen *v.* Fish, 27 Wis. 535; Preutiss *v.* Danaher, 20 Wis. 311; Dunbar *v.* Hollinshead, 10 Wis. 505.

3. See the statutes.

4. See the statutes, and the discussion, *supra* and *infra*, this section.

[a] Newly Discovered Evidence.

time for making motions for new trials in criminal cases, different from that provided for civil cases.

7. **Particular Courts.**—a. *Inferior Courts.*—The time fixed by statute for seeking a new trial in inferior courts is sometimes different from that in superior courts.⁵

b. *Federal Courts.*—In the federal courts, the motion may be filed during the term at which the verdict was rendered,⁶ but not after the term at which final judgment was entered.⁷ The federal statute providing that the practice and modes of proceeding in civil causes shall conform "as near as may be" to the practice existing in the state courts,⁸ does not require conformity to the state practice in respect to the time for making motions for new trials.⁹

c. *Courts of Equity.*—The time for applying for a rehearing in equity,¹⁰ and for seeking relief in equity from a judgment at law,¹¹ are elsewhere treated.

8. **When Granted of Court's Own Motion.**—The time within which the court may of its own motion grant a new trial is elsewhere discussed.¹²

9. **Reckoning the Time.**—Where the statute designates so many days after the verdict or decision, the time begins to run when the verdict or decision is rendered,¹³ and not from the date of its entry of

The provisions of the statute authorizing new trials for newly discovered evidence in civil cases after the term have no application to criminal cases. *Hubbard v. State*, 72 Neb. 62, 100 N. W. 153. See also *Klink v. People*, 16 Colo. 467, 27 Pac. 1062; *Thompson v. Washington Territory*, 1 Wash. Ter. 547.

5. See the statutes, and *People v. Court of General Sessions of the Peace*, 185 N. Y. 504, 78 N. E. 149.

6. *Felton v. Spiro*, 78 Fed. 576, 581, 24 C. C. A. 321. See *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 18 Sup. Ct. 786, 42 L. ed. 1192.

[a] **Rules of Court.**—(1) The time in which motions for new trials may be made in the federal courts is regulated somewhat by the rules of court, and they vary in the different districts. See *Hastings v. Northern Pac. R. Co.*, 53 Fed. 224; *Henning v. Western Union Tel. Co.*, 41 Fed. 864. (2) Rule 5 of the Southern District of New York extends the term for the purpose of such motions until three calendar months, beginning on the first Tuesday of the month in which the verdict is rendered or judgment entered. Under this rule it has been held that the time runs from the month in which judgment was entered, regardless of the words "verdict is rendered."

Hughes v. New York, O. & W. R. R., 225 Fed. 568.

[b] **Section 937 Rev. St.**, providing for granting a stay of execution, does not limit the time within which motion for new trial may be made. *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321.

7. *United States v. Mayer*, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. ed. 129; *Mann v. Dempster*, 181 Fed. 76, 104 C. C. A. 110. Compare *German Ins. Co. v. Town of Manning*, 100 Fed. 581.

8. U. S. Rev. Sts., §914. See the title "United States Courts."

9. *United States v. Mayer*, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. ed. 129.

10. See the title "Rehearing."

11. See *infra*, III, D, 12.

12. See *supra*, III, A, 7.

13. *Ind.*—*Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557. *Kan.*—*Kansas City, Ft. S. & M. R. Co. v. Berry*, 55 Kan. 186, 40 Pac. 288. *Ky.*—*Imperial Fire Ins. Co. v. Kiernan*, 6 Ky. L. Rep. 302. *Neb.* *Ames v. Parrott*, 61 Neb. 847, 86 N. W. 503, 87 Am. St. Rep. 536.

[a] **After Notice of Decision.**—A statutory provision of so many days "after notice of the decision," requires no formal notice if the moving party had actual notice. *California*

record.¹⁴ Under the common law rule, the four days allowed for the motion were reckoned inclusive of the first and last day,¹⁵ and this rule has been followed by some of our own decisions.¹⁶ Sunday was not counted, at common law,¹⁷ nor was any other day on which the court did not actually sit.¹⁸ In our state decisions, some cases hold that Sunday is counted, unless it be the last day, in which case it is excluded,¹⁹ and the same rule has been applied to a holiday,²⁰ while, other cases, following the common law rule, exclude all Sundays from the counting.²¹ Likewise, some decisions, hold that the days mean calendar, or working days, regardless of whether the court is in session or not,²² while, on the other hand, it has been held that only judicial days are to be counted, that is, days on which court is actually held, recess days being excluded.²³

10. Extension of Time.—In some states, the court may, in its discretion, for good cause shown, extend the time for moving for a new trial,²⁴ and, in some jurisdictions, the parties may stipulate for

Imp. Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018.

14. *Ames v. Parrott*, 61 Neb. 847, 86 N. W. 503, 87 Am. St. Rep. 536.

As to distinction between rendition and entry of judgment, see 14 STANDARD PROC. 972, 958.

[a] Where the Code requires the motion to be filed within three days after the verdict or decision is "rendered," the findings of the court are its "verdict or decision," and the motion should be made within three days from the rendition thereof. The date of entry in the journal would be presumed to be the date of rendition, but where the record shows these dates to be different the latter alone is to be considered. *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, 80 N. W. 255.

15. *Chitty Gen. Pr.*, Vol. IV, 84; *Tidd*, 9th ed., 912; *Kirkham v. Marter*, 2 B. & Ald. 613, 106 Eng. Reprint 490.

16. *Interstate Petroleum Co. v. Adams*, 21 Ky. L. Rep. 767, 52 S. W. 1059; *Harlan v. Braxdale's Admr.*, 18 Ky. L. Rep. 171, 35 S. W. 916; *Lane v. Shreiner*, 1 Bin. (Pa.) 292.

[a] The day upon which the verdict is rendered is counted. *White v. Crutcher*, 1 Bush (Ky.) 472.

[b] Day on Which Verdict Was Rendered Is Excluded.—*Blevins v. Morledge*, 5 Okla. 141, 47 Pac. 1068.

17. *Kirkham v. Marter*, 2 B. & Ald. 613, 1 Chit. R. 382, 18 E. C. L. 212, 106 Eng. Reprint 490; *Tidd*, 9th ed., 912; *Chitty Gen. Pr.*, IV, 84.

18. *Bromley v. Foster*, 1 Chit. Rep. 562, 18 E. C. L. 307.

19. *Svea Insurance Co. v. McFarland*, 7 Ariz. 131, 60 Pac. 936; *Chicago Label & Box Co. v. Washburn*, 15 Ohio Cir. Ct. 510, 8 Ohio Cir. Dec. 113. *Contra*, *Littleford v. Mercantile Credit Guarantee Co.*, 3 Ohio N. P. 194, 4 Ohio Dec. 175. See generally the title "Sunday and Holidays."

[a] **Intervening Sunday Counted.** A motion filed on Wednesday, next succeeding the Saturday on which the decision was rendered, where the period allowed by the statute is three days, is too late. *Van Laer v. Kansas Triphammer Brick Works*, 56 Kan. 545, 43 Pac. 1134.

20. *Oberer v. State*, 8 Ohio Cir. Ct. (N. S.) 93. *Contra*, *German Sav. Bank v. Cady*, 114 Iowa 228, 86 N. W. 277.

21. *Long v. Hawkins*, 178 Mo. 103, 77 S. W. 77; *State v. McGowan*, 62 Mo. App. 625.

22. *Long v. Hawkins*, 178 Mo. 103, 77 S. W. 77; *Maloney v. Missouri Pac. Ry. Co.*, 122 Mo. 106, 26 S. W. 702; *State v. McGowan*, 62 Mo. App. 625.

23. Ia.—*Ewaldt v. Farlon*, 62 Iowa 212, 17 N. W. 487. **La.**—*McFarlane v. Renaud*, 1 Mart. (O. S.) 220. *Mo. Clerks' Sav. Bank v. Thomas*, 2 Mo. App. 367.

[a] In Louisiana, the statute expressly mentions judicial days. *Garland's Rev. Code of Prac.*, 1914, art. 558.

24. U. S.—See *German Ins. Co. v. Manning*, 100 Fed. 581. **Colo.**—*Mills' Ann. Code, Civil Proc.*, §218. "The motion for a new trial . . . shall be filed within five days after verdict,

an extension of time.²⁵ In case an extension is granted, the application must be made within the extended time, or else it will be too late.²⁶ Moreover, in some jurisdictions, irrespective of a formal extension, the court may have discretionary power to permit an application to be made even after the expiration of the ordinary time.²⁷ It is, however, no excuse for delay that counsel did not have time by reason of other engagements,²⁸ or that the matter was left with associate counsel who was absent,²⁹ or that it was due to the neglect of the party's attorney,³⁰ or that a motion to modify the court's findings was pending.³¹ Moreover, the delay of the clerk in entering the verdict or decision on the court journal will not operate to extend the time.³² In some jurisdictions, however, the statutory time is held mandatory, and the courts, therefore, have no power to grant, or the parties to stipulate for, extensions.³³ And where jurisdiction of the

but the court may extend the time for good cause." *Denver & R. G. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. 976. **Conn.**—*Tomlinson v. Derby*, 41 Conn. 268. **Ga.**—*Glynn County Academy v. Dart*, 67 Ga. 765. **Mich.**—*People ex rel. Aetna L. S. & T. Ins. Co. v. Judge Wayne Cir. Ct.*, 20 Mich. 220. **S. D.**—*Fuller & Johnson Mfg. Co. v. Child*, 22 S. D. 351, 117 N. W. 523. **Tex.**—*Bullock v. State*, 12 Tex. App. 42; *White v. State*, 10 Tex. App. 167. **Wash.**—*O'Brien v. American Casualty Co.*, 57 Wash. 598, 107 Pac. 519; *McAllister v. Seattle Brew. & M. Co.*, 44 Wash. 179, 87 Pac. 68.

Extension of time to give notice of intention to move for new trial, see *infra*, III, E, 1, c.

25. **U. S.**—*Hastings v. Northern Pac. R. Co.*, 53 Fed. 224. **1a.**—*Eckel v. Walker*, 48 Iowa 225. **Ky.**—*Huffman v. Charles*, 30 Ky. L. Rep. 197, 97 S. W. 775. **Utah.**—*East v. Mooney*, 7 Utah 414, 27 Pac. 4.

26. *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150, 12 N. W. 222.

27. **Ariz.**—*Svea Ins. Co. v. McFarland*, 7 Ariz. 131, 60 Pac. 936; *Spicer v. Simms*, 6 Ariz. 347, 57 Pac. 610. **Conn.**—*Uncas Paper Co. v. Corbin*, 75 Conn. 675, 55 Atl. 165. **Mass.**—*Whitney v. Hunt-Spiller Mfg. Corp.*, 218 Mass. 318, 105 N. E. 1054. **Mich.**—*Hayes v. Ionia Circ. Judge*, 125 Mich. 277, 84 N. W. 141. **Nev.**—*Sherman v. Southern Pac. Co.*, 31 Nev. 285, 102 Pac. 257. **Tex.**—*Wells v. Melville*, 25 Tex. 337; *Davis v. Zumwalt*, 1 White & W. Civ. Cas. §596. **Wash.**—*Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107; *Bailey v. Drake*, 12 Wash. 99, 40

Pac. 631. **Eng.**—*Purnell v. Great Western R. Co.*, 1 Q. B. D. 636, 45 L. J. Q. B. 687, 35 L. T. N. S. 605, 24 Wkly. Rep. 909. **Can.**—*Rooney v. Rooney*, 29 U. C. C. P. 347, 4 Ont. App. 255; *Bens v. Stover*, 12 U. C. Q. B. 623.

[a] **By statute** in case a party is "unavoidably prevented" from applying within the prescribed time. **Ind.**—*Mann v. Carson*, 5 Ind. Ter. 115, 82 S. W. 692; *Waitman v. Bowles*, 3 Ind. Ter. 294, 58 S. W. 686. **Kan.**—*Hopkins v. Watson*, 67 Kan. 858, 74 Pac. 233; *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670; *Hemme v. School Dist. No. 4*, 30 Kan. 377, 1 Pac. 104. **Neb.**—*Roggencamp v. Dobbs*, 15 Neb. 620, 20 N. W. 100. **Wyo.**—*Todd v. Peterson*, 13 Wyo. 513, 81 Pac. 578; *Kent v. Upton*, 3 Wyo. 43, 2 Pac. 234.

[b] **That defendant could not appear on account of dangerous illness in his family**, is a valid excuse. *Hemme v. School District No. Four*, 30 Kan. 377, 1 Pac. 104.

28. *Benning v. Barlow*, 75 Ga. 870.

29. *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150, 12 N. W. 222.

30. *Roggencamp v. Dobbs*, 15 Neb. 620, 20 N. W. 100.

31. *Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694.

32. *Ames v. Parrott*, 61 Neb. 847, 86 N. W. 503, 87 Am. St. Rep. 536; *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, 80 N. W. 255.

33. **Ind.**—*McIntosh v. Zuring*, 150 Ind. 301, 49 N. E. 164; *Secor v. Souder*, 95 Ind. 95; *Pennsylvania Co. v. Sedwick*, 59 Ind. 336; *Krutz v. Craig*, 53 Ind. 561. **Ky.**—*Farmer v. Wickliffe Bank*, 21 Ky. L. Rep. 468, 51 S. W.

court over the proceedings has terminated by reason of the end of the term at which judgment was entered, it cannot be revived thereafter by consent of the parties.³⁴

11. Necessity of Observing and Waiver.—An application for a new trial must be made within the time allowed by law,³⁵ unless this period has been lawfully extended,³⁶ and if not so made the application will be useless, either for the purpose of obtaining a new trial,³⁷ or as a prerequisite to appellate review.³⁸ It is too late, however, to object on this ground for the first time, after a new trial has been granted.³⁹

The effect of a motion in arrest or an appeal as a waiver of new trial, is elsewhere treated.⁴⁰

798. **Mo.**—*King v. Gilson*, 206 Mo. 264, 104 S. W. 52. **Neb.**—*Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632, 154 N. W. 217; *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, 80 N. W. 225. **Tex.**—*Gill v. Rodgers*, 37 Tex. 628. **Wyo.**—*Kent v. Upton*, 3 Wyo. 43, 2 Pac. 234, extension of time nugatory on ex parte application. **Can.**—See *Woodman v. Moncton*, 20 N. Brunsw. 12.

34. *United States v. Mayer*, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. ed. 129.

35. **Ariz.**—*Daggs v. Howard Sheep Co.*, 16 Ariz. 283, 145 Pac. 140; *Walker v. Blake*, 13 Ariz. 1, 108 Pac. 221. **Colo.**—*Clark v. Perry*, 17 Colo. 56, 28 Pac. 329. **Ind.**—*Blose v. Myers*, 58 Ind. App. 34, 107 N. E. 548, 550. **Kan.**—*Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670; *Osborne v. Hamilton*, 29 Kan. 1. **Mo.**—*Williams v. Kansas City S. R. Co.*, 156 Mo. App. 675, 138 S. W. 44; *State v. McGowan*, 62 Mo. App. 625. **Neb.**—*Harris v. Jennings*, 64 Neb. 80, 89 N. W. 625, 97 Am. St. Rep. 635; *Nelson v. Farmland Security Co.*, 58 Neb. 604, 79 N. W. 161. **N. D.**—*Grove v. Morris*, 31 N. D. 8, 151 N. W. 779. **Wyo.**—*Blonde v. Merriam*, 21 Wyo. 513, 526, 133 Pac. 1076.

36. See *supra*, III, D, 10.

Relief in equity, see *infra*, III, D, 12.

37. **Colo.**—*Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588; *Clark v. Perry*, 17 Colo. 56, 28 Pac. 329. **Ga.**—*Register v. State*, 12 Ga. App. 688, 78 S. E. 142. **Idaho.**—*State v. Davis*, 8 Idaho 115, 66 Pac. 932. **Ind.**—*Pittsburgh, etc. R. Co. v. State*, 178 Ind. 498, 99 N. E. 801; *Ward v. State*, 171 Ind. 565, 86 N. E. 994. **Ia.**—*Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150, 12 N. W. 222. **Kan.**—*Douglass v. Anthony*, 45 Kan. 439, 25 Pac. 853. **Mich.**—*People v.*

Swartz, 118 Mich. 292, 76 N. W. 491. **Mo.**—*State v. Simenson*, 263 Mo. 264, 172 S. W. 601; *State v. Riley*, 228 Mo. 431, 128 S. W. 731. **Neb.**—*Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632, 154 N. W. 217; *Carmack v. Erdenberger*, 77 Neb. 592, 110 N. W. 315. **N. C.**—*State v. Murray*, 80 N. C. 364. **R. I.**—*State v. Cushing*, 11 R. I. 213. **Tex.**—*Francis v. State*, 75 Tex. Crim. 362, 170 S. W. 779; *Kinch v. State*, 70 Tex. Crim. 419, 156 S. W. 649. **Utah.**—*State v. Mickle*, 25 Utah 179, 70 Pac. 856.

[a] But where a party has been deprived of his right to review through the death of the trial judge and the consequent impossibility of having a bill of exceptions signed, application for new trial, being the only remedy, may be permitted after time for such proceeding has expired. *German Ins. Co. v. Town of Manning*, 100 Fed. 581.

38. **Ind.**—*Evansville v. Martin*, 103 Ind. 206, 2 N. E. 596. **Iowa.**—*Johnson Bros. v. Wright*, 124 Iowa 61, 99 N. W. 103; *Ewaldt v. Farlon*, 62 Iowa 212, 17 N. W. 487. **Kan.**—*Ritchie v. Kansas, etc. Ry. Co.*, 55 Kan. 36, 39 Pac. 718; *Deford v. Orvis*, 52 Kan. 432, 34 Pac. 1044. **Ky.**—*Cundiff's Admr. v. Luce*, 11 Ky. L. Rep. 860. **Mo.**—*Missouri, K. & E. Ry. Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417; *Widman v. American Cent. Ins. Co.*, 115 Mo. App. 342, 91 S. W. 1003. **Neb.**—*Carmack v. Erdenberger*, 77 Neb. 592, 110 N. W. 315; *Harris v. Jennings*, 64 Neb. 80, 89 N. W. 625, 97 Am. St. Rep. 635; *Fitzgerald v. Brandt*, 36 Neb. 683, 54 N. W. 992.

39. *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324.

40. See *supra*, III, D, 4.

12. Bill in Equity.—In some jurisdictions, after the judgment, or after the time has expired in which a motion for a new trial may be regularly made, a bill in equity may be filed, in certain cases, to vacate the judgment and to obtain a new trial.⁴¹ The usual grounds for such a bill are unavoidable casualty or misfortune,⁴² or where a judgment was obtained through accident, mistake, or fraud,⁴³ or newly discovered evidence.⁴⁴ The plaintiff in such a petition must, however, be without fault,⁴⁵ free from negligence in making his defense in the action at law,⁴⁶ or in striving to obtain testimony,⁴⁷ and guiltless of laches in filing his application.⁴⁸

E. PRACTICE IN CONNECTION WITH APPLICATION.—1. Notice of Intention.—**a. Requirement.**—In some jurisdictions, the adverse party must be served with a notice of the intention of the aggrieved

41. U. S.—Sanford *v. White*, 132 Fed. 531. **Ia.**—Ruppin *v. McLachlan*, 122 Iowa 343, 98 N. W. 153. **N. J.** See Hayes *v. United States Phonograph Co.*, 65 N. J. Eq. 5, 55 Atl. 84; Wolcott *v. Jackson*, 52 N. J. Eq. 387, 28 Atl. 1045; Hannon *v. Maxwell*, 31 N. J. Eq. 318. **Tex.**—Johnson *v. Templeton*, 60 Tex. 238.

See 15 STANDARD PROC. 257.

Grounds of relief in equity against judgment, see generally 15 STANDARD PROC. 287, et seq.

42. Ia.—Ruppin *v. McLachlan*, 122 Iowa 343, 98 N. W. 153. **Ky.**—Goff *v. Wilburn*, 25 Ky. L. Rep. 1963, 79 S. W. 232; Bone *v. Blankenbaker*, 24 Ky. L. Rep. 1438, 71 S. W. 638. **Neb.** Ritchey *v. Seeley*, 73 Neb. 164, 102 N. W. 256.

[a] **Ineffectual Proceedings at Law.** A court of equity will not, however, entertain a bill to vacate a judgment and to grant a new trial, for alleged errors of law, where an ineffectual attempt to obtain a new trial was made under the provisions of the statute. Publishing House of Evangelical Assn. *v. Heyl*, 61 Kan. 634, 60 Pac. 317. And see Hendrickson *v. Bradley*, 85 Fed. 508, 29 C. C. A. 303.

[b] **Poverty and Ignorance of Party.**—A bill for a new trial stating that by reason of their poverty and ignorance complainants did not appeal an ejectment suit, but that since the trial a deed of gift to the premises, executed some fifteen years before, had been discovered, states no ground for granting a new trial. Rosenbaum *v. Scott* (Miss.), 40 So. 485. Compare 15 STANDARD PROC. 317.

43. U. S.—Sanford *v. White*, 132

Fed. 531. **Ga.**—Webb *v. Parker*, 41 Ga. 478. **Ill.**—West Chicago St. R. Co. *v. Stoltzenfeldt*, 100 Ill. App. 142; Prussian Nat. Ins. Co. *v. Chichocky*, 94 Ill. App. 168; Henry *v. Seager*, 80 Ill. App. 172; Ennor *v. Galena & S. W. R. Co.*, 14 Ill. App. 327. **Neb.**—Zweibel *v. Caldwell*, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84; Van Antwerp *v. Lathrop*, 70 Neb. 747, 98 N. W. 35; Klabunde *v. Byron Reed Co.*, 69 Neb. 120, 95 N. W. 4, 98 N. W. 182. **W. Va.** Graham *v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245.

See 15 STANDARD PROC. 287, et seq., 314, 320, 335.

44. Bankers' Union of the World v. Landis, 75 Neb. 625, 106 N. W. 973; Cairo & F. R. R. Co. *v. Titus*, 32 N. J. Eq. 397. See 15 STANDARD PROC. 339.

[a] **Criminal Cases.**—Equity, however, cannot grant a new trial in a criminal case on the ground of newly discovered evidence. Hubbard *v. State*, 72 Neb. 62, 100 N. W. 153; Paulson *v. State*, 25 Neb. 344, 41 N. W. 249.

45. Zweibel v. Caldwell, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84; Freeman *v. Wood*, 14 N. D. 95, 103 N. W. 392.

46. Ark.—Seroggin *v. Hammett Grocer Co.*, 66 Ark. 183, 49 S. W. 820.

Ga.—Berry *v. Burghard*, 111 Ga. 117, 36 S. E. 459. **Ill.**—Allen *v. Smith*, 72 Ill. 331. **Ind.**—Embrey *v. Berry*, 11 Ind. 129. **Ky.**—Jacobs *v. Jacobs*, 23 Ky. L. Rep. 186, 62 S. W. 263. **Tex.** Johnson *v. Templeton*, 60 Tex. 238.

47. Moore v. Rogers, 27 Ky. L. Rep. 827, 86 S. W. 977.

48. Cal.—Neal *v. Byers*, 45 Cal. 234. **Ill.**—Exchange Nat. Bank *v. Darrow*, 177 Ill. 362, 52 N. E. 356. **R. I.**—Mc-

party to move for a new trial.⁴⁹ A failure to serve all adverse parties with such notice will deprive an aggrieved party of his right to be heard.⁵⁰

b. *Form of Notice.*—When the adverse party is in court, the notice may usually be given orally, or, as said, "in open court."⁵¹ Otherwise, the notice should be in writing.⁵² It should contain everything which the statute requires,⁵³ and should clearly indicate the purpose to ask for a new trial,⁵⁴ though this need not be stated in express terms.⁵⁵

Cudden v. Wheeler & Wilson Mfg. Co., 23 R. I. 528, 51 Atl. 48.

49. See the statutes and the following: Cal.—Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225. Mont. Cummings v. Reins Copper Co., 40 Mont. 599, 107 Pac. 904. S. D.—Traxinger v. Minneapolis, St., etc. R. Co., 23 S. D. 90, 120 N. W. 770; Mac Gregor v. Pierce, 17 S. D. 51, 95 N. W. 281. Utah.—East v. Mooney, 7 Utah 414, 27 Pac. 4. Wash.—Boarman v. Hinkley, 17 Wash. 126, 49 Pac. 226.

[a] The adverse party (1) upon whom the notice is to be served is determined by the same rule as is the "adverse party" upon whom a notice of appeal is to be served, namely, every party whose interest in the subject-matter of the motion is adverse to, or will be affected by, the granting of the motion or changing the former decision. Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; United States v. Crooks, 116 Cal. 43, 47 Pac. 870. (2) Such a party may include a co-party of the applicant who does not join in the application for the new trial. United States v. Crooks, *supra*; Clark v. Austin, 38 Minn. 487, 38 N. W. 615.

[b] "Extraordinary Case."—Where, under the local practice, an application for a new trial may be made, out of the usual time, in unusual or "extraordinary cases," due notice of such an application may be required to be served upon the adverse party. See Cleveland v. Chambliss, 64 Ga. 353, containing a form of notice.

50. United States v. Crooks, 116 Cal. 43, 47 Pac. 870; Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 82, 35 L. R. A. 318.

[a] Served Upon All Adverse Parties.—A notice of intention to move for a new trial must be served upon every party whose interest in the sub-

ject-matter of the motion is adverse to, or will be affected by, the granting of the motion, or by changing the former decision of the court. Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. Rep. 82, 35 L. R. A. 318.

[b] New Trial to Part of the Parties.—The notice need be served only upon those parties against whom the new trial is granted where they are less than all of the original parties. Adams v. Stewart County Bank, 94 Ga. 718, 20 S. E. 356.

51. Killip v. Empire Mill Co., 2 Nev. 34. See Bear River, etc. Min. Co. v. Boles, 24 Cal. 354.

52. Mallory v. See, 129 Cal. 356, 61 Pac. 1123; Flateau v. Lubeck, 24 Cal. 364; Killip v. Empire Mill Co., 2 Nev. 34.

[a] Signature.—The notice should be signed either by the movant or by his attorney of record. McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732.

53. See the statutes.

54. O'Connell v. Main & Tenth Sts. Hotel Co., 90 Cal. 515, 27 Pac. 373.

55. O'Connell v. Main & Tenth Sts. Hotel Co., 90 Cal. 515, 27 Pac. 373; Bauder v. Tyrrel, 59 Cal. 99.

[a] Notice of intention to move to set aside the decision and judgment sufficiently shows the purpose to ask for a new trial, where the stated grounds and basis of the motion are such that under the statutes, the motion to set aside the decision could only be intended to secure a new trial. O'Connell v. Main & Tenth Sts. Hotel Co., 90 Cal. 515, 27 Pac. 373.

[b] A notice making no reference to the verdict or decision, but merely stating that the court would be moved to set aside the "judgment" is held insufficient, since the motion should be addressed to the verdict, or the decision, rather than to the judgment.

c. *Time*.—The notice must be filed and served within the time required by the statute,⁵⁶ and failure to observe these requirements will waive the right to move for a new trial,⁵⁷ unless the time has been extended, where that is permissible,⁵⁸ or there has been a waiver,⁵⁹ as by the appearance of the opposite party at the hearing of the motion, without objecting to want of notice.⁶⁰

d. *Designation of Grounds*.—The notice of intention must designate the grounds upon which the motion for the new trial will be made,⁶¹ and failure to comply with this requirement will make the notice insufficient.⁶² The grounds should be stated clearly so that due attention may be called to the same,⁶³ and the language of the statute

Little v. Jacks, 67 Cal. 165, 7 Pac. 449; Martin v. Matfield, 49 Cal. 42.

56. Cal.—Gardner v. Stare, 135 Cal. 118, 67 Pac. 5; Little v. Jacks, 67 Cal. 165, 7 Pac. 449; Brady v. Feisil, 54 Cal. 180; Roussin v. Stewart, 33 Cal. 208. Ga.—Smedley v. Williams, 112 Ga. 114, 37 S. E. 111. Nev.—Elder v. Frevert, 18 Nev. 278, 3 Pac. 237. S. D. Louder v. Hunter, 27 S. D. 271, 130 N. W. 774; Hall v. Harris, 1 S. D. 279, 46 N. W. 931, 36 Am. St. Rep. 730. Utah.—McGrath v. Tallent, 7 Utah 256, 26 Pac. 574. Wash.—Boorman v. Hinckley, 17 Wash. 126, 49 Pac. 226.

[a] *Notice Held Filed Prematurely*.—McIntyre v. Mac Ginniss, 41 Mont. 87, 108 Pac. 353, 137 Am. St. Rep. 701; Power v. Turner, 37 Mont. 521, 97 Pac. 950.

[b] *Rule nisi must be served within the required time*. Wood v. Wood, 132 Ga. 484, 64 S. E. 467.

57. Sutton v. Symons, 100 Cal. 576, 35 Pac. 158; Hodgdon v. Griffin, 56 Cal. 610.

[a] *A failure on the part of the clerk to endorse as filed within the time required by law, when, in fact, the notice was filed in time, will not vitiate the notice*. Commercial Nat. Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. 750. See 3 STANDARD PROC. 983.

58. See *infra*, this note.

[a] *Under the former practice, (1) in California, the time for filing and serving the notice could be extended by the court (Burton v. Todd, 68 Cal. 485, 9 Pac. 663), or (2) by the agreement of the parties. Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898. (3) Under the statutory amendment, however, of 1915 (Civ. Code, §659, 1916) the time cannot be extended either by order or stipulation.*

[b] *The execution must be secured*

within the time allowed for the original notice. State v. Mason, 18 Mont. 362, 45 Pac. 557.

As to extension of time to move for new trial, see supra, III, D, 10.

59. See *infra*, this note.

[a] *Failing To Object When Served*. Any fault in giving the required notice will be waived, on appeal, where the record fails to show that any objection to the service was made on admitting service of it. Cal.—Schieffely v. Tapia, 68 Cal. 184, 8 Pac. 878. Ga.—Summerford v. Kinard, 8 Ga. App. 253, 68 S. E. 955. Mont.—Rutherford v. Talent, 6 Mont. 112, 9 Pac. 886. And see Kenyon-Noble Lumb. Co. v. School Dist. No. 4, 40 Mont. 123, 105 Pac. 551; Hamilton v. Dooley, 15 Utah 280, 49 Pac. 769.

60. Ia.—Means v. Yeager, 96 Iowa 694, 65 N. W. 993. Mont.—Gregg v. Garrett, 13 Mont. 10, 31 Pac. 721. See Curn v. Perkins, 40 Mont. 588, 107 Pac. 901. Utah.—Cereghino v. Cereghino, 4 Utah 100, 6 Pac. 523.

61. See the statutes.

62. Cal.—Polk v. Boggs, 122 Cal. 114, 54 Pac. 536. Mont.—Ogle v. Potter, 24 Mont. 501, 62 Pac. 920. Nev.—Worthing v. Cutts, 8 Nev. 118. Can. Furlong v. Reid, 12 Ont. Pr. 201; Scott v. Crerar, 11 Ont. 541.

63. Cal.—*In re Yoakam's Est.*, 103 Cal. 503, 37 Pac. 485. P. I.—McCullough v. Aenlle, 3 Phil. Isl. 285. S. D. Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943; Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205.

[a] *When the notice of intention contains such specifications of certain rulings of the court, in excluding and striking out evidence, as are sufficient to call the attention of the trial court to the particular errors relied on, and which present substantially all the*

may be sufficient.⁶⁴ When the motion is to be made upon a statement of the case,⁶⁵ a general allegation of errors of law is sufficient, since the statutes require the statement to specify the particular errors upon which the party will rely.⁶⁶ When, however, the motion is to be made upon the minutes of the court, a mere statement that the evidence is insufficient to justify the verdict is too vague; the particulars of the alleged insufficiency must be set forth.⁶⁷

c. *Designating Evidence or Record Relied on.*—The statutes usually require the notice to specify whether the motion is to be based upon affidavits or the minutes of the court, or under some statutes, on a statement of the case or a bill of exceptions.⁶⁸

2. **Requisites of Motions.**—a. *Form.*—In most jurisdictions, either by requirement of statute or rule of court, a motion for a new trial must be in writing, the practice in civil and criminal cases not always being the same, however.⁶⁹ And, although a fixed form of

questions discussed, the specification is sufficient. *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943.

64. *Moddie v. Breiland*, 9 S. D. 506, 70 N. W. 637.

65. See the title "**Statement and Abstract of Case.**"

66. *Cal.*—*Swett v. Gray*, 141 Cal. 63, 74 Pac. 439. *Mont.*—*Martin v. Corcadden*, 34 Mont. 308, 86 Pac. 33; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579; *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836. *N. D.*—*Henry v. Maher*, 6 N. D. 413, 71 N. W. 127.

67. *Cal.*—*Salisbury v. Burr*, 114 Cal. 451, 46 Pac. 270; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. 954; *Baird v. Peall*, 92 Cal. 235, 28 Pac. 285; *Harnett v. Central Pac. R. Co.*, 78 Cal. 31, 20 Pac. 154. *Idaho.*—*Kelley v. Clark*, 21 Idaho 231, 121 Pac. 95. *N. D.*—*Henry v. Maher*, 6 N. D. 413, 71 N. W. 127. *S. D.*—*Wolf v. Sneve*, 23 S. D. 260, 121 N. W. 781; *Wenke v. Hall*, 17 S. D. 305, 96 N. W. 103.

[a] **Former Statute in Montana Repealed.**—*Ettien v. Drum*, 35 Mont. 81, 88 Pac. 659.

68. See the statutes and the following cases: *Cal.*—*Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027; *Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 689, 110 Pac. 591. *Idaho.*—*Storer v. Heitfeld*, 17 Idaho 113, 105 Pac. 55. *Mont.*—*State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139; *Gregg v. Garrett*, 13 Mont. 10, 31 Pac. 721. *S. D.*—*Thompson v. Chicago, M. & St. P. R. Co.*, 26 S. D. 296, 128 N. W. 809.

[a] **Sufficiently Certain.**—Notice of intention to move for a new trial is not rendered uncertain by the allegation that the motion will be made on the minutes of the court and a bill of exceptions. *Hall v. Harris*, 1 S. D. 279, 46 N. W. 331, 36 Am. St. Rep. 730.

[b] **Treated as a "Statement."** Where the notice states that the motion will be made upon a "statement," and the record of the proceedings is settled by the judge as a "bill of exceptions," such record may, nevertheless, be treated as a "statement." *Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 689, 110 Pac. 591.

69. See the statutes and the following cases: *Cal.*—*People v. Ah Sam*, 41 Cal. 645, criminal case. *Ind.*—*Whaley v. Gleason*, 40 Ind. 405; *Nutter v. State*, 9 Ind. 178; *Steele v. Michigan Buggy Co.*, 50 Ind. App. 635, 95 N. E. 435. *Kan.*—*Eskridge v. Lewis*, 51 Kan. 376, 32 Pac. 1104; *Douglass v. Insley*, 34 Kan. 604, 9 Pac. 475; *Clayton v. School District*, 20 Kan. 256, 262. *Ky.*—*McAllister v. Connecticut Mut. Life Ins. Co.*, 78 Ky. 531; *Hopkins v. Com.*, 3 Bush 480; *Reed v. Miller*, 1 Bibb 142. *Mass.*—*Brown v. Swan*, 1 Mass. 202. *Neb.*—*Cedar County v. Goetz*, 3 Neb. (Unof.) 172, 91 N. W. 177; *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587, 44 N. W. 864. *Ohio.*—*Hoffman v. Gordon*, 15 Ohio St. 211.

[a] **Filing Implies Writing.**—In *Osborne v. Ehrhard*, 37 Kan. 413, 15 Pac. 590, it is held that a recitation in a record that "thereupon the defendant filed his motion for a new trial as

motion is seldom, if ever, required, yet written motions should be carefully prepared with due regard to the rules of pleading.⁷⁰

Defects as to mere matter of form, however, will not, as a rule, render a motion invalid.⁷¹ However, unless otherwise required by statute or rule of court, the motion may be made orally,⁷² and, in some states, particularly in criminal cases, where the statutes do not require a written motion, it is the practice to make the motion orally, filing written grounds of the motion with the clerk.⁷³

b. *Designation of Grounds.*—(I.) *In General.*—In most jurisdictions, by requirement of statute or rule of court, the motion must designate the grounds for new trial relied upon by the applicant.⁷⁴

follows," which is followed by a full and formal motion including the style of the case in which it was filed, the grounds upon which it was based, and purporting to be signed by counsel, fairly implies that the motion was in writing. See further, *Salinas v. Wright*, 11 Tex. 572.

70. See *infra*, this note, and *State ex rel. Barnes v. Kimes*, 11 Ohio C. C. (N. S.) 77.

Form of Motion—

[Title of court and cause]

Now comes the ——— by his attorney, ———, and moves the court to set aside the verdict in the above-entitled cause, and to grant a new trial therein, on the following grounds, to-wit: (stating the grounds relied upon).

71. *D. C.*—*Jones v. Pennsylvania R. Co.*, 7 Mackey 426. *Fla.*—*Baggett v. Savannah, etc. R. Co.*, 45 Fla. 184, 34 So. 564. *Ind.*—*Burt v. Hoettinger*, 28 Ind. 214; *Kimball v. Whitney*, 15 Ind. 280; *Humphries v. Marshall's Admr.*, 12 Ind. 609. *Ia.*—*Powers v. Des Moines City R. Co.*, 143 Iowa 427, 121 N. W. 1095. *Kan.*—*Hartley v. Chidester*, 36 Kan. 363, 13 Pac. 578. *Wash.*—*McInnes v. Sutton*, 35 Wash. 384, 77 Pac. 736. *Can.*—*Follett v. Sacco*, 11 Ont. W. R. 377.

[a] *Signing.*—Where the statute requires the motion to be signed, a motion without any signature may be fatally defective on appeal. *Smith v. Fordyce* (Tex.), 18 S. W. 663. And see *Reamer v. Morrison Exp. Co.*, 93 Mo. App. 501, 67 S. W. 718, holding that an omission to sign, due to oversight of counsel, may be corrected even after the four days allowed for a motion has elapsed.

72. *Ala.*—*William Moneagle & Co. v. Livingston*, 150 Ala. 562, 43 So. 840. *Cal.*—*People v. Ah Sam*, 41 Cal. 645.

See *People v. Long*, 7 Cal. App. 27, 93 Pac. 387. *Idaho.*—See *Kelley v. Clark*, 21 Idaho 231, 121 Pac. 95; also *Storer v. Heitfeld*, 17 Idaho 113, 105 Pac. 55. *Ill.*—*Metropolitan West Side El. R. Co. v. White*, 166 Ill. 375, 46 N. E. 978; *M. W. of A. v. Graber*, 128 Ill. App. 585; *Merritt v. LeClair*, 118 Ill. App. 328. *Kan.*—*Doster v. Sterling*, 33 Kan. 381, 6 Pac. 556. *Wis.*—*Hansen v. Fish*, 27 Wis. 535.

73. *Cal.*—See *People v. Ah Sam*, 41 Cal. 645; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387. *Ga.*—*McAdams v. State* (Ga. App.), 70 S. E. 893; *Shocklin v. State*, 8 Ga. App. 399, 69 S. E. 35; *Thomas v. State*, 7 Ga. App. 337, 66 S. E. 964. *Ky.*—*Hopkins v. Com.*, 3 Bush 480.

74. *Ga.*—*Fidelity & Cas. Co. v. Geiger*, 142 Ga. 438, 83 S. E. 92; *Newman v. Cross*, 108 Ga. 776, 33 S. E. 641; *Bessman v. Girardey*, 66 Ga. 18. *Ill.*—*Gascoigne v. Metropolitan W. S. Elev. R. Co.*, 239 Ill. 18, 87 N. E. 883; *Hutchison v. Moore Bros. Furniture Co.*, 85 Ill. App. 456. *Ind.*—*Conrad v. Hansen*, 171 Ind. 43, 85 N. E. 710; *Emison v. Shepard*, 121 Ind. 184, 22 N. E. 883; *La Follette v. Higgins*, 109 Ind. 241, 9 N. E. 780. *Ia.*—*Beal v. Stone*, 22 Iowa 447. *Kan.*—*Bailey v. Riverside Tp.*, 82 Kan. 429, 108 Pac. 796; *Osborne & Co. v. Ehrhard*, 37 Kan. 413, 15 Pac. 590; *Carson v. Funk*, 27 Kan. 524. *Ky.*—*Louisville & N. R. Co. v. Woodford*, 152 Ky. 398, 153 S. W. 722; *McLain v. Dibble & Co.*, 13 Bush 297; *Reed v. Miller*, 1 Bibb 142. *Mass.*—*Loveland v. Rand*, 200 Mass. 142, 85 N. E. 948. *Minn.*—*Olson v. Berg*, 87 Minn. 277, 91 N. W. 1103. *Mo.*—*Falloon v. Fenton*, 182 Mo. App. 93, 167 S. W. 591; *Dale v. Parker*, 143 Mo. App. 492, 128 S. W. 510. *N. Y.*—*Brunner v. Downs*, 63 Hun 626, 17 N. Y.

This requirement is analogous to the practice of assigning errors in proceedings upon appeal.⁷⁵ The ground assigned must be a ground recognized by law,⁷⁶ and all the grounds depended upon should be included in the motion.⁷⁷ A moving party is restricted to the grounds assigned,⁷⁸ since grounds not assigned will be considered waived.⁷⁹ A new trial will be granted, however, if any of the grounds alleged prove sufficient.⁸⁰

(II.) **Designated Elsewhere in Proceedings.** — The necessity of specifically setting forth the grounds in the motion may be obviated by reference to a specification of the errors or deficiencies elsewhere in the proceedings, as in the notice of intention,⁸¹ or in the bill of exceptions

Supp. 633. **Okla.**—*Rogers v. Bonnett*, 4 Okla. 90, 46 Pac. 599; *Walter A. Wood, Mowing, etc. Mach. Co. v. Farnham*, 1 Okla. 375, 33 Pac. 867. **Tex.** *Wright v. Wright* (Tex. Civ. App.), 155 S. W. 1015; *Kruegel v. Bolanz* (Tex. Civ. App.), 103 S. W. 435; *Connor v. Saunders*, 9 Tex. Civ. App. 56, 29 S. W. 1140. **Vt.**—*Montpelier & W. R. R. Co. v. Macchi*, 74 Vt. 403, 52 Atl. 960.

75. See *Lynch v. Stapleton*, 4 Ky. L. Rep. 985, the grounds for a new trial should be as specific as an assignment of errors.

76. *Lynch v. Milwaukee Harvester Co.*, 159 Ind. 675, 65 N. E. 1025; *State v. Richeson*, 36 Ind. App. 373, 75 N. E. 846; *Felt v. East Chicago Iron & Steel Co.*, 27 Ind. App. 494, 61 N. E. 744; *Fenner v. Simon*, 26 Ind. App. 628, 60 N. E. 363.

77. **Ga.**—*Clark v. Havard*, 133 Ga. 160, 65 S. E. 380, 134 Am. St. Rep. 199. **Ind.**—*Moon v. Jennings*, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383. **Neb.**—*Lincoln v. Beckman*, 23 Neb. 677, 37 N. W. 593.

[a] **Separate motions cannot be filed** for each ground assigned. *Moon v. Jennings*, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383.

78. **Ala.**—*Dothan Bank v. Wilks*, 132 Ala. 573, 31 So. 451. **Ga.**—*Suburban Realty Co. v. Elder*, 138 Ga. 571, 75 S. E. 652; *Turner v. Pearson*, 93 Ga. 515, 21 S. E. 104; *Powell v. Howell*, 21 Ga. 214. **Ill.**—*Janeway v. Burton*, 201 Ill. 78, 66 N. E. 337; *People v. Petrie*, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 263. **Ky.**—*Harris v. Southern R. Co.*, 25 Ky. L. Rep. 559, 76 S. W. 151; *Todd v. Louisville, etc. R. Co.*, 10 Ky. L. Rep. 864, 11 S. W. 8. **Mass.**—*Love-land v. Rand*, 200 Mass. 142, 85 N. E. 948. **Mont.**—*Fearon v. Mullins*, 38

Mont. 45, 98 Pac. 650. **Wis.**—*Duffy v. Radke*, 138 Wis. 38, 119 N. W. 811. **Can.**—*Rogers v. Munns*, 25 U. C. Q. B. 153.

79. **Ga.**—*Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 41 S. E. 240, 90 Am. St. Rep. 102, 57 L. R. A. 752; *Fletcher v. Collins*, 111 Ga. 253, 36 S. E. 640; *Smith v. Hembree*, 3 Ga. App. 510, 60 S. E. 126. **Ill.**—*Chicago City R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716; *Spring Valley Coal Co. v. Chiaventone*, 214 Ill. 314, 73 N. E. 420. **Ind.**—*Nesbitt v. Stevens*, 161 Ind. 519, 69 N. E. 256; *Surber v. Mayfield*, 156 Ind. 375, 60 N. E. 7; *Kernodle v. Gibson*, 114 Ind. 451, 17 N. E. 99. **Ky.**—*Farmer v. Gregory*, 78 Ky. 475; *Harris v. Southern Ry. Co.*, 25 Ky. L. Rep. 559, 76 S. W. 151. **Mo.**—*Coffey v. Carthage*, 200 Mo. 616, 98 S. W. 562; *Bollinger v. Carrier*, 79 Mo. 318; *Kraemer v. Ward*, 149 Mo. App. 432, 130 S. W. 66. **N. Y.** *Koehler v. New York Steam Co.*, 71 App. Div. 222, 75 N. Y. Supp. 597. **Tex.**—*Texas M. R. Co. v. Trijerina*, 51 Tex. Civ. App. 100, 111 S. W. 239; *Bonnell v. Prince*, 11 Tex. Civ. App. 399, 32 S. W. 855.

80. *Thomas v. Illinois Cent. R. Co.*, 169 Iowa 337, 151 N. W. 387; *Boyd v. Western Union Tel. Co.*, 117 Iowa 338, 90 N. W. 711.

[a] **Group of Instructions.**—A general assignment that a group of instructions is erroneous is not sufficient where even one of the group is correct. *Hoover v. Weesner*, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; *Ledwith v. Campbell*, 1 Neb. (Unof.) 695, 95 N. W. 838; *McIntyre v. Union Pac. Ry. Co.*, 56 Neb. 587, 77 N. W. 57; *Graham v. Frazier*, 49 Neb. 90, 68 N. W. 367.

81. See *Kelley v. Clark*, 21 Idaho

or statement of the case which is filed in support of the motion.⁸²

(III.) **Sufficiency of Statement.**—As a rule, the grounds should be stated clearly, so that the attention of the court, and of the opposite party, will be directed to them, and they may be informed with reasonable certainty of the points upon which the movant relies.⁸³ In some cases,⁸⁴ and, in some jurisdictions, in all cases,⁸⁵ the language of the statute may be sufficient, and a substantial compliance may be all that is required, the exact language of the statute being unnecessary. The latter rule is especially applicable where the statement of the case is required to specify particularly the specific matters relied on.⁸⁶

(IV.) **Particular Grounds.**—(A.) **IRREGULARITIES IN THE PROCEEDINGS.** It is too indefinite to allege merely that a new trial is asked for on the ground of irregularities in the proceedings; the particular irregularity or irregularities should be pointed out.⁸⁷

(B.) **MISCONDUCT.**—When misconduct is relied upon, the particular misconduct complained of must be specified in the motion.⁸⁸

231, 121 Pac. 95; *Rutherford v. Talent*, 6 Mont. 112, 9 Pac. 886.

As to statement of grounds in notice of intention, see *supra*, III, E, 1, d.

82. **Cal.**—*Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762. See *Kent v. Williams*, 146 Cal. 3, 79 Pac. 527; *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828. **Ga.**—See *Darsey v. Darsey*, 131 Ga. 208, 62 S. E. 20. **Ind.**—*Elliott v. Russell*, 92 Ind. 526.

See the title "Statement and Abstract of Case."

83. **Cal.**—*Hill v. Weisler*, 49 Cal. 146. **Ga.**—*Toomey v. Read*, 133 Ga. 855, 67 S. E. 100; *Henley v. Brockman*, 124 Ga. 1059, 53 S. E. 672; *Hicks v. Mather*, 107 Ga. 77, 32 S. E. 901. **Ind.**—*Reese v. Caffee*, 133 Ind. 14, 32 N. E. 720; *Irwin v. Smith*, 72 Ind. 482; *Musselman v. Musselman*, 44 Ind. 106. **Ky.**—*American Credit-Indem. Co. v. National Clothing Co.*, 122 S. W. 840; *Meaux v. Meaux*, 81 Ky. 475; *Ohio Val. Ry. & Min. Co. v. Kuhn*, 9 Ky. L. Rep. 467, 5 S. W. 419. **Mo.**—*Huppert v. Weisgerber*, 25 Mo. App. 95; *Fox v. Young*, 22 Mo. App. 386. **Neb.**—*Spencer v. Thistle*, 13 Neb. 227, 13 N. W. 214. **Tex.**—*Holmes v. State*, 68 Tex. Crim. 17, 150 S. W. 926.

Compare *supra*, III, E, 1, d.

As to specific grounds, see *infra*, this section.

84. See *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

85. *Chicago, B. & Q. R. Co. v. Cass*, 51 Neb. 369, 70 N. W. 955; *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102

(statute so provides); *Walrath v. State*, 8 Neb. 80; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944.

[a] **Language of Statute.**—The supreme court of Kansas says: "It has always been held that to set forth the grounds of the motion in the language of the statute is sufficient . . . A different rule obtains in some of the states." *Spadra-Clarksville Coal Co. v. Nicholson*, 93 Kan. 638, 643, 145 Pac. 571, Ann. Cas. 1916D, 652.

[b] A statement more specific than the statute is not improper, however, but should be encouraged. *Marbourg v. Smith*, 11 Kan. 554.

86. See *Nelson v. Jordeth*, 15 S. D. 46, 87 N. W. 140, and *supra*, III, E, 2, b, (II).

87. *Grose v. Dickerson*, 53 Ind. 460; *Musselman v. Musselman*, 44 Ind. 106; *Scoville v. Chapman*, 17 Ind. 470; *Tommer v. Densmore*, 8 Neb. 384, 1 N. W. 315; *Lowrie v. France*, 7 Neb. 191.

[a] **Failure To Admonish Jury.**—A motion for a new trial based upon the ground that the court failed to admonish the jury upon adjournment, should set out such failure. *Brink v. Territory*, 3 Okla. 588, 41 Pac. 614.

[b] **Disqualification of Juror.**—The particular juror and the disqualification should be stated. **Ga.**—*Gibson v. Williams*, 39 Ga. 660. **Ind.**—*Harper v. State*, 101 Ind. 109. **Kan.**—*State v. Hinkle*, 27 Kan. 308. Compare *Lesslie v. State*, 18 Ohio St. 390.

88. **Ind.**—*Louisville, etc. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58; *Greg-*

(C.) **ERRORS OF LAW.**—(1.) *In General.*—It is a general rule that the motion must contain a specification of the alleged errors. A motion based upon a general allegation of “errors of law occurring at the trial” is too broad, and carries with it no specific information.⁸⁹ However, in some jurisdictions, it is sufficient to follow the language of the statute, “errors of law occurring at the trial and excepted to.”⁹⁰ In all cases, moreover, of assignments of errors it should appear that due exception was taken to each and every alleged error,⁹¹ and where two or more rulings are assigned jointly as errors, the motion will be denied unless all the rulings thus assigned are erroneous.⁹²

(2.) *Admission or Rejection of Evidence.*—An allegation that the court erred in admitting or excluding evidence is not sufficient, in most jurisdictions, since the particular evidence alleged to have been erroneously received or rejected must be pointed out.⁹³ In some juris-

ory *v. Schoenell*, 55 Ind. 101. **Me.** *Lennox v. Knox, etc. Co.*, 62 Me. 322. **Wis.**—*Newton v. Whitney*, 77 Wis. 515, 46 N. W. 882.

[a] **Form—Misconduct of Prosecuting Officer.**—“That counsel for the state, in argument to the jury, improperly alluded to the fact that the defendant had not testified in his own behalf.” *Lesslie v. State*, 18 Ohio St. 390.

[b] **Form—Separation of Jury.**—See *State v. McCormick*, 84 Me. 566, 24 Atl. 938.

89. **Alaska.**—*Moore v. Steelsmith*, 1 Alaska 121. **Ark.**—*Choctaw & M. R. Co. v. Goset*, 70 Ark. 427, 68 S. W. 879. **Ind.**—*Brackett v. Brackett*, 23 Ind. App. 530, 55 N. E. 783. **Ky.**—*Williams & Co. v. Case Plow Works*, 13 Ky. L. Rep. 140; *Home Ins. Co. v. Brownlee*, 13 Ky. L. Rep. 173; *Bertman v. Ebert's Admr.*, 9 Ky. L. Rep. 198; *Hornback v. Merrill*, 8 Ky. L. Rep. 875.

[a] They should be set forth with sufficient certainty, so that a person of good understanding may know what is meant. *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403.

[b] But it is sufficient to describe the error as one “in rejecting competent testimony” or “in admitting incompetent testimony” or in “giving” or “refusing” instructions, since the exceptions taken to these matters sufficiently indicate the errors referred to. *Meaux v. Meaux*, 81 Ky. 475, 479. But see *Dawson v. Baum*, 3 Wash. Ter. 464, 19 Pac. 46, holding insufficient a general statement that the court erred in

instructions to the jury, or in admitting evidence and the like.

90. **Kan.**—*DaLee v. Blackburn*, 11 Kan. 190. **Neb.**—*Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102, by statute. *Compare Phoenix Ins. Co. v. King*, 52 Neb. 562, 72 N. W. 855. **Okla.** *Boyd v. Bryan*, 11 Okla. 56, 65 Pac. 940. See *supra*, III, E, 2, b, (III). **S. D.** See *Nelson v. Jordreth*, 15 S. D. 46, 87 N. W. 140.

91. *Bank of Dothan v. Wilks*, 132 Ala. 573, 31 So. 451.

92. *Clay v. Smith*, 108 Ga. 189, 33 S. E. 963; *Indianapolis & M. Rapid Transit Co. v. Hall*, 165 Ind. 557, 76 N. E. 242; *Sievers v. Peters Box & Lumb. So.*, 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; *Board of Comrs. of Hendricks County v. Eaton*, 38 Ind. App. 30, 77 N. E. 958; *Logansport & W. V. Nat. Gas Co. v. Coate*, 29 Ind. App. 290, 64 N. E. 638.

93. **Ala.**—*Alabama Midland Ry. Co. v. Brown*, 129 Ala. 282, 29 So. 548. **Ga.**—*Ford v. Blackshear Mfg. Co.*, 140 Ga. 670, 79 S. E. 576; *Callaway v. Beauchamp*, 140 Ga. 207, 78 S. E. 846; *Dunn v. Evans*, 139 Ga. 741, 78 S. E. 122; *Courier-Journal v. Howard*, 119 Ga. 378, 46 S. E. 440; *Denton v. Ward*, 112 Ga. 532, 37 S. E. 729. **Ind.**—*Conrad v. Hansen*, 171 Ind. 43, 85 N. E. 710; *Dunn v. State*, 162 Ind. 174, 70 N. E. 521; *Benefiel v. Aughe*, 93 Ind. 401; *Sherlock v. Alling*, 44 Ind. 184. **Miss.**—*Richburger v. State*, 90 Miss. 806, 44 So. 772. **Mo.**—*State v. Holden*, 203 Mo. 581, 102 S. W. 490. *Contra*, however, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235. **Tenn.**—*Memphis St. R. Co. v. Johnson*, 114 Tenn. 632, 83

dictions, however, this ground is sufficiently covered by the general assignment of "error at law occurring at the trial and excepted to,"⁹⁴ or error in the admission of incompetent, or in the rejection of competent evidence,⁹⁵ or the general assignment may be sufficiently supplemented by the specification in the statement of the case or bill of exceptions.⁹⁶

(3.) *Instructions.*—Erroneous instructions should also be particularly designated.⁹⁷ In some jurisdictions, however, a general statement of error in giving or in refusing instructions is held sufficient;⁹⁸ and

S. W. 169. **W. Va.**—*Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604. **Can.** *Crandell v. Nott*, 30 U. C. C. P. 63; *McDermott v. Ireson*, 38 U. C. Q. B. 1.

[a] **For example**, "that the court erred in admitting (or excluding) the deposition of John Doe." See, in general, *Dorsch v. Rosenthal*, 39 Ind. 209; *Brewer v. State*, 32 Tex. Crim. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

94. **Kan.**—*DaLee v. Blackburn*, 11 Kan. 190. **Neb.**—*Albright v. Peters*, 58 Neb. 534, 78 N. W. 1063; *Riverside Coal Co. v. Holmes*, 36 Neb. 858, 55 N. W. 255; *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102. **Okla.**—*Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944.

See also *supra*, III, E, 2, b, (III).

95. *Newton's Exr. v. Field*, 98 Ky. 186, 32 S. W. 623; *Meaux v. Meaux*, 81 Ky. 475.

[a] **Missouri.**—An exception to the reception of evidence will be preserved by a general allegation in the motion for new trial that the court admitted illegal evidence; it is not necessary to point out specifically in the motion the evidence in question. *Payne v. Payne*, 57 Mo. App. 130.

96. See *Elliott v. Russell*, 92 Ind. 526, and *supra*, III, E, 2, b, (II).

[a] **Bill of Exceptions Must Have Been Filed.**—*Cain v. Goda*, 94 Ind. 555; *Arbuckle v. Biederman*, 94 Ind. 168; *Noble v. Dickson*, 48 Ind. 171.

97. **Ala.**—*Southern R. Co. v. Kirsch*, 150 Ala. 659, 43 So. 796; *Alabama Midland R. Co. v. Brown*, 129 Ala. 282, 29 So. 548. **Ark.**—*Kansas, etc. R. Co. v. Davis*, 83 Ark. 217, 103 S. W. 603; *Steward v. Scott*, 57 Ark. 153, 20 S. W. 1088. **Ga.**—*Brook v. Brook*, 140 Ga. 590, 79 S. E. 473; *Williams v. State*, 124 Ga. 782, 53 S. E. 98; *Watts v. State*, 120 Ga. 496, 48 S. E. 142. **Ind.**—*Wallace v. Exchange Bank of Spencer*, 126 Ind. 265, 26 N. E. 175; *Jones v.*

Layman, 123 Ind. 569, 24 N. E. 363; *Rudolph v. Landwerlen*, 92 Ind. 34. **Ia.** *Lyons v. Van Gorder*, 77 Iowa 600, 42 N. W. 500. **Ky.**—*Akers v. Akers*, 24 Ky. L. Rep. 636, 69 S. W. 715. **Mo.** *Shinn v. United R. Co.*, 248 Mo. 173, 154 S. W. 103; *State v. King*, 194 Mo. 474, 92 S. W. 670. **Tenn.**—*Memphis St. R. Co. v. Johnson* 114 Tenn. 632, 88 S. W. 169. **Tex.**—*Kubacak v. State*, 59 Tex. Crim. 165, 127 S. W. 836; *Talbot v. State*, 58 Tex. Crim. 324, 125 S. W. 906; *Sutherland v. McIntire* (Tex. Civ. App.), 28 S. W. 578. **Wis.** *Candrian v. Miller*, 98 Wis. 164, 73 N. W. 1004; *Meno v. Haefel*, 46 Wis. 282, 1 N. W. 31. **Can.**—*Montgomery v. Dean*, 7 U. C. C. P. 513; *McDermott v. Ireson*, 38 U. C. Q. B. 1.

[a] **Reference by Number.**—That the court erred in refusing to give instructions, "numbers ten to twenty-two inclusive, asked by the defendant," has been held sufficient. *Weber v. Kansas City Cable Ry. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819.

[b] **A mere statement that the charge was erroneous** is too indefinite. *Darnell v. State*, 15 Tex. App. 70.

[c] **Instructions Not Applicable.** If instructions, although correct as abstract propositions of law, were not applicable to the facts of the case, such error, if relied upon, must be identified. *Glaze v. Mills*, 119 Ga. 261, 46 S. E. 99.

[d] **Form.**—See **Ark.**—*Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, 412, 19 S. W. 1056. **Ga.**—*Pinkard v. State*, 30 Ga. 757. **Miss.**—*Price v. State*, 36 Miss. 531, 72 Am. Dec. 195.

98. *Irwin v. Smith*, 72 Ind. 482; *Bartholomew v. Langsdale*, 35 Ind. 278; *Dawson v. Coffman*, 28 Ind. 220; *Newton's Exr. v. Field*, 98 Ky. 186, 32 S. W. 623; *Meaux v. Meaux*, 81 Ky. 475;

where an assignment in the language of the statute is sufficient,⁹⁹ or the assignment may be supplemented by the specification in the statement of the case or bill of exceptions,¹ a general assignment would seem to be sufficient. But it has been held that an allegation that a series or a group of instructions is erroneous, is not sufficient unless, in fact, all are erroneous.²

(D.) VERDICT OR JUDGMENT CONTRARY TO LAW. — A statement that the verdict is against law, or contrary to law, is too general, and should be disregarded by the court. There should be a specification in what way it is against law,³ so as to call the attention of the court to the point relied upon by the applicant.⁴ An assignment in the motion that the "judgment" is contrary to law presents no question, since it does not state any recognized cause for a new trial.⁵ Moreover, a specification that the verdict is contrary to the charge of the court is insufficient.⁶

(E.) CONTRARY TO EVIDENCE. — (1.) *In General.* — Where the ground for the new trial is that the verdict is contrary to the evidence, or is not supported by the evidence, a mere statement to that effect does not, according to the prevailing rule, satisfy the requirement; because the motion must specify the particular reasons why the verdict is al-

Louisville, etc. R. Co. v. McCoy, 81 Ky. 403.

99. See *supra*, III, E, 2, b, (III).

1. See *supra*, III, E, 2, b, (II), and McCreery v. Everding, 44 Cal. 246.

2. Hoover v. Weesner, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905; Chicago Furniture Co. v. Cronk, 35 Ind. App. 591, 74 N. E. 627.

[a] In Nebraska, the statute provides in both civil and criminal cases that it shall be sufficient to assign the grounds "in the language of the statute and without further or other particularity" (Neb. Rev. St., 1913, §§7885, 9133), and errors in instructions are not mentioned in the statute but are apparently covered only by the general ground "errors of law occurring at the trial." Nevertheless it is held that if any of the instructions given are correct, the erroneous instructions will not be considered unless specifically assigned in the motion. Fletcher v. Brewer, 88 Neb. 196, 129 N. W. 288; Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N. W. 855; Thompson v. State, 44 Neb. 366, 62 N. W. 1060.

3. Ala.—Moneagle & Co. v. Livingston, 150 Ala. 562, 43 So. 840; Ard v. Crittenden, 39 So. 675; Winter v. Judkins, 106 Ala. 259, 17 So. 627. Alaska. Moore v. Steelsmith, 1 Alaska 121. Ga. Napier v. Burkett, 113 Ga. 607, 38 S. E. 941; Roberts v. Keeler, 111 Ga. 181,

36 S. E. 617. Ind.—Famous Mfg. Co. v. Harmon, 28 Ind. App. 117, 62 N. E. 306. Ky.—Dietz v. Barnard, 32 Ky. L. Rep. 1130, 107 S. W. 766; Hollingsworth v. Warnock, 20 Ky. Law Rep. 883, 47 S. W. 770; Williams & Co. v. Case Plow Works, 13 Ky. Law Rep. 140. Tex.—Moody v. Hahn, 25 Tex. Civ. App. 474, 62 S. W. 940; Brownwood First Nat. Bank v. Routh, 18 Tex. Civ. App. 250, 44 S. W. 44. Utah.—Gilbertson v. Miller Min. & Smelting Co., 4 Utah 46, 5 Pac. 699.

[a] Apparent of Record.—A general statement that the verdict is contrary to law will be sufficient to cover a case where, in a criminal prosecution, it appears on the record that the trial was held without an arraignment or plea. Bowen v. State, 108 Ind. 411, 9 N. E. 378; Shoffner v. State, 93 Ind. 519; Tindall v. State, 71 Ind. 314.

4. Winter v. Judkins, 106 Ala. 259, 17 So. 627.

5. Ark.—Howcott v. Kilbourn, 44 Ark. 213. Cal.—Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527. Ga. Coleman v. Slade, 75 Ga. 61. Idaho. Caldwell v. Wells, 16 Idaho 459, 101 Pac. 812. Ind.—Hall v. McDonald, 171 Ind. 9, 85 N. E. 707; Lynch v. Milwaukee Harvester Co., 159 Ind. 675, 65 N. E. 1025. N. Y.—Garbutt v. Garbutt, 43 Hun 635, 4 N. Y. St. 416.

6. Cruger v. Tucker, 69 Ga. 557.

leged to be contrary to the evidence, or the particulars in which the evidence is insufficient.⁷ However, it has been held, in a few cases, that an assignment "that the verdict is contrary to the evidence,"⁸ and, also, that the verdict "is not sustained by the evidence,"⁹ is a sufficient designation of the grounds, by virtue of the fact that such statements follow, or substantially follow, the language of the statute, authorizing a new trial for such cause.

(2.) *Excessive or Inadequate Damages.* — If the motion is based upon the amount of recovery, the general rule is that such fact must be clearly alleged,¹⁰ as, for example, that there was error in the assessment of the amount,¹¹ or that the damages are excessive.¹² But, though the general rule is to the contrary,¹³ in some jurisdictions a more general statement is permissible, and such causes for new trial may be assigned under an allegation that the verdict is not sustained

7. **Alaska.** — *Williams v. Alaska Commercial Co.*, 2 Alaska 43. **Cal.** *Graybill v. DeYoung*, 140 Cal. 323, 73 Pac. 1067; *O'Leary v. Castle*, 133 Cal. 508, 65 Pac. 950. **Ill.** — *Congregation B'Nai Abraham v. Voigt*, 67 Ill. App. 227. **Me.** — *Freeman v. Morey*, 41 Me. 588. **Mich.** — *Storch v. Rose*, 152 Mich. 521, 116 N. W. 402. **Mont.** — *Zickler v. Deegan*, 16 Mont. 198, 40 Pac. 410; *Taylor v. Holter*, 2 Mont. 476. **N. D.** *Henry v. Maher*, 6 N. D. 413, 71 N. W. 127; *Pickert v. Rugg*, 1 N. D. 230, 46 N. W. 446. **Tex.** — *Cason v. Connor*, 83 Tex. 26, 18 S. W. 668; *Missouri Pac. R. Co. v. Cheek* (Tex. Civ. App.), 159 S. W. 427; *Texas, etc. R. Co. v. Norman* (Tex. Civ. App.), 91 S. W. 594; *Dodd v. Presley* (Tex. Civ. App.), 86 S. W. 73.

8. **Ark.** — *Naylor v. McNair*, 92 Ark. 345, 122 S. W. 662. **Ind.** — *Collins v. Maghee*, 32 Ind. 268. **Ky.** — *Meaux v. Meaux*, 81 Ky. 475. **Can.** — *Cameron v. Milloy*, 14 U. C. C. P. 340.

9. *Ellison v. Ganiard*, 167 Ind. 471, 79 N. E. 450; *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109; *Collins v. Maghee*, 32 Ind. 268.

[a] **Verdict Contrary to Evidence.** In *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446, the court said: "The first cause for which a new trial was claimed was that the verdict was contrary to the evidence; and the second, that the verdict was not sustained by sufficient evidence. The latter is the proper and statutory cause for which a new trial may be demanded, and, when stated, it is not necessary to allege that the verdict is contrary to the evidence. A verdict

which is contrary to the evidence is correctly described in the motion for a new trial in the language of the statute, as not sustained by sufficient evidence."

[b] Though the statute requires a specification wherein the verdict or finding is unsupported by evidence, or wherein the alleged insufficiency of the evidence consists, a specification that there is no evidence to support the verdict or finding assailed is sufficient, for if there is no evidence such a specification is exact and definite. *Knott v. Peden*, 84 Cal. 299, 24 Pac. 160.

10. **Cal.** — *Live-Stock Gazette Pub. Co. v. Union Stock-Yard Co.*, 114 Cal. 447, 46 Pac. 286. **Ind.** — *Davis v. Montgomery*, 123 Ind. 587, 24 N. E. 367; *Thickstun v. Baltimore, etc. R. Co.*, 119 Ind. 26, 21 N. E. 323. **Neb.** — *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590, 68 N. W. 935; *Riverside Coal Co. v. Holmes*, 36 Neb. 858, 55 N. W. 255. **Tex.** — *Jacobs v. Hawkins*, 63 Tex. 1; *Pecos & N. T. R. Co. v. Sutor* (Tex. Civ. App.), 153 S. W. 185; *St. Louis, etc. R. Co. v. Smith*, 11 Tex. Civ. App. 550, 32 S. W. 828.

11. *Lake Erie, etc. R. Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290.

12. *Lake Erie, etc. R. Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, 30 Ind. 8.

13. **Ill.** — *Star Brewery v. Croake*, 57 Ill. App. 287. **Ind.** — *Hvatt v. Mattingly*, 68 Ind. 271. **Ia.** — *Reynolds v. Iowa, etc. Ins. Co.*, 80 Iowa 563, 46 N. W. 659. **Minn.** — *English v. Minneapolis &*

by sufficient evidence, and is the result of passion and prejudice,¹⁴ or is contrary to law and the evidence,¹⁵ or that "the verdict was wholly unwarranted by the evidence."¹⁶

(F.) ACCIDENT OR SURPRISE. — Where it is permissible to use the language of the statute,¹⁷ or refer to affidavits for the facts,¹⁸ a general assignment of accident or surprise would seem to be sufficient. However, in some jurisdictions, the motion must show what the alleged accident or mistake was, and that the facts are such as to warrant a new trial.¹⁹

(G.) NEWLY DISCOVERED EVIDENCE. — As in other cases, where a statement in the language of the statute,²⁰ or a reference to affidavits for the particulars²¹ is permitted, a general assignment of newly discovered evidence as a ground for new trial, is probably sufficient. But in any event it is necessary that either the motion or the affidavits show that the alleged evidence was discovered after the trial;²² also that the applicant could not have obtained the evidence by previous diligence, including a statement of what the acts of diligence were,²³ and what the newly discovered evidence is, so that the court

St. P. S. R. Co., 96 Minn. 213, 104 N. W. 886. **Mo.**—*Pierson v. Slifer*, 52 Mo. App. 273. **Neb.**—*Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813; *Hammond v. Edwards*, 56 Neb. 631, 77 N. W. 75; *Riverside Coal Co. v. Holmes*, 36 Neb. 858, 55 N. W. 255. **Wis.**—*Sloteman v. Thomas*, etc. Mfg. Co., 69 Wis. 499, 34 N. W. 225.

14. *DuBrutz v. Jessup*, 54 Cal. 118; *McCloskey v. Pulitzer Pub. Co.*, 163 Mo. 22, 63 S. W. 99.

15. *McCloskey v. Pulitzer Pub. Co.*, 163 Mo. 22, 63 S. W. 99, the court saying that it is clear that if the damages are excessive, the verdict was against the evidence.

16. *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474.

17. See *supra*, III, E, 2, b, (III).

18. See *supra*, III, E, 2, b, (II), and *infra*, III, F, 9, g.

19. **Ga.**—*Ayer v. James*, 120 Ga. 578, 48 S. E. 154.

[a] That movant has a meritorious case which the new trial would probably establish. *Montgomery v. Carlton*, 56 Tex. 431; *Sheppard v. Avery* (Tex. Civ. App.), 32 S. W. 791; *Yarborough v. Downes*, 1 White & W. Civ. Cas. §675.

20. See *supra*, III, E, 2, b, (III).

21. See *supra*, III, E, 2, b, (II), and *Hesse v. Seypp*, 88 Mo. App. 66.

[a] Form of Affidavit.—See State

v. Moberly, 121 Mo. 604, 611, 26 S. W. 364.

22. **Ark.**—*Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181; *Bourland v. Skimnee*, 11 Ark. 671. **Cal.**—*Brooks v. Lyon*, 3 Cal. 113; *Bartlett v. Hogden*, 3 Cal. 55. **Ga.**—*Wallace v. Tumlin*, 42 Ga. 462. **Ind.**—*Berry v. Daily*, 20 Ind. 183. **Kan.**—*St. Louis*, etc. R. Co. *v. Gaston*, 67 Kan. 217, 72 Pac. 777. **N. Y.**—*Raphelsky v. Lynch*, 2 Jones & S. 31, 12 Abb. Pr. (N. S.) 224, 43 How. Pr. 157. **Tex.**—*Frizzell v. Johnson*, 30 Tex. 31; *Madden v. Shapard*, 3 Tex. 49; *Hodges v. Ross*, 6 Tex. Civ. App. 437, 25 S. W. 975.

23. **U. S.**—*Payan v. United States*, 15 Ct. Cl. 56. **Ga.**—*Mays v. Wilson*, 141 Ga. 523, 81 S. E. 440; *Atlanta Rapid Transit Co. v. Young*, 117 Ga. 349, 43 S. E. 861; *Patterson v. Collier*, 77 Ga. 292, 3 S. E. 119. **Ind.**—*Working v. Garn*, 148 Ind. 546, 47 N. E. 951; *Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697; *Bertram v. State*, 32 Ind. App. 199, 69 N. E. 479. **Ky.**—*Cahill v. Mullins*, 31 Ky. L. Rep. 72, 101 S. W. 336; *Urso v. Unverzagt*, 2 Ky. L. Rep. 228. **Minn.**—*Keough v. McNitt*, 6 Minn. 513. **Mo.**—*Wabash R. Co. v. Mirrieles*, 182 Mo. 126, 81 S. W. 437; *John Schoen Plumbing Co. v. Huganin*, 156 Mo. App. 68, 135 S. W. 967. **N. Y.**—*Thompson v. Welde*, 27 App. Div. 186, 50 N. Y. Supp. 618; *Williams v. Joline*, 126 N. Y. Supp. 417. **Tex.**—*Waples v. Overaker*, 77 Tex. 7, 13 S. W. 527, 19

may see that it is material, not merely cumulative, not merely impeaching, and probably would change the result.²⁴ In other words, facts warranting the granting of the application, must appear.²⁵

c. *Verification*.—Unless required by statute or rule of court, a motion for a new trial does not have to be verified.²⁶

d. *Filing and Record*.—The motion must be filed within the time prescribed by law for the making of the application,²⁷ and it is regularly filed with the clerk of the court in which the trial was held.²⁸ It should be endorsed by the clerk as "filed," and, in some states, should be entered on the record.²⁹ By statute, in a number of states, if a party is "unavoidably prevented" from filing his motion in time, it may be filed later within the discretion of the court.³⁰ Moreover, in

Am. St. Rep. 727; *Moores v. Wills*, 69 Tex. 109, 5 S. W. 675.

24. Cal.—*Brooks v. Lyon*, 3 Cal. 113; *Bartlett v. Hogden*, 3 Cal. 55. Ga.—*Wallace v. Tumlin*, 42 Ga. 462; *Gibson v. Williams*, 39 Ga. 660. Ind.—*Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909. Ia.—*Manson v. Ware*, 63 Iowa 345, 19 N. W. 275. Ky.—*Ewing v. McConnell*, 1 A. K. Marsh. 188. Me.—*Gilbert v. Woodbury*, 22 Me. 246; *Dennett v. Dow*, 17 Me. 19. Mo.—*Lyons v. Metropolitan St. R. Co.*, 253 Mo. 143, 161 S. W. 726; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *King v. Gilson*, 206 Mo. 264, 104 S. W. 52. N. Y.—*Raphelsky v. Lynch*, 2 Jones & S. 31, 43 How. Pr. 157, 12 Abb. Pr. (N. S.) 224; *In re Kranz*, 41 Hun 463, 3 N. Y. St. 297. Tex.—*Anderson v. Sutherland*, 59 Tex. 409; *Frizzell v. Johnson*, 30 Tex. 31; *Edrington v. Kiger*, 4 Tex. 89. Vt.—*Bradish v. State*, 35 Vt. 452. Wis.—*Moss v. Vroman*, 5 Wis. 147. Can.—*Longueuil Corp. v. Cushman*, 24 U. C. Q. B. 602; *Robinson v. Rapelje*, 4 U. C. Q. B. 289.

25. *Burritt v. Gibson*, 3 Cal. 396.

26. Cal.—*Vilhac v. Biven*, 28 Cal. 409. Ga.—*Burdette v. Crawford*, 125 Ga. 577, 54 S. E. 677; *Horton v. Smith*, 115 Ga. 66, 41 S. E. 253. Kan.—*Railroad Co. v. Gaston*, 67 Kan. 217, 72 Pac. 777. Mont.—*Raymond v. Thexton*, 7 Mont. 299, 17 Pac. 258. Neb.—*Hake v. Woolner*, 55 Neb. 471, 75 N. W. 1087; *Romberg v. Fokken*, 47 Neb. 193, 66 N. W. 282.

27. Ga.—*Hilt v. Young*, 116 Ga. 708, 43 S. E. 76; *New England Mtg. Security Co. v. Collins*, 115 Ga. 104, 41 S. E. 270. Me.—*Cate v. Merrill*, 109 Me. 424, 84 Atl. 897. Mo.—*Keaton v. Keaton*, 74 Mo. App. 174. Ore.—*MacMahon v. Hull*, 63 Ore. 133, 119 Pac.

348, 124 Pac. 474, 126 Pac. 3. Wyo.—*Todd v. Peterson*, 13 Wyo. 513, 81 Pac. 878.

As to time for making application, see *supra*, III, D.

[a] Where the filing of a notice of intention to move for a new trial is required it will stand in place of the formal motion. *East v. Mooney*, 7 Utah 414, 27 Pac. 4. See *supra*, III, E, 1.

28. *New England Mortg. Sec. Co. v. Collins*, 115 Ga. 104, 41 S. E. 270 (leaving the motion in the office of the judge in care of his special bailiff is not sufficient); *William Deering & Co. v. Armstrong*, 18 Ind. App. 687, 48 N. E. 1045. See generally the title "Filing."

29. *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762, entry may refer to the notice of intention.

[a] Whether Part of Record.—(1) In some states, the motion when filed becomes a part of the record. Ark.—*Johnson v. State*, 43 Ark. 391; *Cox v. Weems*, 64 Ga. 165. Ind.—*Hunter v. Hatfield*, 68 Ind. 416. Kan.—*McCullough v. Allen*, 10 Kan. 150. Neb.—*Eaton v. Carruth*, 11 Neb. 231, 9 N. W. 58. (2) In other jurisdictions, however, the contrary is true. Ill.—*St. Louis, etc. R. Co. v. Dorsey*, 63 Ill. 326. Mo.—*McCarthy v. McGinnis*, 76 Mo. 344. Okla.—*Blanchard v. United States*, 7 Okla. 13, 54 Pac. 300. Ore.—*Thompson v. Backenstos*, 1 Ore. 17. See *infra*, III, H, 4, c.

[b] Correction of Omission.—Where the motion has been endorsed as filed, an omission to enter the filing as of record may be corrected, on motion, by an order nunc pro tunc. *Gilmore v. Harp*, 92 Mo. App. 386.

30. Kan.—*Fudge v. St. Louis & S.*

some jurisdictions, it may be filed, under such circumstances, even after the term,³¹ although the contrary is also held.³² A party seeking, under this rule, to file a motion after the time specified by law, must show that the circumstances were beyond his control. The rule does not cover cases of negligence on a movant's part.³³

e. *Amendments.*—By force of statute or rules of court, the motion may be amended, either in form, or in substance, by the addition of new grounds,³⁴ even after the original motion has been denied³⁵ and the time for making an original application has expired.³⁶ Motions to amend, however, lie within the discretion of the court, and will be refused when the proposed amendments are immaterial.³⁷ In some jurisdictions, unless the proposed new grounds are such that there is still time to base an original motion upon them,³⁸ new grounds cannot be added after the period allowed by law for filing the motion has expired,³⁹ although amendments as to matter of form may still be

F. Ry. Co., 31 Kan. 146, 1 Pac. 141; Hemme v. School Dist., 30 Kan. 377, 1 Pac. 104. **Neb.**—Roggencamp v. Dobbs, 15 Neb. 620, 20 N. W. 100. **Wyo.**—Todd v. Peterson, 13 Wyo. 513, 81 Pac. 878.

[a] **Unavoidably Prevented.**—A party desiring to file a motion for a new trial must see that his motion is placed in the hands of the district clerk, or in his office, within the time required by law, and unless this is done the motion is not filed in time, unless a showing is made that the party was unavoidably prevented from doing so. *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670; *City of Osborne v. Hamilton*, 29 Kan. 1.

31. *State v. Daugherty*, 70 Iowa 439, 30 N. W. 685; *State v. Hughes*, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

32. *Ex parte Holmes*, 21 Neb. 324, 227, 32 N. W. 69.

33. *Roggencamp v. Dobbs*, 15 Neb. 620, 20 N. W. 100.

[a] **Kansas.**—(1) Where a motion for a new trial did not come to the hands of the clerk until a few minutes after the announcement of the adjournment of the term, it was held, under the circumstances, to have been filed in time. *Glover v. Rateliff*, 69 Kan. 428, 77 Pac. 89. (2) Where, however, a motion inclosed in a letter was mailed to the clerk of the court at 7 p. m. of the last day on which the motion could be regularly filed, and was received by the clerk the next day and filed by him as soon as received, it was held too late. *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670.

34. **U. S.**—*Preble v. Bates*, 37 Fed. 772. **Ga.**—*McLeod v. Morris*, 120 Ga. 753, 48 S. E. 188; *Mann v. Tallapoosa St. Ry. Co.*, 99 Ga. 117, 24 S. E. 871; *Girardey v. Bessman*, 62 Ga. 654; *Moore v. Ulm*, 34 Ga. 565. **Ia.**—*Sowden & Co. v. Craig*, 20 Iowa 477. **Ky.** *Houston v. Kidwell*, 83 Ky. 301. **Neb.** *Lincoln v. Beckman*, 23 Neb. 577, 37 N. W. 593. **Ohio.**—*Seagrave v. Hall*, 6 Ohio Cir. Dec. 497, 10 Ohio Cir. Ct. 395. **Wash.**—*Kreielsheimer v. Nelson*, 33 Wash. 406, 72 Pac. 72.

35. *Thompson v. Thompson*, 109 Mo. App. 462, 84 S. W. 1022, if filed within the statutory time allowed for the original motion. And see *Jung v. Theo. Hamm Brewing Co.*, 95 Minn. 367, 104 N. W. 233.

36. **Ga.**—*Tifton, etc. R. Co. v. Chastain*, 122 Ga. 250, 50 S. E. 105; *Central R., etc. Co. v. Pool*, 95 Ga. 410, 22 S. E. 631. **Ky.**—*Wooldridge v. White*, 105 Ky. 247, 48 S. W. 1081; *Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63. **Minn.** *Jung v. Theo. Hamm Brew. Co.*, 95 Minn. 367, 104 N. W. 233.

[a] **An amendment is allowable at any time before the final disposition of the motion.** *Tifton, T. & G. Ry. Co. v. Chastain*, 122 Ga. 250, 50 S. E. 105.

37. **Ga.**—*Lester v. Savannah Guano Co.*, 94 Ga. 710, 20 S. E. 1. **Ind.**—*Andis v. Richie*, 120 Ind. 138, 21 N. E. 1111. **Ia.**—*Dutton v. Seevers*, 89 Iowa 302, 56 N. W. 398.

38. *Van Horn v. Redmon*, 67 Iowa 689, 25 N. W. 881.

39. **Kan.**—*Culp v. Steere*, 47 Kan. 746, 28 Pac. 987; *Perry v. Eaves*, 4

made.⁴⁰ And in furtherance of justice an appellate court, upon remanding the cause for the insufficiency of the motion, may, in some states, direct the allowance of an amendment to present an apparently good ground for new trial.⁴¹

f. *Notice.*⁴²—The necessity for notice of the motion is governed entirely by statutes and rules of court.⁴³ In some states such a notice is necessary,⁴⁴ but may be waived by the appearance of the opposite party,⁴⁵ or by his filing an affidavit in resistance to the motion.⁴⁶

3. *Effect of Motion.*—The pendency of a motion for a new trial is sufficient cause for the court to refuse to proceed further upon the verdict until the motion is disposed of,⁴⁷ although it is held that such a motion upon a general verdict does not preclude a subsequent motion for judgment on facts specially found.⁴⁸ The effect of a motion for new trial as a supersedeas or stay is treated elsewhere in this work.⁴⁹

4. *Application by Petition.*—a. *Nature of.*—It is provided by statute, in some states, that when the application for a new trial is made after the term in which the trial was held, or after the time in which an ordinary motion may be filed, the application shall be made by petition.⁵⁰ A petition can be used, however, only for the grounds,

Kan. App. 26, 45 Pac. 718. **Mo.**—*Mirrieles v. Wabash R. Co.*, 163 Mo. 470, 63 S. W. 718; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330. **Mont.**—*Sullivan v. City of Helena*, 10 Mont. 134, 25 Pac. 94. **Neb.**—*Aultman, Miller & Co. v. Leahy*, 24 Neb. 286, 38 N. W. 740. 40. *Mann v. Tallapoosa St. Ry. Co.*, 99 Ga. 117, 24 S. E. 871; *Reamer v. Morrison Express Co.*, 93 Mo. App. 501, 67 S. W. 718.

41. *Ayer v. James*, 120 Ga. 578, 48 S. E. 154.

42. *Notice of intention to move for new trial*, see *supra*, III, E, 1.

43. See the statutes and rules.

44. **Fla.**—*Dupuis v. Thompson*, 16 Fla. 69. **Kan.**—See *Barons v. Anderson*, 37 Kan. 399, 15 Pac. 226, in inferior courts. **Mass.**—*Cram v. Moore*, 158 Mass. 276, 33 N. E. 524, copy of motion required by rule of court. **Minn.** *Clark v. Austin*, 38 Minn. 487, 38 N. W. 615. **Wis.**—*McWilliams v. Bannister*, 42 Wis. 301, 305.

[a] *The Kansas statute*, for example, is a type of such provisions. The opposite party shall also have a reasonable notice of such motion for a new trial, if the same is not made on the day of the former trial and in the presence of such party; such notice to be given by the applying party. *Gen. Sts.*, 1915, §7812. Under this statute, the presence of the opposite party's attorney constitutes reasonable notice

to such party. *Barons v. Anderson*, 37 Kan. 399, 15 Pac. 226.

45. **Ala.**—*Barr v. White*, 2 Port. 542. **Del.**—*Jester v. Lekite*, 5 Har. 19.

Mont.—See, however, *Gregg v. Garrett*, 13 Mont. 10, 31 Pac. 721. **Utah.** *Cereghino v. Cereghino*, 4 Utah 100, 6 Pac. 523.

46. *Means v. Yeager*, 96 Iowa 694, 65 N. W. 993.

47. *Wright v. Haddock*, 7 Dana (Ky.) 253.

48. *Leslie v. Merrick*, 99 Ind. 180.

49. See the title "Supersedeas and Stay of Proceedings."

50. **Ind.**—*Hines v. Driver*, 100 Ind. 315; *Roush v. Layton*, 51 Ind. 106; *Webster v. Maiden*, 41 Ind. 124. **Ia.** *Mengel v. Mengel*, 120 N. W. 72; *Hunter v. Porter*, 124 Iowa 351, 100 N. W. 53; *Engels v. Kiene*, 88 N. W. 331. **Kan.**—*Odell v. Sargent*, 3 Kan. 80. **Ky.** *Hackett v. Rosenham*, 105 Ky. 26, 47 S. W. 450. **Mo.**—*Jones v. Marble Head Lime Co.*, 128 Mo. App. 345, 107 S. W. 420. **Neb.**—*Chadron Loan Bldg. Assn. v. Scott*, 4 Neb. (Unof.) 694, 96 N. W. 220. **N. H.**—*Russell v. Dyer*, 39 N. H. 528. **Ohio.**—*Stuckey v. Bloomer*, 2 Ohio Cir. Ct. 541, 1 Ohio Cir. Dec. 631. **Okla.**—*Butt v. Carson*, 5 Okla. 160, 48 Pac. 182. **Tex.**—*Spencer v. Kinnard*, 12 Tex. 180; *Kruegel v. Porter* (Tex. Civ. App.), 136 S. W. 801; *Jirou v. Jirou* (Tex. Civ. App.), 136 S. W. 493.

[a] *Petition or Complaint.*—In some

and under the circumstances, specified by the statute.⁵¹ A petition, or complaint, for a new trial is an independent proceeding.⁵² While it grows out of the original action, it is a new and distinct action begun by the filing of a pleading.⁵³

b. *Requisites of Petitions.* — (I.) *In General.* — The petition should be entitled the same as the original action,⁵⁴ and should contain allegations of all the necessary facts required to make out a case for the granting of a new trial.⁵⁵ Neither the evidence nor the pleadings in the original case,⁵⁶ nor the evidence in support of the petition,⁵⁷ can

states the application is known as a "complaint." It is patterned after the application in equity for a rehearing, in connection with which a petition, and not a motion, is the proper procedure. See *U. S.*—*Harman v. Lewis*, 24 Fed. 530. *Conn.*—*Jeffery v. Fitch*, 46 Conn. 601. *Ga.*—*Brower v. Cothran*, 75 Ga. 9.

As to bill in equity, see *supra*, III, D, 12. See also the title "*Bills of Review.*"

51. *Grinnell Brick & Tile Co. v. Booknau*, 167 Iowa 279, 140 N. W. 239; *Lovelace v. Lovell*, 107 Ky. 676, 55 S. W. 549, petition for new trial for error in assessing amount of recovery where statute limits a petition to grounds discovered after the term.

[a] *Treated as a Motion.*—Where a petition contains all the essentials of a sufficient motion it may be treated as a motion if the proper procedure requires a motion. *Hunter v. Porter*, 124 Iowa 351, 100 N. W. 53.

52. *Hines v. Driver*, 100 Ind. 315.

[a] *It is a civil action for a new trial.* *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127.

53. *Chicago, R. I. & P. R. Co. v. Mosher*, 76 Kan. 599, 92 Pac. 554.

[a] *The application is a new action*, in which summons or process regularly issues against the adverse party and which is heard and determined by the court upon evidence adduced by the parties. *Fuller v. United States*, 182 U. S. 562, 21 Sup. Ct. 871, 45 L. ed. 1230.

[b] *The procedure is similar to other matters begun by petition.* *Fox v. Lima Nat. Bank*, 11 Ohio Dec. (Reprint) 127.

[c] *Filing Petition in Original Suit.* "The pleading filed by appellant by leave of court in this case . . . is a petition for a new trial and to vacate the original judgment (on the ground

of evidence discovered after the term at which the judgment was rendered). . . . That it was filed by leave of court in the original suit, instead of with the clerk, as a separate and independent action, does not change its nature, and was not prejudicial to appellee. . . . He was not bound to take any notice of it until after process had been issued thereon and served on him, and it did not stand for trial until the next regular term after such service. But it is essentially a suit which must be tried and determined by the ordinary rules of pleading." *Hackett v. Rosenham*, 105 Ky. 26, 47 S. W. 450.

54. *Hintrager v. Sumbardo*, 54 Iowa 604, 7 N. W. 92.

55. *Ala.*—*Callahan v. Lott*, 42 Ala. 167. *Ind.*—*Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Anderson v. Hathaway*, 130 Ind. 528, 30 N. E. 638; *Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697; *Shewalter v. Williamson*, 125 Ind. 373, 25 N. E. 452. *Ia.*—*Bevering v. Smith*, 90 N. W. 840.

[a] *The facts should be stated directly and not argumentatively.* *Ia.* *Bevering v. Smith*, 90 N. W. 840. *Neb.* *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753, 40 N. W. 298. *Tex.* *Robbie v. Upson* (Tex. Civ. App.), 153 S. W. 406.

56. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Shewalter v. Williamson*, 125 Ind. 373, 25 N. E. 452.

[a] *It is neither necessary nor sufficient to set out in the petition the evidence given at the trial of the original cause, since the evidence there given must be established by proper evidence at the trial of the issues joined on the petition.* *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Stineman v. Beath*, 36 Iowa 73.

57. *Freeman v. Gragg*, 73 Ala. 199;

be resorted to for the supplying of any averments essential to its sufficiency.

A new trial cannot be granted on a petition where the grounds alleged were known to the applicant before the trial,⁵⁸ or, in some jurisdictions, unless the applicant was unavoidably prevented from making his application during the time prescribed for a motion.⁵⁹ Consequently, the petition must show that the causes were discovered after the time in which a motion could be filed, or that the applicant was unavoidably prevented from making his motion.⁶⁰

(II.) **Newly Discovered Evidence.** — The petition, on the ground of newly discovered evidence, must show the character of the evidence, that it is material, not merely cumulative, and that it was discovered after the trial.⁶¹ The petition should also allege that the newly discovered evidence could not, by reasonable diligence, have been discovered in time for the trial,⁶² that due diligence was used,⁶³ and, in some jurisdictions, the facts constituting the alleged diligence must also be stated.⁶⁴

(III.) **Accident and Surprise.** — A petition for a new trial on the ground of accident, surprise, or mistake must set forth the facts upon which the

Davis v. Davis, 145 Ind. 4, 43 N. E. 935.

58. *Connell v. Connell*, 119 Iowa 602, 93 N. W. 582.

59. *Steel v. Seale*, 4 Ky. L. Rep. 42.

60. Ga.—*Watts v. White Hickory Wagon Co.*, 108 Ga. 809, 34 S. E. 147. Ind.—*Shigley v. Snyder*, 45 Ind. 543; *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60. Ia.—*Connell v. Connell*, 119 Iowa 602, 93 N. W. 582. Kan.—*Odell v. Sargent*, 3 Kan. 80. R. I.—*Haggelund v. Oakdale Mfg. Co.*, 26 R. I. 520, 60 Atl. 106; *McDermott v. Rhode Island Co.*, 60 Atl. 48; *McCudden v. Wheeler & Co. Mfg. Co.*, 23 R. I. 528, 51 Atl. 48. Tex.—*Ingle v. Bell*, 84 Tex. 463, 19 S. W. 553; *McGloin v. McGloin*, 70 Tex. 634, 8 S. W. 305; *Cook v. De la Garza*, 13 Tex. 431; *White v. Holmes*, 61 Tex. Civ. App. 438, 129 S. W. 872. Can.—*Woodman v. Moncton*, 20 N. Brunswick, 12.

61. *Freeman v. Gragg*, 73 Ala. 199; *Davidson v. Hughes*, 76 Kan. 247, 91 Pac. 913.

[a] The materiality of the newly discovered evidence must be set forth in the body of the complaint or petition, and not left to inference from the pleadings and evidence in the original case. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Anderson v. Hathaway*, 130 Ind. 528, 30 N. E. 638.

62. Conn.—*Parsons v. Platt*, 37

Conn. 563. Ill.—*Mikshonis v. Hyde Park Hotel Co.*, 178 Ill. App. 593. Ind.—*Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933; *Carver v. Compton*, 51 Ind. 451; *East v. McKee*, 14 Ind. App. 45, 42 N. E. 368. Ia.—*Sullivan v. Herriek*, 161 Iowa 148, 140 N. W. 359. Ky.—*Smith v. Chapman*, 153 Ky. 70, 154 S. W. 915; *Garvy & Co. v. Bancum*, 4 Ky. L. Rep. 731. Neb.—*City Sav. Bank v. Carlon*, 87 Neb. 266, 127 N. W. 161; *Johnson v. Parrotte*, 34 Neb. 26, 51 N. W. 290. N. Y.—*Hagan v. New York, etc. R. Co.*, 44 Misc. 540, 90 N. Y. Supp. 125. Tex.—*White v. Holmes*, 61 Tex. Civ. App. 438, 129 S. W. 872.

63. *Ragsdale v. Matthews*, 93 Ind. 589; *Reno v. Robertson*, 48 Ind. 106; *Johnson v. Parrotte*, 34 Neb. 26, 51 N. W. 290.

64. Ill.—*Exchange Nat. Bank v. Darrow*, 177 Ill. 362, 52 N. E. 356, affirming 74 Ill. App. 170. Ind.—*Davis v. Davis*, 145 Ind. 4, 43 N. E. 935; *Anderson v. Hathaway*, 130 Ind. 528, 30 N. E. 638; *Allen v. Bond*, 112 Ind. 523, 14 N. E. 492; *East v. McKee*, 14 Ind. App. 45, 42 N. E. 368. Ia.—*Scott v. Hawk*, 105 Iowa 467, 75 N. W. 368. Neb.—*Johnson v. Parrotte*, 34 Neb. 26, 51 N. W. 290; *Burlington, etc. R. Co. v. Dobson*, 17 Neb. 450, 455, 23 N. W. 353, 511. Tex.—*Anderson v. Sutherland*, 59 Tex. 409.

application is based,⁶⁵ and show that due diligence was exercised.⁶⁶

c. *Amendments*.—Amendments to a petition may be allowed in accordance with the statutes or rules of court,⁶⁷ and the general principles elsewhere discussed.⁶⁸

d. *Verification*.—Verification of the petition is not necessary where the statute does not require it.⁶⁹

e. *Time and Place of Filing*.—The statutes usually specify the time within which the petition may be filed,⁷⁰ which may be at a subsequent term,⁷¹ or a year,⁷² or even years,⁷³ after the final judgment, or after the discovery of the new evidence. But if a petition is not filed within the prescribed time, it cannot be considered.⁷⁴ The petition should ordinarily be filed with the clerk.⁷⁵

f. *Service of Summons*.—There should be service of summons in case of a petition the same as in other independent actions,⁷⁶ or publication made.⁷⁷

g. *Demurrers and Motions*.—The petition for a new trial may be demurred to as in the case of other petitions or complaints.⁷⁸ Also, in

65. *Fisk v. Miller*, 20 Tex. 572.

66. *Fisk v. Miller*, 20 Tex. 572.

67. *Dothard v. Teague*, 40 Ala. 583.

68. See the titles "*Amendments and Jeofails*;" "*New Cause of Action or Defense*."

69. *Moody v. Branham*, 47 Kan. 314, 27 Pac. 975. *Contra*, *East v. McKee*, 14 Ind. App. 45, 42 N. E. 368. But see *Allen v. Gillum*, 16 Ind. 234.

70. See the statutes.

71. *Ga.*—*Hudgins v. Veal*, 98 Ga. 137, 26 S. E. 479. *Ind.*—*Webster v. Maiden*, 41 Ind. 124. *Ky.*—*Nickell v. Fallen*, 15 Ky. L. Rep. 389, 23 S. W. 366.

[a] *Kentucky*.—Not later than the second term after the discovery. *Nickell v. Fallen*, 15 Ky. L. Rep. 389, 23 S. W. 366; *Voltz v. Tutt*, 13 Ky. L. Rep. 877.

72. *Ind.*—*Tereba v. Standard Cabinet Mfg. Co.*, 32 Ind. App. 9, 68 N. E. 1033. *Ia.*—*Hunter v. Porter*, 124 Iowa 351, 100 N. W. 53; *Bevering v. Smith*, 121 Iowa 607, 96 N. W. 1110. *Neb.*—*Hellman v. David Adler & Sons Clothing Co.*, 60 Neb. 580, 83 N. W. 846. *R. I.*—*Horton v. Feinberg*, 23 R. I. 190, 49 Atl. 696.

73. See the statutes.

74. *Kan.*—*Soper v. Medberry*, 24 Kan. 128. *Ky.*—*Nickell v. Fallen*, 15 Ky. L. Rep. 389, 23 S. W. 366. *Minn.*—*Kurtz v. St. Paul & D. R. Co.*, 65 Minn. 60, 67 N. W. 808; *Lathrop v. Dearing*, 59 Minn. 234, 61 N. W. 24. *N. Y.*—*Peck v. Hiler*, 30 Barb. 655;

Thompson v. Welde, 27 App. Div. 186, 50 N. Y. Supp. 618; *Davis v. Grand Rapids Fire Ins. Co.*, 7 App. Div. 403, 39 N. Y. Supp. 1019; *Evans v. United States Life Ins. Co.*, 21 Abb. N. C. 315, 12 N. Y. St. 635. *E. I.*—*Horton v. Feinberg*, 23 R. I. 190, 49 Atl. 696.

[a] *The year runs from* entry of judgment. *Bevering v. Smith*, 121 Iowa 607, 96 N. W. 1110; *Gray v. Coan*, 48 Iowa 424. See *Hunter v. Porter*, 124 Iowa 351, 100 N. W. 53.

75. *Hacket v. Rosenham*, 105 Ky. 26, 47 S. W. 450.

[a] *Need Not Be Filed in Open Court*.—*Scott v. Scott's Exr.*, 82 Ky. 328; *Carroll v. Haugartner*, 66 Wis. 511, 29 N. W. 210; *Smith v. Smith*, 51 Wis. 665, 8 N. W. 868.

[b] *Presented to Judge*.—A petition for new trial after final judgment must be presented to the judge in person. It is not sufficient to file it with the clerk. *Ex parte Johnson*, 60 Ala. 429.

76. *Ind.*—*Hiatt v. Ballinger*, 59 Ind. 303. *Ia.*—*Engels v. Kiene*, 88 N. W. 331; *Darrance v. Preston*, 18 Iowa 396. *Kan.*—*Chicago, R. I. & P. R. Co. v. Mosher*, 76 Kan. 599, 92 Pac. 554. *Ky.*—*Hacket v. Rosenham*, 105 Ky. 26, 47 S. W. 450.

77. *Darrance v. Preston*, 18 Iowa 396; *Kan. Gen. Sts.*, 1915, §7210.

78. *Ind.*—*Hines v. Driver*, 100 Ind. 315; *Sanders v. Loy*, 45 Ind. 229. *Kan.*—*Sexton v. Lamb*, 27 Kan. 432. *Neb.*—*Axtell v. Warden*, 7 Neb. 186.

[a] *A petition on the ground of*

some jurisdictions, like any other petition, it may be met with a motion to make more definite and certain.⁷⁹ The fact that it sets forth several grounds does not make it objectionable as stating several causes of action.⁸⁰

h. *Answer*.—In some jurisdictions, the statutes provide that the facts stated in the petition shall be considered as denied without answer.⁸¹ In others, however, an answer may be required to be filed.⁸²

i. *Hearing*.—The statutes usually provide for a prompt hearing of the petition,⁸³ and the issues are tried as in any other proceeding.⁸⁴

F. **HEARING.—1. In General.**—The practice in connection with the hearing and the decision upon motions for new trials is largely regulated by local rules of court and statutes.⁸⁵

2. Time of Hearing.—The time of the hearing is ordinarily fixed either by the rules or by statute, which may be within a specified time after filing the motion, or after judgment,⁸⁶ or at the earliest practical time after filing the affidavits or notice of intention,⁸⁷ or within the term at which the trial was held.⁸⁸ In the absence of such regulations,

newly discovered evidence (1) is not demurrable for the reason that it contains merely a general allegation of diligence, and inability to obtain the evidence set out, where the particular acts of diligence are not called for. *Scott v. Hawk*, 105 Iowa 467, 75 N. W. 368. (2) "We do not think the question of the probable effect of the new evidence, where it is material and competent and not cumulative, is one to be determined upon a demurrer to the petition. Whether or not it is cumulative, however, may well be decided in that manner, and such a decision is open to review on appeal. 'No discretion is reposed in the court in determining whether or not evidence is cumulative. It is a bare legal proposition, which has been a fruitful subject of discussion in the courts for many years.' (Town of Manson v. Ware, 63 Iowa 345, 349.)" *Haughton v. Bilson*, 84 Kan. 129, 113 Pac. 400.

79. See *Grinnell Brick & Tile Co. v. Booknau*, 167 Iowa 279, 149 N. W. 239.

80. *Gottlieb Bros. v. Jasper*, 27 Kan. 770.

81. See the statutes.

82. *Slusser v. Palin*, 35 Ind. App. 335, 74 N. E. 17; *Hackett v. Rosenham*, 105 Ky. 26, 47 S. W. 450.

83. See the statutes.

84. See the statutes and the following: *Ind.*—*Davis v. Davis*, 145 Ind. 4, 43 N. E. 935. *Ia.*—*Engels v. Kiene*, 88 N. W. 331; *Scott v. Hawk*, 105

Iowa 467, 75 N. W. 368; *Stineman v. Beath*, 36 Iowa 73. *Okla.*—*Butt v. Carson*, 5 Okla. 160, 48 Pac. 182; *Long v. Board of Comrs.*, 5 Okla. 128, 47 Pac. 1063.

[a] The court is not concluded by the statements in the petition and affidavits, but may consider the same as affected by, and bearing upon all the testimony and all the facts as developed upon the original trial. *Sexton v. Lamb*, 27 Kan. 432 (*per Brewer, J.*); *Chicago, R. I. & P. R. Co. v. Mosher*, 76 Kan. 599, 92 Pac. 554.

[b] A transcript of the record is not essential. *Roush v. Layton*, 51 Ind. 106; *Rickart v. Davis*, 42 Ind. 164; *Freeman v. Bowman*, 25 Ind. 236.

[c] **Bill of Exceptions.**—The evidence on the trial as well as the newly discovered evidence must be set out in a bill of exceptions. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753, 40 N. W. 298.

85. See the statutes and rules of court.

86. See the statutes, and *Ariz. Rev. St.*, 1913, §591.

87. See *Cal.*—*Code Civ. Proc.*, 1917, §660. *Colo.*—*Code*, 1910, §§238, 239. *Idaho.*—*Session Laws*, 1911, p. 377.

88. *U. S.*—*James v. Appel*, 192 U. S. 129, 24 Sup. Ct. 222, 48 L. ed. 377. *Ariz.*—*Ruff v. Hand*, 3 Ariz. 175, 24 Pac. 257. *Ark.*—*Vallentine v. Holland*, 40 Ark. 338; *Walker v. Jefferson*, 5 Ark. 23. *D. C.*—*Doddridge v. Gaines*, 1 MacArthur 335. *Ind.*—*Ferger v*

the fixing of the time is within the discretion of the court.⁸⁹ Where based upon the minutes of the court, the motion should be brought on for hearing promptly while the facts are still fresh in the mind of the judge.⁹⁰

In criminal cases the time fixed by statute sometimes differs from that prescribed for civil cases.⁹¹

3. Notice of Hearing.—The rules or the statute may require notice of the hearing to be served upon the opposing party.⁹²

4. Continuances.—A hearing may be postponed or continued in the discretion of the court.⁹³ In many jurisdictions, moreover, if the motion is filed during the term, the hearing may be continued to a subsequent term.⁹⁴

5. Hearing in Chambers or in Vacation.—Except where it is so

Wesler, 35 Ind. 53; Blair *v.* Russell, 1 Ind. 516, Smith 287. **Ky.**—Snyder *v.* Cox, 21 Ky. L. Rep. 796, 53 S. W. 263. **Minn.**—Le Tourneau *v.* Aitkin County, 73 Minn. 82, 80 N. W. 840. **N. Y.** Rayne *v.* O'Connor, 84 Misc. 41, 145 N. Y. Supp. 980. **N. C.**—England *v.* Duckworth, 75 N. C. 309. **S. C.**—Calhoun *v.* Port Royal & W. C. Ry. Co., 42 S. C. 132, 20 S. E. 30; Molair *v.* Port Royal & A. Ry. Co., 31 S. C. 510, 10 S. E. 243. **Tex.**—Niagara Ins. Co. *v.* Lee, 73 Tex. 641, 11 S. W. 1024; Bass *v.* Hays, 38 Tex. 128; Bradford *v.* Malone (Tex. Civ. App.), 130 S. W. 1013. **Wis.**—Kurath *v.* Gove Automobile Co., 144 Wis. 480, 129 N. W. 619; Prentiss *v.* Danaher, 20 Wis. 311.

89. Ga.—Greer *v.* State, 87 Ga. 559, 13 S. E. 552. **Idaho.**—Behrensmeyer *v.* Gwinn, 25 Idaho 186, 136 Pac. 623. **Minn.**—Phoenix *v.* Gardner, 13 Minn. 294.

90. State *ex rel.* Cohn *v.* District Court, 38 Mont. 119, 99 Pac. 139, 141; Prentiss *v.* Danaher, 20 Wis. 311; Dunbar *v.* Hollinshead, 10 Wis. 505.

91. See the statutes.

92. See the statutes, and Cochran *v.* Philadelphia Mtg. & Tr. Co., 70 Neb. 100, 96 N. W. 1051; Kennedy *v.* Kennedy, 18 N. J. L. 51; Earl *v.* Burr, 12 N. J. L. 321.

[a] **Notice Not Required.**—In the absence of statutory requirement or rule of court, notice is unnecessary. **Colo.**—Shafer *v.* Hewitt, 6 Colo. App. 374, 41 Pac. 509. **Ga.**—Wiggins *v.* Marietta Trust, etc. Co., 134 Ga. 346, 67 S. E. 813. **P. I.**—Chaves *v.* Linan, 1 Phil. Isl. 448.

Notice of motion, see *supra*, III, E, 2, f.

93. Ga.—Brewer *v.* New England Mortg., etc. Co., 130 Ga. 761, 61 S. E. 712; Shockley *v.* Turnell, 114 Ga. 378, 40 S. E. 279; Tyler *v.* Arnett, 13 Ga. App. 595, 79 S. E. 482. **Ill.**—Wentworth *v.* Treat, 89 Ill. App. 214. **Kan.** Wheeler & Wilson Mfg. Co. *v.* Morgan, 29 Kan. 519. **Mo.**—King *v.* King, 42 Mo. App. 454. **Tex.**—Hayes *v.* Gallaher, 21 Tex. Civ. App. 88, 51 S. W. 280.

[a] **To Give Opportunity for Counter-affidavits.**—Smith *v.* Shook, 30 Mont. 30, 75 Pac. 513.

94. U. S.—Walker *v.* Moser, 117 Fed. 230, 54 C. C. A. 262. **Ala.**—Walker *v.* Hale, 16 Ala. 26. **Colo.**—Gomer *v.* Chaffe, 5 Colo. 383. **Ga.**—Kehely *v.* Atlantic Consol. St. R. Co., 103 Ga. 563, 29 S. E. 712; King *v.* Carey, 5 Ga. 270. **Ind.**—State *v.* Clark, 16 Ind. 97. **Ia.**—Van de Haar *v.* Van Domseler, 56 Iowa 671, 10 N. W. 227. **Kan.** Hinchey *v.* Starrett, 91 Kan. 181, 137 Pac. 81; Mound City Mut. L. Ins. Co. *v.* Twining, 19 Kan. 349; Brenner *v.* Bigelow, 8 Kan. 496. **Ky.**—Gordon *v.* Com., 136 Ky. 508, 124 S. W. 806. **Mo.**—Gray *v.* Missouri Lumb. & Min. Co., 177 S. W. 595; State *v.* McQuillin, 246 Mo. 586, 151 S. W. 444. **Ohio.** Coleman *v.* Edwards, 5 Ohio St. 51. **Utah.**—Wasatch Min. Co. *v.* Jennings, 14 Utah 221, 46 Pac. 1106.

[a] **Time of Hearing.**—It is not necessary that the hearing be held within the time fixed by the statute for the filing of the motion. If the motion is filed in time but the court adjourns sine die without taking any action upon it, the motion will be continued to the next term of court. Mound City Mut. Life Ins. Co. *v.*

expressly provided by statute that the hearing may be in vacation or in chambers,⁹⁵ it must be conducted in court and at term time.⁹⁶

6. Assistance of Counsel.—The parties have a right to be heard by counsel.⁹⁷

7. Presence of Parties.—The parties, of course, have a right to be present, particularly in a criminal case.⁹⁸ In the latter class of cases the general rule seems to be that the presence of the accused is not necessary,⁹⁹ unless required by statute;¹ though there is authority to the contrary.² However, the court may refuse to hear the motion if the accused is not personally present,³ except in misdemeanor cases punishable only by fine.⁴

8. Before What Court.—Regularly, the motion is heard in the trial court, and by the judge who tried the case,⁵ although it may be heard by his successor, or by some other judge, in accordance with the local rules of court or statutes.⁶

9. Evidence and Record in Support of Application.—a. *In General.*—Matters of evidence in connection with applications for new trials will be found discussed in another work.⁷ The motion itself cannot speak as to the facts, but they must be made to appear in some other way.⁸ The character of the showing required depends largely

Twining, 19 Kan. 349; Brenner v. Bigelow, 8 Kan. 496.

95. See the statutes. See also 16 STANDARD PROC. 618.

96. Donly v. Fort, 42 S. C. 200, 20 S. E. 51. See also 16 STANDARD PROC. 618.

97. Railway Co. v. Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71, holding that an arbitrary refusal of the court to hear counsel in argument upon a motion for a new trial is error.

[a] See, however, State v. Boasso, 38 La. Ann. 202, holding that it is not a denial of accused's constitutional right to be heard by counsel where the court refuses to hear argument on the ground that the verdict is contrary to law and evidence.

98. State v. Lewis, 80 Mo. 110; Berkley v. State, 4 Tex. App. 122.

[a] See also State v. Decklotts, 19 Iowa 447, holding that the error in denying the right of defendant to be present may be cured by permitting him to be present at a rehearing of the motion.

99. La.—State v. Harris, 34 La. Ann. 118. Mass.—Com. v. Costello, 121 Mass. 371, 23 Am. Rep. 277. Mich. People v. Ormsby, 48 Mich. 494, 12 N. W. 671. Miss.—See Simpson v. State, 56 Miss. 297. Pa.—Jewell v. Com., 22 Pa. 94. S. C.—State v. Jefcoat, 20 S. C. 383.

1. Simpson v. State, 56 Miss. 297; Berkley v. State, 4 Tex. App. 122; Gibson v. State, 3 Tex. App. 437.

2. Hooker v. Com., 13 Gratt. (54 Va.) 763.

3. Me.—Anonymous, 31 Me. 592. Mass.—Com. v. Andrews, 97 Mass. 543. S. C.—State v. Rippon, 2 Bay 99. Eng. Rex v. Teal, 11 East. 307, 103 Eng. Reprint 1022; Rex v. Bembridge, 3 Doug. 327, 330, 26 E. C. L. 218, 99 Eng. Reprint 679; Rex v. Gibson, 2 Str. 968, 7 Mod. 205, 93 Eng. Reprint 972; Howard v. Reg., 10 Cox C. C. 54; The Queen v. Caudwell, 17 Q. B. 503.

4. Reg. v. Parkinson, 2 Den. C. C. 459, 15 Jur. 1011.

5. Wallace v. Columbia, 48 Mo. 436. See *supra*, III, C.

6. See the statutes and *supra*, III, C, 2.

[a] Where a motion is continued till the trial judge has gone out of office, the motion may be heard by his successor. American Cent. Ins. Co. v. Neff, 43 Kan. 457, 23 Pac. 606; Bass v. Swingley, 42 Kan. 729, 22 Pac. 714.

7. See ENCY. OF EV., title "New Trial."

8. Chiles v. State, 45 Ark. 143. See also Werner v. State, 44 Ark. 122; Donevant v. Mothershed, 2 Mill (S. C.) 169.

upon the grounds themselves and whether the motion is based upon the record or minutes of the court, or upon affidavits or other extrinsic evidence.⁹

b. *Oral Testimony*.—The admission of oral testimony in support of a motion for new trial is, unless the statutes otherwise provide, a matter largely within the discretion of the court.¹⁰

c. *Bill of Exceptions*.—Whether a bill of exceptions is necessary or proper depends largely upon the grounds of the motion, the character of the evidence relied upon, and the statute or rules as to what the motion may or must be based on.¹¹ If such a bill be a necessary or proper method of getting into the record matters which would not otherwise be available on the hearing, it should be prepared in accordance with the requirements of the statute, if any, and the rules and principles elsewhere treated.¹²

d. *Statement or Case*.—Under some statutes the motion may be made upon what is variously designated as a "statement of the case,"

9. See *infra*, this section.

[a] **The recollection of the court may be aided by affidavits and the briefs of counsel.** *Chandler v. Thompson*, 30 Fed. 38.

[b] **When the hearing is not founded on facts in the knowledge of the court,** the evidence may be presented in open court, or by depositions, or by interrogatories, or by cross-interrogatories, or by a commissioner appointed by the court, on consent of the parties. *Vose v. Mayo*, 3 Cliff. 484, 29 Fed. Cas. No. 17,009.

10. **Colo.**—*Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103. **Ind.**—See *Allen v. Gillum*, 16 Ind. 234. **Kan.** *Gano v. Wells*, 36 Kan. 688, 14 Pac. 251. **Mass.**—*Spaulding v. Knight*, 118 Mass. 528. **Mo.**—*Howland v. Reeves*, 25 Mo. App. 458, oral examination of the sheriff on alleged misconduct of the jury. **Tenn.**—*Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

[a] **Where it is permissible for a juror to testify,** his testimony may be taken orally at the hearing. *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341; *State v. Horne*, 9 Kan. 119. As to propriety of juror's impeaching his verdict, see 2 ENCY. OF EV. 218, 220; 8 ENCY. OF EV. 964.

11. See the statutes and *infra*, this note. See also the title "Bills of Exceptions."

[a] **In absence of a statute, or a rule,** requiring it, a bill of exceptions is not an essential, however, on the motion for a new trial, since the recollections of the court may be aided by

other means of evidence. *Chandler v. Thompson*, 30 Fed. 38, 39.

[b] **A bill of exceptions is necessary** (1) to review sufficiency of evidence as a ground for a new trial. *Ralston v. Kohl's Admr.*, 30 Ohio St. 92. (2) Where the motion is heard by a different judge from the one presiding at the trial, the verdict will not be set aside on the ground of excessive damages, unless all the evidence relating to the character and extent of the damage sustained is preserved by a bill of exceptions. *Farshall v. Minneapolis & St. L. Ry. Co.*, 35 Fed. 649.

[c] **A rule of court requiring a bill of exceptions is inconsistent with a statutory definition** declaring a new trial to be a re-examination of an issue of fact "in the same court," since the court is bound to know, without such a bill, what occurred. *Emery v. Emery*, 54 Iowa 106, 6 N. W. 152.

Necessity of stating in notice of intention whether motion based on bill of exceptions, see *supra*, III, E, 1, e.

12. See the statutes and the title "Bills of Exceptions."

[a] **Must be served within the time required by law.** *Benedix v. German Ins. Co.*, 80 Wis. 148, 49 N. W. 811.

[b] **Incorrect Designation.**—Where the meaning is obvious, a bill of exceptions will not be invalidated by the mere fact that it was designated by some other term. *Robinson v. Helena Light & R. Co.*, 38 Mont. 222, 99 Pac. 837; *Friel v. Kimberly-Montana Gold Min. Co.*, 34 Mont. 54, 85 Pac. 734.

a "statement," a "case," or by some equivalent name, the purpose of which is to furnish and preserve the necessary record evidence of the proceedings upon which the motion is founded.¹³ Where such a statement is essential, the motion cannot be determined before it has been settled,¹⁴ and an order for a new trial made without the necessary statement, or other substitute, cannot stand.¹⁵ It also furnishes, under some statutes, the particulars as to the grounds or errors relied upon where there has been a general statement in the notice or motion.¹⁶

e. *Minutes of the Court*.—In some states, the statutes provide that the motion for a new trial may be made upon the minutes of the court,¹⁷ or that the judge presiding at the trial may, in his discretion, entertain such a motion made upon his minutes.¹⁸ When the motion is made on the minutes, the court may take into consideration the pleadings, orders of the court on file, and reference may be made to the record, minute entries, depositions and any other documentary evidence offered at the trial, and to the report of the proceedings taken by the stenographer, or, if none, to such proceedings as are within the recollection of the judge.¹⁹ The fact that no written memoranda have been made

13. See fully the titles "**Case on Appeal**;" "**Statement and Abstract of Case**."

Necessity of reference to in notice of intention to move for new trial, see *supra*, III, E, 1, e.

As supplementary to motion, see III, E, 2, b, (II).

14. *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605.

15. *Parrott v. Hot Springs*, 9 S. D. 202, 68 N. W. 329.

16. See the title "**Statement and Abstract of Case**."

17. See the statutes and the following: Cal.—*Malcolmson v. Harris*, 90 Cal. 262, 27 Pac. 206; *Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 639, 110 Pac. 591. Minn.—*Gribble v. Livermore*, 64 Minn. 396, 67 N. W. 213. Mont.—*State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139. S. C.—*Molair v. Port Royal & A. Ry. Co.*, 31 S. C. 510, 10 S. E. 243. Wis.—*Emmons v. Sheldon*, 26 Wis. 648.

[a] **Minutes of the Court**.—Before the day of official stenographers, the trial judge made, independently of the record proper, brief notes of the proceedings, such notes being known as "the judge's minutes," or "minutes of the court." *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205.

[b] **Object of the Statute**.—"There seems to be considerable doubt in the minds of attorneys, as to what the legislature meant in the amendment of 1907 by the use of the terms 'upon

the minutes of the court.' . . . Other states have somewhat similar statutes, and a review of these, and the decisions of courts construing them, has led us to conclude that the purpose which our legislature had in view, doubtless, was to facilitate the proceeding for a new trial and save the moving party useless expense in the event his motion should be granted and no appeal taken. If we are correct in this conclusion, then it follows, in the absence of any restriction in the statute, that the review by the trial court may be as comprehensive as if all the proceedings had been reduced to writing and embodied in the judgment-roll, including a bill of exceptions." *State v. District Court*, 38 Mont. 119, 99 Pac. 139, 141.

18. See the statutes and *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

[a] **The New York statute applies** (1) only to jury trials. *Knight v. Sackett & W. L. Co.*, 29 Jones & S. 219, 19 N. Y. Supp. 712, 31 Abb. N. C. 373, 46 N. Y. St. 866. (2) The procedure is also limited to the grounds expressed in the statute. See *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 120, 25 N. E. 325, 9 L. R. A. 612. (3) Irregularity on the part of the jury is not one of the reasons for a new trial under this section. *Jarchover v. Dry Dock, E. B. & B. R. Co.*, 54 App. Div. 238, 66 N. Y. Supp. 575.

19. Cal.—See §660, Code Civ. Proc., 1916. Idaho.—*Kelley v. Clark*, 21

does not prevent the making and entertaining of a motion on the minutes of the court.²⁰

f. *Brief of the Evidence*. — Sometimes, under statute, a "brief of the evidence" must be filed with the motion for a new trial.²¹ The brief is subject to the approval of the judge, and subject to the right of amendment allowed in applications for a new trial.²² Evidence, whether oral²³ or documentary,²⁴ not included in the brief, will not be considered.

g. *Affidavits*. — (I.) *In General*. — Where the grounds for a new trial are not apparent of record, affidavits are generally required in support of the application.²⁵ They are usually filed, and the statutes or rules often expressly require them, when the motion is grounded upon (1) irregularities in the proceedings, (2) misconduct of the jury or prevailing party, (3) accident or surprise, and (4) newly discovered evidence.²⁶ Affidavits, however, are not binding upon the court, but are

Idaho 231, 121 Pac. 95. *Mont.*—*State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139.

[a] *The notes of the official stenographer* taken at the trial (1), when written out at length, may in the discretion of the judge be treated as the minutes of the court upon the trial. *N. Y. Code Civ. Proc.*, §1007; *Schlottterer v. Brooklyn & N. Y. Ferry Co.*, 102 App. Div. 363, 92 N. Y. Supp. 674. (2) It is not even necessary that the stenographer's notes be transcribed, if the presiding judge can remember the evidence and the proceedings sufficiently to enable him to pass upon the motion. *State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139, 141. (3) Reference may be made to the stenographer's notes without waiting for a transcript of them. *Kelley v. Clark*, 21 Idaho 231, 121 Pac. 95.

20. *Malcolmson v. Harris*, 90 Cal. 262, 27 Pac. 206, the court may depend upon its recollection. See also *State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139.

21. *Taylor v. Tanner*, 143 Ga. 18, 84 S. E. 68; *Ward v. Ward*, 134 Ga. 714, 68 S. E. 478. See also the title "State-ment and Abstract of Case."

[a] *Brief on Defendant's Motion Available on Plaintiff's Motion*.—See *Stewart v. Mynatt*, 135 Ga. 637, 70 S. E. 325.

[b] *Such a brief is essential to the validity of the motion*. *Moxley v. Georgia Ry. & Elec. Co.*, 122 Ga. 493, 50 S. E. 339.

22. *Park's Ann. Code*, 1914, §6089; *Central R. & Bkg. Co. v. Pool*, 95 Ga.

410, 22 S. E. 631; *Hinson v. Guckenhimer*, 95 Ga. 567, 22 S. E. 274; *Watson v. Long*, 94 Ga. 255, 21 S. E. 507.

23. *Rodahan v. Terry*, 83 Ga. 399, 9 S. E. 721.

24. *Southern Ry. Co. v. Dantzler*, 99 Ga. 323, 25 S. E. 606.

25. See generally the statutes and the following discussion. See also *ENCY. OF EV.*, title "New Trial."

[a] *English Common Law*.—See *Tidd's Pr.* 914.

[b] *Admissible When*. — Affidavits are not admissible for the purpose of presenting additional evidence upon the original issues except in case of newly discovered evidence. They are necessary, however, to establish grounds for a new trial that are dehors the record. *Mayeski v. His Creditors*, 40 La. Ann. 94, 4 So. 9; *Cochrane v. Knowles*, 3 G. Gr. (Iowa) 115.

[c] *Covered by Bill of Exceptions*. If the contents of proposed affidavits are substantially embodied in a bill of exceptions, it is not error to refuse to admit them. *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89.

[d] *Where there is no statute regulating affidavits in support of motions for new trials*, the matter is one of practice. They may be filed without leave of court, and the court in its discretion may grant a continuance, even at the hearing, to enable them to be prepared. *Howland v. Reeves*, 25 Mo. App. 458.

26. See the statutes, and *ENCY. OF EV.*, title "New Trial."

open to the scrutiny of its judgment,²⁷ and counter-affidavits may be filed by the adverse party.²⁸

(II.) **Requisites.** — Affidavits should be in the English language,²⁹ executed by competent witnesses,³⁰ and filed and served as required by law.³¹

(III.) **Of Jurors.** — It is a general rule, to which there are exceptions in some jurisdictions, that the affidavits of jurors are not admissible to impeach their verdict for irregularity of themselves or their associates, but that they are admissible for the purpose of sustaining the verdict.³²

G. **DETERMINATION.** — 1. **Duty of the Court.** — Upon the hearing, it is the duty of the court to consider the grounds for the motion. This means a judicial consideration, an exercise of judgment as to the sufficiency of the grounds. To refuse such consideration, and to overrule a motion arbitrarily, or pro forma, is error.³³ When the motion is based upon the ground of errors of law occurring at the trial, all rulings of the court made during the trial, and properly excepted to and presented, should again be considered by the court.³⁴ In applications based on the weight or the insufficiency of the evidence, it is the duty of the court to weigh the evidence,³⁵ and in case of alleged newly dis-

27. *Bruce v. Truett*, 5 Ill. 454; *Burton v. Malthy*, 18 La. 531; *Flower v. O'Connor*, 8 Mart. N. S. (La.) 592.

28. *Ind.*—*Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483; *Newcastle & R. R. Co. v. Chambers*, 6 Ind. 346. *Ky.* *Bratton v. Bryan*, 1 A. K. Marsh. 212. *R. I.*—*Burlingame v. Cowee*, 16 R. I. 40, 12 Atl. 234, to enlighten but not to control the court's discretion.

29. *Spencer v. Doane*, 23 Cal. 418.

30. *Donley v. Wiggins*, 52 Tex. 301.

31. See the statutes.

32. See *ENCY. OF EV.*, title "New Trial," and also 3 *ENCY. OF EV.* 220, 234.

33. *Cal.*—*Boin v. Spreckels Sugar Co.*, 155 Cal. 612, 102 Pac. 937; *Morgan v. Los Angeles Pac. Co.*, 13 Cal. App. 12, 108 Pac. 735. *Ga.*—*McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71; *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912. *Kan.* *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772; *Smith v. Benton*, 54 Kan. 708, 39 Pac. 701; *Larabee v. Hall*, 50 Kan. 311, 31 Pac. 1062. *La.*—*Adams v. Webster*, 25 La. Ann. 113. *Nev.* *Goldfield Mohawk Min. Co. v. Francis-Mohawk Min. & L. Co.*, 33 Nev. 491, 112 Pac. 42. *N. Y.*—*Tracey v. Altmyer*, 46 N. Y. 598; *Yaw v. Whitmore*, 66 App. Div. 317, 72 N. Y. Supp. 765. *Tenn.*—*East Tennessee, V. & G. R. R. Co. v. Lee*, 95 Tenn. 388, 32 S. W.

249. *Vt.*—*Ranney v. St. Johnsbury & L. C. R. Co.*, 67 Vt. 594, 32 Atl. 810.

[a] But the mere refusal to hear argument on the motion, even in a criminal case, does not necessarily constitute reversible error. *Hodge v. Territory*, 12 Okla. 108, 69 Pac. 1077.

[b] Where a case is heard by the court without a jury, it is not error to overrule a motion for a new trial pro forma, refusing to hear it upon its merits, and the findings of fact and the judgment will not be disturbed by this court if the evidence is sufficient to sustain such findings and judgment. *Pinson v. Prentise*, 8 Okla. 143, 56 Pac. 1049.

34. *Da Lee v. Blackburn*, 11 Kan. 190; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944; *Boyd v. Bryan*, 11 Okla. 56, 65 Pac. 940.

[a] But see *Thorne v. American Distributing Co.*, 117 Fed. 973, to the effect that the law embodied in the instructions cannot properly be reconsidered except to remedy some inadvertent error.

35. *Big Brushy Coal & Coke Co. v. Williams*, 176 Fed. 529, 99 C. C. A. 102.

[a] **Not To Be Sustained Upon an Untried Theory.**—"A verdict which, upon the issue submitted to the jury, is against the weight of the evidence introduced at the trial cannot be sus-

covered evidence, the questions to be considered are whether the evidence is, in fact, newly discovered and material, or whether merely cumulative, and whether diligence was exercised in its discovery.³⁶

2. Discretion of the Court.—In deciding a motion for a new trial not only the judicial, but also the discretionary, function of the court is invoked.³⁷ While there may be cases where the grounds for a new trial are so clear and imperative that, as a matter of justice, it may be the duty of the court to grant a new trial,³⁸ yet a new trial is not, unless expressly so given by statute, a matter of right,³⁹ and the court is not bound to grant a new trial even if both parties ask for it,⁴⁰ or because both parties are dissatisfied with the results;⁴¹ but as a general rule, the granting or refusing a new trial lies in the judicial discretion of the court.⁴² Thus, where the application alleges that the verdict is

tained by the opinion of the court upon a distinct ground of liability, which has not been alleged or tried, and which can only be put in issue by an amendment of the declaration and by evidence which the jury have never been permitted to consider, nor the defendants to be heard upon before them." *Elkins v. Boston & Albany Ry.*, 115 Mass. 190.

[b] **Disputed Facts.**—In a motion for a new trial on the minutes made upon a case and exceptions, all disputed facts must be found in favor of the party in whose favor the jury found. *Clark v. Lyons*, 38 Misc. 516, 77 N. Y. Supp. 967.

36. *Finfrock v. Ungeheuer*, 8 Kan. App. 481, 54 Pac. 504. See generally *supra*, II, H.

37. **Ga.**—*Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912; *Central R. & Bkg. Co. v. Ogletree*, 97 Ga. 325, 22 S. E. 953. **Kan.**—*Ragan v. James*, 7 Kan. 354. **N. Y.**—*Seeley v. Chittenden*, 4 How. Pr. 265. **Wash.**—*Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166.

See also *supra*, I, B, 5, a, (I), (B).

38. See: **Mont.**—*Case v. Kramer*, 34 Mont. 142, 85 Pac. 878. **Ohio.**—*Heffner v. Scranton*, 27 Ohio St. 579. **Eng.**—*Newcastle v. Broxtowe*, 4 Barn. & Ad. 273, 24 E. C. L. 126, 110 Eng. Reprint 458.

[a] Where the court is satisfied that the verdict is wrong and upon legal grounds should be set aside, it is his duty to grant a new trial. *Myers v. Knabe*, 4 Kan. App. 484, 46 Pac. 472.

39. *Kearney v. Snodgrass*, 12 Ore.

311, 7 Pac. 309; *Kinney v. Beverley*, 2 Hen. & M. (12 Va.) 318, 327.

Statutory new trial as of right, see *supra*, I, B, 8.

40. **Ill.**—*Smedley v. Chicago & N. W. Ry. Co.*, 45 Ill. App. 426. **Kan.**—*Gunn v. Durkee*, 41 Kan. 144, 21 Pac. 156. **Ohio.**—*Brainard v. Lane*, 26 Ohio St. 632. **W. Va.**—*Guyandotte Valley Ry. Co. v. Buskirk*, 57 W. Va. 417, 50 S. E. 521, 110 Am. St. Rep. 785.

41. *Fabricant v. Philadelphia Rapid Transit Co.*, 138 Fed. 976; *McLaughlin Bros. v. American Express Co.*, 14 Ohio Dec. (N. P.) 607.

42. **U. S.**—*McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. ed. 98; *Thompson & Co. v. Shea*, 11 Fed. 847. **Cal.**—*Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Gutierrez v. Brinkerhoff*, 64 Cal. xvii, 1 Pac. 482; *Pinkham v. McFarland*, 5 Cal. 137. **Fla.**—*Haile v. Mason Hotel & Investment Co.*, 71 Fla. 469, 71 So. 540. **Ga.**—*Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912; *Wheelus v. Long*, 73 Ga. 110. **Ill.**—*Smedley v. Chicago & N. W. Ry. Co.*, 45 Ill. App. 426. **Ind.**—*Aiken v. Bruen*, 21 Ind. 137. **Ia.**—*Marr v. Burlington, C. R. & N. R. Co.*, 121 Iowa 117, 96 N. W. 716; *Conklin v. Dubuque*, 54 Iowa 571, 6 N. W. 894; *Humphreys v. Hoyt*, 4 G. Gr. 245. **Kan.**—*Gunn v. Durkee*, 41 Kan. 144, 21 Pac. 156; *Ragan v. James*, 7 Kan. 354. **La.**—*Pahnwitz v. Fassman*, 2 La. Ann. 625. **Md.**—*Sittig v. Birkestack*, 38 Md. 158. **Mass.**—*Boyd v. Boston Elevated Ry. Co.*, 224 Mass. 199, 112 N. E. 607; *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. **Miss.**—*See Dulaney v. Rankin*, 47 Miss. 391. **Mo.**—*Farrell v. St. Louis Transit Co.*,

contrary to evidence,⁴³ or that the damages are inadequate or excessive,⁴⁴ or that the result was due to accident or surprise,⁴⁵ or that new

- 103 Mo. App. 454, 78 S. W. 312; *Noble v. Kansas City*, 95 Mo. App. 167, 68 S. W. 969. **N. Y.**—*Gautier v. Douglass Mfg. Co.*, 52 How. Pr. 325, 17 Civ. Proc. 371, 26 N. Y. St. 40; *Mulford v. Yager*, 54 Hun 633, 7 N. Y. Supp. 88, 4 Silv. 58; *Oberlie v. Bushwick Ave. R. Co.*, 43 Hun 638, 6 N. Y. St. 771. **N. C.**—*Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727. **Ohio**.—*Stuckey v. Bloomer*, 1 Ohio Cir. Dec. 631, 2 Ohio Cir. Ct. 541; *Miller v. Simms*, 13 Ohio Dec. 675, 1 Cin. R. 485. **Okla.**—*St. Paul Fire & Marine Ins. Co. v. Peck*, 158 Pac. 595. **Pa.**—*Cronrath v. Border*, 27 Pa. Super. 15; *Com. v. Manson*, 2 Ashm. 31. **S. C.**—*Maekie v. Garlington*, 3 McCord 276. **S. D.**—*Kunz v. Dinneen*, 18 S. D. 262, 100 N. W. 165; *Polk v. Carney*, 17 S. D. 436, 97 N. W. 360. **Va.**—*Citizens' Bank of Norfolk v. Taylor & Co.*, 104 Va. 164, 51 S. E. 159. **Wis.**—*Heller v. Abbot*, 79 Wis. 409, 48 N. W. 598. **Eng.** *Doe ex dem. Tatham v. Wright*, 6 N. & M. 132, 1 H. & W. 729, 5 L. J. K. B. 124; *Wood v. Gunston*, Style 462, 466, 82 Eng. Reprint 864, 867.
43. **U. S.**—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. 1334, 30 L. ed. 1022; *McBride v. Neal*, 214 Fed. 966, 131 C. C. A. 262; *Copper River & N. W. R. Co. v. Reeder*, 211 Fed. 280, 127 C. C. A. 648; *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321. **Ala.**—*United States Cast Iron Pipe, etc. Co. v. Granger*, 172 Ala. 546, 55 So. 244; *Richardson v. Birmingham Cotton Mfg. Co.*, 116 Ala. 381, 22 So. 478. **Cal.**—*Wurzbarger v. Nellis*, 165 Cal. 48, 130 Pac. 1052; *Holtum v. Germania L. Ins. Co.*, 139 Cal. 645, 73 Pac. 591; *In re Wickersham's Est.*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437. **Conn.**—*Stern v. Simons*, 77 Conn. 150, 58 Atl. 696; *Fell v. John Hancock Mut. L. Ins. Co.*, 76 Conn. 494, 57 Atl. 175; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. **Fla.**—*Farrell v. Solary*, 43 Fla. 124, 31 So. 283; *Bishop v. Taylor*, 41 Fla. 77, 25 So. 287. **Ga.**—*McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71; *Georgia, C. & N. R. Co. v. Mathews*, 116 Ga. 424, 42 S. E. 771. **Ia.**—*Eggert v. Interstate Inv., etc. Co.*, 146 Iowa 481, 125 N. W. 246; *Holman v. Omaha & C. B. Ry. & B. Co.*, 110 Iowa 485, 81 N. W. 704; *Moore v. Horton*, 105 Iowa 376, 75 N. W. 195. **Ky.**—*Byrd v. Central Ky. Tract. Co.*, 136 Ky. 766, 125 S. W. 174; *Hurt v. Louisville & N. R. Co.*, 116 Ky. 545, 76 S. W. 502. **Mo.**—*Fitzjohn v. St. Louis Transit Co.*, 183 Mo. 74, 81 S. W. 907; *Herndon v. Lewis*, 175 Mo. 116, 74 S. W. 976; *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076. **N. Y.**—*People v. Dooling*, 132 App. Div. 50, 116 N. Y. Supp. 371; *Ross v. Metropolitan St. R. Co.*, 104 App. Div. 378, 93 N. Y. Supp. 679; *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842. **Wis.**—*Collins v. Janesville*, 117 Wis. 415, 94 N. W. 309; *Lee v. Chicago, etc. R. Co.*, 101 Wis. 352, 77 N. W. 714; *Heller v. Abbot*, 79 Wis. 409, 48 N. W. 598. **Can.** *Eureka Woolen Mills Co. v. Moss*, 11 Can. Sup. Ct. 91; *Day v. Hagerman*, 5 U. C. Q. B. 451.
44. **U. S.**—*Copper River & N. W. R. Co. v. Reeder*, 211 Fed. 280, 127 C. C. A. 648; *Thompson & Co. v. Shea*, 11 Fed. 847, 4 McCrary 93. **Cal.** *Colon v. Tosetti*, 14 Cal. App. 693, 113 Pac. 365, 366. **Conn.**—*Cables v. Bristol Water Co.*, 86 Conn. 223, 84 Atl. 928. **Ga.**—*Donaldson v. Cothran*, 60 Ga. 603. **Ia.**—*Clark v. Iowa Cent. Ry. Co.*, 144 N. W. 332. **Minn.**—*Pinkerton v. Wisconsin Steel Co.*, 109 Minn. 117, 123 N. W. 60; *Schmidt v. Chicago, M. & St. P. R. Co.*, 108 Minn. 329, 122 N. W. 9. **Mont.**—*Garwood v. Corbett*, 38 Mont. 364, 99 Pac. 958. **R. I.**—*York v. Stiles*, 21 R. I. 225, 42 Atl. 876. **Tex.**—*Jackson v. Dallas Fair Park Amusement Assn.*, 155 S. W. 1181. **Wash.**—*Bernard v. North Yakima*, 80 Wash. 472, 141 Pac. 1034; *Aboltin v. Heney*, 62 Wash. 65, 113 Pac. 245.
45. **U. S.**—*Manning v. German Ins. Co.*, 107 Fed. 52, 46 C. C. A. 144 (*reversing* 100 Fed. 581); *Albright v. McTighe*, 49 Fed. 817. **Ga.**—*Massey v. Allen*, 48 Ga. 21; *Smith v. Brand*, 44 Ga. 588. **Kan.**—*Turner v. Elbing State Bank*, 91 Kan. 123, 136 Pac. 917; *Green v. Bulkley*, 23 Kan. 130. **Ky.** *Donallen v. Lennox*, 6 Dana 89; *Turner's Admr. v. Booker*, 2 Dana 334; *Illinois Cent. R. Co. v. Beauchamp*, 25 Ky. L. Rep. 1429, 77 S. W. 1096. **Minn.** *Dobrowoloske v. Parpala*, 121 Minn.

evidence has been discovered,⁴⁶ or that the verdict was the result of misconduct,⁴⁷ or even when the application is grounded on alleged errors of law occurring at the trial,⁴⁸ the granting or the refusing of a new trial rests in the judicial discretion of the court, depending upon the circumstances of each case, and the furtherance of substantial jus-

455, 141 N. W. 803; *Wingen v. May*, 92 Minn. 255, 99 N. W. 809; *Miller v. Layne*, 84 Minn. 221, 87 N. W. 605. **Mo.**—*Jacob v. McLean*, 24 Mo. 40; *Moreland v. McDermott*, 10 Mo. 605; *Frick Co. v. Caffery*, 48 Mo. App. 120. **Neb.**—*Matoushek v. Dutcher*, 67 Neb. 627, 93 N. W. 1049; *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661, 81 N. W. 849. **N. Y.**—*Tyler v. Hoornbeck*, 48 Barb. 197; *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842; *Mulford v. Yager*, 4 Silv. Sup. 58, 58 Hun 633, 7 N. Y. Supp. 88, 17 N. Y. Civ. Proc. 371. **Tex.**—*Dotson v. Moss*, 58 Tex. 152; *Delmas v. Margo*, 25 Tex. 1, 78 Am. Dec. 516; *St. Louis Southwestern R. Co. v. Dickens* (Tex. Civ. App.), 56 S. W. 124.

46. **Ala.**—*Jones v. Tucker*, 132 Ala. 305, 31 So. 21. **Cal.**—*In re Dolbeer's Estate*, 153 Cal. 652, 96 Pac. 266; *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Hobler v. Cole*, 49 Cal. 250. **Ga.**—*Bradford v. Brand*, 132 Ga. 642, 64 S. E. 688; *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912; *Doherty v. Lewis*, 92 Ga. 573, 17 S. E. 913. **Ia.** *Chambliss v. Hass*, 125 Iowa 484, 101 N. W. 153, 68 L. R. A. 126; *Searcy v. Martin Woods Co.*, 93 Iowa 420, 61 N. W. 934; *Murray v. Weber*, 92 Iowa 757, 60 N. W. 492. **Ky.**—*National C. Constr. Co. v. Duvall*, 153 Ky. 394, 155 S. W. 757; *Louisville, etc. Packet Co. v. Mulligan*, 25 Ky. L. Rep. 1287, 77 S. W. 704. **Mass.**—*Keet v. Mason*, 167 Mass. 154, 45 N. E. 81; *Troeder v. Hyams*, 153 Mass. 536, 27 N. E. 775. **Mich.**—*Goodyear v. Detroit United Ry.*, 177 Mich. 129, 143 N. W. 14; *Branch v. Klatt*, 173 Mich. 31, 138 N. W. 263. **Mo.**—*Coleman v. Cole*, 96 Mo. App. 22, 69 S. W. 692; *Longdon v. Kelly*, 51 Mo. App. 572. **N. C.**—*Bouldin v. Daniel*, 151 N. C. 283, 65 S. E. 1001. **Wis.**—*Weichman v. Kast*, 157 Wis. 316, 147 N. W. 369; *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N. W. 274; *Clithero v. Fenner*, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. Rep. 978. **Can.**—*Trumble v. Hortin*, 22 Ont. App.

51; *Murray v. Canada Cent. R. Co.*, 7 Ont. App. 646.

47. **Ia.**—*Clesle v. Frerichs*, 95 Iowa 83, 63 N. W. 581; *George v. Swafford*, 75 Iowa 491, 39 N. W. 804; *First Nat. Bank v. Wabash, St. L. & P. Ry. Co.*, 61 Iowa 700, 17 N. W. 48. **Mass.** *Manning v. Boston El. R. Co.*, 187 Mass. 496, 73 N. E. 645; *Hilton v. McDonald*, 173 Mass. 124, 53 N. E. 208; *Harrington v. Worcester, L. & S. St. Ry. Co.*, 157 Mass. 579, 32 N. E. 955. **Minn.**—*Jung v. Theo. Hamm Brewing Co.*, 95 Minn. 367, 104 N. W. 233. **Mo.**—*Benjamin v. Metropolitan St. R. Co.*, 245 Mo. 598, 151 S. W. 91; *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104; *Fendler v. Dewald*, 14 Mo. App. 60. **N. Y.**—*Bennett v. Matthews*, 40 How. Pr. 428. **Tex.**—*Kalteyer v. Mitchell*, 102 Tex. 390, 117 S. W. 792, 132 Am. St. Rep. 889; *Missouri, K. & T. R. Co. v. Hawkins*, 50 Tex. Civ. App. 128, 109 S. W. 221; *Texas, etc. R. Co. v. Raney* (Tex. Civ. App.), 23 S. W. 340. **Wash.**—*Johansen v. Pioneer Min. Co.*, 77 Wash. 421, 137 Pac. 1019.

48. **U. S.**—*McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. ed. 98; *Rowe v. Mathews*, 18 Fed. 132. **Ala.**—*West v. Cunningham*, 9 Port. 104, 33 Am. Dec. 300. **Ark.**—*Cheatham v. Roberts*, 23 Ark. 651. **Ga.**—*Central R. & Bkg. Co. v. Ogletree*, 97 Ga. 325, 22 S. E. 953; *Singer Mfg. Co. v. Lancaster*, 75 Ga. 280; *Buchanan v. Higginbotham*, 42 Ga. 198. **Ill.**—*Hewitt v. Jones*, 72 Ill. 218. **Ia.**—*Hydinger v. Chicago, B. & Q. R. Co.*, 126 Iowa 222, 101 N. W. 746; *Marr v. Burlington, C. R. & N. R. Co.*, 121 Iowa 117, 96 N. W. 716. **Kan.** *Buoy v. Clyde Milling & Elev. Co.*, 68 Kan. 436, 75 Pac. 466; *Pierson v. Thompson*, 4 Kan. App. 173, 45 Pac. 944. **Md.**—*Waters v. Waters*, 26 Md. 53. **Mo.**—*Hess v. United R. Co.*, 127 Mo. App. 304, 105 S. W. 277. **N. C.** *Purnell v. Purnell*, 89 N. C. 42. **R. I.** *York v. Stiles*, 21 R. I. 225, 42 Atl. 876. **S. C.**—*Mackie v. Garlington*, 3 McCord 276. **S. D.**—*Kunz v. Dinneen*, 18 S. D. 262, 100 N. W. 165. **Wis.**

tice. Moreover, where substantial justice is done by a verdict, a new trial will not be granted upon technical grounds,⁴⁹ and a new trial may be refused where the amount in controversy is trifling.⁵⁰

The general rule of judicial discretion is applied in criminal as well as in civil cases.⁵¹

3. Imposing Conditions.—*a. In General.*—In granting or refusing motions for new trials, the court may, according to the general rule,

Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112.

49. Ordway *v.* Boston & M. R. R., 69 N. H. 429, 45 Atl. 243; Buck *v.* Waddle, 1 Ohio 357.

[a] **Only Where Verdict or Decision Wrong—Whether on Motion or Petition.**—A statute authorizing a new trial only where the verdict or decision appears to be wrong, applies whether the application be by motion or petition, and requires the court to consider the whole case, including the newly discovered evidence, and determine whether the verdict or decision was wrong. Haughton *v.* Bilson, 90 Kan. 360, 133 Pac. 722.

50. Ill.—Badgley *v.* Heald, 9 Ill. 64. Mass.—Hagar *v.* Weston, 7 Mass. 110. Eng.—Vernon *v.* Hankey, 2 T. R. 113, 100 Eng. Reprint 62; Lord Sandwich's Case, 2 Salk. 648, 91 Eng. Reprint 550.

Compare *supra*, II, G, 5, c.

[a] **De minimis non curat lex** applies where the amount involved is only four dollars. York *v.* Stiles, 21 R. I. 225, 42 Atl. 876.

51. U. S.—Daniels *v.* United States, 196 Fed. 459, 116 C. C. A. 233; Hedderly *v.* United States, 193 Fed. 561, 114 C. C. A. 227; United States *v.* Gibson, 188 Fed. 396. Ala.—Arden *v.* State, 6 Ala. App. 64, 60 So. 538; Dill *v.* State, 5 Ala. App. 162, 59 So. 307. Ark.—Avant *v.* State, 116 Ark. 588, 173 S. W. 405; Lee *v.* State, 116 Ark. 588, 172 S. W. 832; Little *v.* State, 111 Ark. 640, 165 S. W. 256. Cal.—People *v.* Brewer, 19 Cal. App. 742, 127 Pac. 808; People *v.* Saunders, 13 Cal. App. 743, 110 Pac. 825. Ga.—Angry *v.* State, 17 Ga. App. 161, 86 S. E. 403; Wilson *v.* State, 15 Ga. App. 632, 84 S. E. 81; Roberson *v.* State, 15 Ga. App. 545, 83 S. E. 877. Idaho.—State *v.* Fleming, 17 Idaho 471, 106 Pac. 305; State *v.* Cook, 13 Idaho 45, 88 Pac. 240. Ill.—Martin *v.* People, 13 Ill. 341. Ind.—Weinzorfflin *v.* State,

7 Blackf. 186. Ia.—State *v.* Lowell, 123 Iowa 427, 99 N. W. 125; State *v.* Hogan, 115 Iowa 455, 88 N. W. 1074. Kan.—State *v.* Durein, 70 Kan. 1, 78 Pac. 152, 15 L. R. A. (N. S.) 908, 70 Kan. 13, 80 Pac. 987. Ky.—Jenkins *v.* Com., 113 S. W. 846. La.—State *v.* Zagone, 135 La. 550, 65 So. 737; State *v.* Brannon, 133 La. 1027, 63 So. 507; State *v.* Charles, 130 La. 683, 58 So. 509. Mass.—Com. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; Com. *v.* White, 147 Mass. 76, 16 N. E. 707. Mich.—People *v.* Francis, 52 Mich. 575, 18 N. W. 364. Minn.—State *v.* Lucken, 129 Minn. 402, 152 N. W. 769; State *v.* Schreiber, 111 Minn. 138, 126 N. W. 536. Mo.—State *v.* Jeffries, 117 Mo. App. 569, 92 S. W. 501. Neb.—Liniger *v.* State, 85 Neb. 98, 122 N. W. 705. Nev.—State *v.* Salge, 2 Nev. 321. N. M.—United States *v.* Biena, 8 N. M. 99, 42 Pac. 70. N. Y.—People *v.* Schover, 140 N. Y. Supp. 427; People *v.* Jones, 115 N. Y. Supp. 800. N. C.—State *v.* Trull, 169 N. C. 363, 85 S. E. 133; State *v.* McKenzie, 166 N. C. 290, 81 S. E. 301. N. D.—State *v.* Albertson, 20 N. D. 512, 128 N. W. 1122. Okla. Diffey *v.* State, 10 Okla. Crim. 190, 135 Pac. 942. Ore.—State *v.* Morris, 58 Ore. 397, 114 Pac. 476. Pa.—Howser *v.* Com., 51 Pa. 332; Com. *v.* Striepeke, 32 Pa. Super. 82. P. R.—People *v.* Rosado, 16 Porto Rico 412. S. C.—State *v.* Brown, 94 S. C. 115, 77 S. E. 734. S. D.—State *v.* Gregory, 31 S. D. 425, 141 N. W. 365. Tex.—McGaughey *v.* State (Tex. Crim.), 169 S. W. 287; Johnson *v.* State, 62 Tex. Crim. 284, 136 S. W. 1058. Utah.—State *v.* Montgomery, 37 Utah 515, 109 Pac. 815. Va.—Grayson *v.* Com., 6 Gratt. (47 Va.) 712. Wash.—State *v.* Welty, 65 Wash. 244, 118 Pac. 9. Wis.—Suckow *v.* State, 122 Wis. 156, 99 N. W. 440. Wyo.—Paseo *v.* State, 19 Wyo. 344, 117 Pac. 862. Can.—Reg. *v.* Mooney, 4 Newfoundl. 757. See Rex *v.* Burr, 13 Ont. L. R. 485, 8 Ont. W. R. 703.

exercise its discretion in imposing such terms and conditions as may seem justified;⁵² and such a discretionary right is sometimes expressly conferred by the statutes.⁵³ For example, a new trial may be ordered unless the prevailing party will consent to a modification or change in the verdict or decision, where items have unjustly been included or excluded,⁵⁴ or the condition may be imposed that the new trial, if granted, shall be limited to certain issues,⁵⁵ or that a bond be given for the payment of the judgment and costs of the former trial.⁵⁶ A new trial has, also, been granted on condition that the parties waive any right of removal of the cause to a federal court,⁵⁷ and on condition that the right of appeal be waived.⁵⁸

b. *Costs.*—(I.) In General.—(A.) ENGLISH COMMON LAW COURTS. In the English courts of common law, it was the earlier rule to

52. *Ala.*—Walker v. Blassingame, 17 Ala. 810; Stephenson v. Mansony, 4 Ala. 317. *Cal.*—Brooks v. San Francisco, etc. R. Co., 110 Cal. 173, 42 Pac. 570; Eaton v. Jones, 107 Cal. 487, 40 Pac. 798; Cordor v. Morse, 57 Cal. 301. *Conn.*—Zaleski v. Clark, 45 Conn. 397. *Ga.*—Gordon v. Mitchell, 68 Ga. 11. *Ill.*—Buntain v. Mosgrove, 25 Ill. 152, 76 Am. Dec. 789. *Ia.*—Loring v. Holt, 39 Iowa 574; Wright v. Antrim, Morris 258. *Mass.*—Peirce v. Adams, 8 Mass. 383; Boyden v. Moore, 5 Mass. 365. *Mich.*—Mabley v. Judge Superior Court, 41 Mich. 31, 1 N. W. 985. *Neb.*—Kruger v. Adams & French Harvester Co., 9 Neb. 526, 4 N. W. 252. *N. Y.*—Sobel v. Counes, 69 Misc. 422, 125 N. Y. Supp. 893. *Pa.*—Wirsing v. Smith, 222 Pa. 8, 70 Atl. 906; Stauffer v. Reading, 206 Pa. 479, 55 Atl. 1072. *P. I.*—Worcester v. Bucknall Steamship Lines, 22 Phil. Isl. 292. *S. C.*—Hall v. Northwestern R. Co., 81 S. C. 522, 62 S. E. 848; Laney v. Bradford, 4 Rich. L. 1. *Tex.*—See Town v. Guerguin, 93 Tex. 608, 57 S. W. 565. *Va.*—Honaker v. Shrader, 115 Va. 318, 79 S. E. 391; Fry v. Stowers, 98 Va. 417, 36 S. E. 482. *Can.*—Pater-son v. Maughan, 39 U. C. Q. B. 371; Boulton v. Defries, 2 U. C. Q. B. 432; Reiffenstein v. Dey, 28 Ont. L. Rep. 491.

But see *Heffner v. Scranton*, 27 Ohio St. 579, and *supra*, III, G, 2.

[a] The appellate court cannot interfere with this exercise of discretion "unless upon a clear showing that it has been abused, or that the terms were grossly unreasonable." *Rice v. Gashirie*, 13 Cal. 53. See *infra*, III, H, 4.

[b] The giving of a bond to pay

any judgment which may be rendered on the new trial cannot be required under a statute permitting the imposition of "such conditions as may be just." *Dewey v. Leonhardt*, 37 Mo. App. 517, interpreting the statute to refer to the payment of costs already incurred, the time within which the pleadings must be amended or filed, and the date of the retrial. Compare *Brenzingier v. American Exchange Bank*, 66 Ohio St. 242, 64 N. E. 118, holding enforceable such a bond given pursuant to such a condition in an order granting a new trial to which the party was not strictly entitled, no objection to the order having been taken by the adverse party.

53. See the statutes, and *Dewey v. Leonhardt*, 37 Mo. App. 517; *Town v. Guerguin*, 93 Tex. 608, 57 S. W. 565, but the condition must not extend beyond the term at which the order is made.

54. *Cal.*—Eaton v. Jones, 107 Cal. 487, 40 Pac. 798. *Ga.*—Johnson v. Duncan, 90 Ga. 1, 16 S. E. 88. *Mass.*—Pollock v. Morrison, 176 Mass. 83, 57 N. E. 326. *Mo.*—McAllister v. Mullanphy, 3 Mo. 38. *Va.*—Fry v. Stowers, 98 Va. 417, 36 S. E. 482. *Can.*—Con-ley v. Lee, 12 U. C. Q. B. 456.

But see *infra*, III, G, 3, c and d.

55. *Conn.*—Zaleski v. Clark, 45 Conn. 397. *Pa.*—Wallace v. Floyd, 29 Pa. 184, 72 Am. Dec. 620. *S. C.*—Laney v. Bradford, 4 Rich. L. 1. *Va.*—Prunty v. Mitchell, 30 Gratt. (71 Va.) 247.

56. *Loring v. Holt*, 39 Iowa 574.

57. *People v. Judge of Superior Court*, 41 Mich. 31, 1 N. W. 985.

58. *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194.

grant new trials upon the merits only on payment of costs, except in particular cases. Later, it was held to be a matter entirely in the discretion of the court.⁵⁹

(B.) AMERICAN COURTS.—In American courts, it is the prevailing practice, either by force of statute or otherwise, that the court may, in its discretion, require as a condition to the granting of a new trial that the moving party shall pay the costs.⁶⁰

59. Chitty's Gen. Pr., vol. IV, p. 88.

[a] In the King's Bench if a new trial was given without anything being said respecting the costs of the former, and the same verdict was given upon the second trial as the first, the costs of the second only were allowed. *Hankey v. Smith*, 3 T. R. 507, 100 Eng. Reprint 703; *Mason v. Skurray*, 2 Doug. 438, 99 Eng. Reprint 280; *Schulbred v. Nutt*, 2 Doug. 438, 99 Eng. Reprint 280.

[b] Common Pleas.—But in the common pleas, if two concurrent verdicts were given, the party succeeding was allowed the costs of both trials; if the second differed from the first, the costs of the second only. *Trelawney v. Thomas*, 1 H. Bl. 641, 126 Eng. Reprint 366.

[c] Present English Practice.—(1) The costs of an application for a new trial are in the discretion of the court of appeal. R. S. C., Ord. 65, r. 1; *Hamilton v. Seal* (1904), 2 K. B. 262; *Jones v. Richards*, 15 T. L. R. 398; *Metropolitan Asylum Managers v. Hill*, 47 L. T. N. S. 29; *Field v. Great Northern R. Co.*, 3 Ex. D. 261. (2) If a new trial is ordered, the costs of the first trial usually abide the result of the second trial. *Jones v. Richards*, 15 T. L. R. 398. (3) The costs of the application for a new trial are given to the party who is successful in the application. *Hamilton v. Seal* (1904), 2 K. B. 262. From *Laws of Eng.* (Halsbury), vol. 23, p. 206.

[d] A new trial was granted without costs (1) when the judge was mistaken in point of law (*Goodright v. Saul*, 4 T. R. 356, 359, 100 Eng. Reprint 1062; *Harris v. Butterly*, 2 Cowp. 483, 98 Eng. Reprint 1199; *Vale v. Bayle*, 1 Cowp. 294, 98 Eng. Reprint 1094; *Rice v. Shute*, 2 W. Bl. 695, 5 Burr. 2611, 96 Eng. Reprint 409; *Rackham v. Jesup*, 3 Wils. K. B. 338, 95 Eng. Reprint 1088; *Buscall v. Hogg*, 3 Wils. K. B. 146, 95 Eng. Reprint

981), or (2) the jury found a verdict contrary to direction as to a matter of law (*Jackson v. Duchaire*, 3 T. R. 551, 100 Eng. Reprint 727. See also *Hodgson v. Barvis*, 2 Chit. 268, 18 E. C. L. 628), or (3) the plaintiff refused to submit to a nonsuit, contrary to the opinion of the judge, and a verdict was found for him (*Pochin v. Pawley*, 1 W. Bl. 670, 96 Eng. Reprint 391), or (4) a verdict was given properly for the plaintiff on one count and improperly against him upon another (*Edie v. East India Co.*, 2 Burr. 1216, 1 Bl. 295, 97 Eng. Reprint 797), or (5) the verdict was obtained by concealing a witness for the adverse party (*Montpesson v. Randle*, Bul. N. P. [Eng.] 328), or (6) by any improper artifice. *Anderson v. George*, 1 Burr. 352, 97 Eng. Reprint 349.

[e] Moreover, where the matter in dispute was small, a new trial was not granted unless it could be done without compelling the party applying to pay the costs. *Jackson v. Duchaire*, 3 T. R. 551, 100 Eng. Reprint 727.

[f] Where the verdict was contrary to evidence, or the damages were excessive, the new trial was granted usually upon payment of costs. *Burton v. Thompson*, 2 Burr. 664, 97 Eng. Reprint 500; *Bright v. Eynon*, 1 Burr. 390, 393, 97 Eng. Reprint 365; *Macrow v. Hull*, 1 Burr. 11, 97 Eng. Reprint 161.

60. *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11; *Brooks v. San Francisco*, etc. R. Co., 110 Cal. 173, 42 Pac. 570; *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194. Ill.—*Buntain v. Mosgrove*, 25 Ill. 152, 76 Am. Dec. 789. Mass. *Johnson v. White*, 98 Mass. 330. Mich. *Wooster v. Calhoun* Circ. Judge, 150 Mich. 459, 114 N. W. 232. Miss.—*Warren v. Frank Gardner Hardware*, etc. Co., 96 Miss. 284, 51 So. 129. N. Y. *Frascone v. Louderback*, 153 App. Div. 199, 138 N. Y. Supp. 370; *Siegrist v. Holloway*, 7 Civ. Proc. 58. Pa.—*Ward v. Patterson*, 46 Pa. 372. Wis.—*Hoff-*

(II.) **Nature of Grounds.**—(A.) **IN GENERAL.**—It is, however, held, in some cases, that when a new trial is awarded as a matter of justice to the applicant where he was without fault, it is error to impose, as a condition, the payment of costs.⁶¹ The statute, moreover, may thus expressly provide.⁶² Accordingly, as in the English common law decisions, where the new trial is granted for errors of law,⁶³ or the jury returns a verdict contrary to law,⁶⁴ or where the ground for the new trial is the misconduct of the prevailing party,⁶⁵ or where the dam-

man *v. Doolittle*, 50 Wis. 505, 7 N. W. 342. **Eng.**—*Punter v. Grantley*, 3 M. & G. 295, 42 E. C. L. 161, 133 Eng. Reprint 1156. **Can.**—*O'Leary v. Pelican Ins. Co.*, 29 N. Brunsw. 510; *Bank of British North America v. Travis*, 7 N. Brunsw. 543; *McEachern v. Ferguson*, 5 N. Brunsw. 355; *Irvine v. Nova Scotia M. Ins. Co.*, 8 Nova Scotia 510; *Cameron v. Monarch Assur. Co.*, 7 U. C. C. P. 212; *Commercial Bank v. Harris*, 27 U. C. Q. B. 526.

[a] **Costs mean** (1) costs of the previous trial. *Evarts v. State*, 41 Ind. 422. (2) An order granting a new trial on condition that "all costs" are paid is void; but an order may be made requiring the costs of the previous trial to be paid as a condition precedent. *McClary v. Nash*, 6 Ky. L. Rep. 302. And see *Schwed v. Hartwitz*, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221.

[b] **Attorney's Fees.**—A condition imposed that the attorney's fees and expenses of the opposite party shall be paid by a certain time or else the motion will stand denied, held error. *Metropolitan St. Ry. Co. v. McClure*, 58 Kan. 109, 48 Pac. 566. See *Brooks v. San Francisco & N. P. Ry. Co.*, 110 Cal. 173, 42 Pac. 570.

[c] **Expenses for Stenographer's Minutes.**—Where plaintiff obtains a new trial, after verdict in his favor, defendant is entitled, as a part of the costs, to his expenses for the stenographer's minutes. *Riegelman v. Brunnings*, 36 App. Div. 351, 56 N. Y. Supp. 755.

61. **Kan.**—*Metropolitan St. Ry. Co. v. McClure*, 58 Kan. 109, 48 Pac. 566; *Spore v. Leeper*, 27 Kan. 68; N. C. C. M. & S. Co. *v. Eakins*, 23 Kan. 63; *Pierson v. Thompson*, 4 Kan. App. 173, 45 Pac. 944. **N. Y.**—*Andrews v. Dresser*, 140 App. Div. 925, 125 N. Y. Supp. 731; *Smith v. New York*, 55 App. Div. 90, 66 N. Y. Supp. 1046, 8 N. Y. Ann.

Cas. 389. **Okla.**—*Bayless v. McFarland*, 10 Okla. 747, 63 Pac. 859.

[a] **The controlling principle** in such cases is that when by reason of error on the part of the court, or misconduct on the part of the jury or prevailing party, a new trial is granted to an applicant who is without fault, costs should not be taxed against him; but where on the ground of accident newly discovered evidence, or other ground that shows no error in the proceedings or fault in the opposing party, the payment of costs as a condition may be proper. *North Center Creek Min. & Smelt. Co. v. Eakins*, 23 Kan. 317.

62. See the statutes.

63. **Ind.**—*Fisher v. Bridges*, 4 Blackf. 518. **Kan.**—*North Center Creek Min. & Smelt. Co. v. Eakins*, 23 Kan. 317. **N. Y.**—*Smith v. New York*, 55 App. Div. 90, 66 N. Y. Supp. 1046, 8 N. Y. Ann. Cas. 389; *Jones v. Marmac Constr. Co.*, 79 Misc. 368, 140 N. Y. Supp. 228; *Stancourt Laundry Co. v. Lamura*, 147 N. Y. Supp. 895. **Wash.** *Casey v. Malidore*, 19 Wash. 279, 53 Pac. 60.

64. **Conn.**—*Johnson v. Scribner*, 6 Conn. 185. **Kan.**—*North Center Creek Min. & Smelt. Co. v. Eakins*, 23 Kan. 317; *Pierson v. Thompson*, 4 Kan. App. 173, 45 Pac. 944. **N. Y.**—*Kahler v. Thron*, 155 App. Div. 744, 140 N. Y. Supp. 1002; *Cohen v. Krulewitech*, 77 App. Div. 126, 78 N. Y. Supp. 1044, 12 N. Y. Ann. Cas. 216; *Dechambeau v. Ames Iron Wks.*, 128 N. Y. Supp. 368. **Wis.**—*Connor Co. v. Goodwillie*, 120 Wis. 603, 98 N. W. 528; *Becker v. Holm*, 100 Wis. 281, 75 N. W. 999; *Schweickhart v. Stuewe*, 75 Wis. 157, 43 N. W. 722; *Smith v. Lander*, 48 Wis. 587, 4 N. W. 767. **Can.**—*Doe ex dem. Blair v. Chace*, 8 N. Brunsw. 501; *Bank of British North America v. Travis*, 7 N. Brunsw. 543.

65. *North Center Creek Min. & Smelt. Co. v. Eakins*, 23 Kan. 317;

ages awarded are so small as to convince the mind that the jury acted under prejudice,⁶⁶ it is the rule that the payment of the costs of the former trial should not be imposed as a condition precedent to the granting of the motion for a new trial.

(B.) INSUFFICIENCY OF EVIDENCE.—Where the motion is grounded upon insufficiency of the evidence, some courts hold that no conditions can be imposed in the granting of a new trial since it is a matter of right;⁶⁷ other cases hold that the imposition of costs, as a condition precedent in such a case, is a matter within the sound, legal discretion of the court, where it does not appear that the verdict is perverse.⁶⁸ Still others hold that the motion should be granted only on condition that the moving party pay the costs,⁶⁹ unless the verdict is perverse, in which case no costs should be imposed.⁷⁰ In New York the different departments of the appellate division of the supreme court do not agree as to the rule to be followed.⁷¹

Pierson v. Thompson, 4 Kan. App. 173, 45 Pac. 944; *Clark v. Eldred*, 54 Hun 5, 7 N. Y. Supp. 95, 26 N. Y. St. 61.

66. *Robbins v. Hudson River R. Co.*, 7 Bosw. (N. Y.) 1; *Emmons v. Sheldon*, 26 Wis. 648. *Contra*, *Rixey v. Ward*, 3 Rand. (24 Va.) 52.

67. *Johnson v. Scribner*, 6 Conn. 185; *Spore v. Leeper*, 27 Kan. 68; *Pierson v. Thompson*, 4 Kan. App. 173, 45 Pac. 944.

68. *Brooks v. San Francisco & N. P. Ry. Co.*, 110 Cal. 173, 42 Pac. 570; *Wolfe v. Ridley*, 17 Idaho 173, 104 Pac. 1014, 20 Am. & Eng. Ann. Cas. 39.

69. *Godfrey v. Godfrey*, 127 Wis. 47, 106 N. W. 814; *Wolfgang v. Schoepke*, 123 Wis. 19, 100 N. W. 1054; *Becker v. Holm*, 100 Wis. 281, 75 N. W. 999.

[a] **Hardship of Payment.**—It is held that even in case of hardship, the rule that a new trial will not be granted, on the ground that the verdict is against the weight of evidence, except upon the condition precedent of payment of costs nevertheless applies. *O'Shea v. McLearn*, 48 Hun 619, 1 N. Y. Supp. 407, 15 Civ. Proc. 69, 16 N. Y. St. 482; *Carter v. Interurban St. Ry. Co.*, 86 N. Y. Supp. 206.

English Common Law Rule.—As previously stated, it was customary in the English common law courts to impose costs as a condition precedent to the granting of a new trial because the verdict was contrary to the evidence.

[b] **Order Silent as to Grounds.** Where the record does not show the ground for which a new trial was

granted, and costs were imposed, it will be presumed, upon appeal, that the ground was insufficiency of evidence and that the costs were properly made a condition. *Giese v. Milwaukee Electric R. & L. Co.*, 116 Wis. 66, 92 N. W. 356; *Mills v. Conley*, 110 Wis. 525, 86 N. W. 203.

70. *Cunningham v. Gans*, 79 Hun 434, 29 N. Y. Supp. 979, 61 N. Y. St. 249; *Becker v. Holm*, 100 Wis. 281, 75 N. W. 999; *Schweickhart v. Stuewe*, 75 Wis. 157, 43 N. W. 722.

[a] **Meaning of Perverse Verdict.** "A verdict of a jury which is wholly unsupported by the evidence is clearly a perverse verdict; as much so as if rendered in direct violation of the law of the case as laid down by the court upon the trial of the action." *Schweickhart v. Stuewe*, 75 Wis. 157, 162, 43 N. W. 722.

71. *Waltz v. Utica & M. V. Ry. Co.*, 116 App. Div. 563, 101 N. Y. Supp. 968.

[a] **Applicant should be required to pay the costs.** *Israel v. Ury*, 52 Misc. 525, 102 N. Y. Supp. 871; *Hart v. Kaplan*, 52 Misc. 653, 101 N. Y. Supp. 763; *Bolles v. Heckman*, 119 N. Y. Supp. 154.

[b] **Should Not Be Required To Pay Costs.**—*Kahler v. Thron*, 155 App. Div. 744, 140 N. Y. Supp. 1002; *Cohen v. Krulewitch*, 77 App. Div. 126, 78 N. Y. Supp. 1044, 12 N. Y. Ann. Cas. 216; *Dechambeau v. Ames Iron Wks.*, 128 N. Y. Supp. 368.

[c] **Matter is largely within the discretion of the trial court, subject to appellate review.** *Dechambeau v.*

(C.) ACCIDENT OR SURPRISE. — Costs may be imposed, in the discretion of the court, where the new trial is grounded on accident or surprise,⁷² and usually will be where the prevailing party was not in any way at fault.⁷³

(D.) NEWLY DISCOVERED EVIDENCE. — An applicant for a new trial on the ground of newly discovered evidence is usually required to pay the costs as a condition precedent,⁷⁴ although it is not always a requisite.⁷⁵

(III.) Time of Payment. — The order granting the new trial may fix the time of paying the costs or expenses,⁷⁶ or it may be fixed by statute.⁷⁷ If, however, no time is specified for such payment, a condition that the costs of the trial be paid means payable on demand.⁷⁸

Ames Iron Works, 128 N. Y. Supp. 368; Gottlieb & Co. v. Coutant, 70 Misc. 380, 127 N. Y. Supp. 250; Joseph v. New York City R. Co., 61 Misc. 440, 115 N. Y. Supp. 101; Duffy v. New York, 55 Misc. 25, 105 N. Y. Supp. 68.

72. Cal.—Ryan v. Mooney, 49 Cal. 33. Neb.—Ogden v. Rosenthal, 55 Neb. 163, 75 N. W. 545. N. H.—Nashua & L. R. R. v. Stimpson, 35 N. H. 286; New England Mut. Fire Ins. Co. v. Lisbon Mfg. Co., 22 N. H. 170.

73. Ryan v. Mooney, 49 Cal. 33; Parshall v. Klinck, 43 Barb. (N. Y.) 203.

74. U. S.—Aiken v. Bemis, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109. Ala. Jones v. Williams, 108 Ala. 282, 19 So. 317. N. Y.—Buffalo Cold Storage Co. v. Bacon, 136 App. Div. 263, 120 N. Y. Supp. 960; Matter of Ryan, 70 Hun 149, 24 N. Y. Supp. 277, 53 N. Y. St. 926; Upington v. Keenan, 67 Hun 648, 21 N. Y. Supp. 699; Comstock v. Dye, 13 Hun 113; Walmsley v. Phillips, 119 N. Y. Supp. 227.

[a] New York.—The payment of the taxable costs of the action up to the time of the making of the motion (for newly discovered evidence) should be imposed as a condition upon granting the motion. Walmsley v. Phillips, 119 N. Y. Supp. 227. See also Buffalo Cold Storage Co. v. Bacon, 136 App. Div. 263, 120 N. Y. Supp. 960 (holding that where in an action tried before a referee, and affirmed by the appellate division of the supreme court, the supreme court grants a new trial for newly discovered evidence, the order should be conditioned upon

the applicant's paying the costs and disbursements of the trial already had, including referee's fees and disbursements in entering judgment, and the costs and disbursements upon the appeal from such judgment to the appellate division, and \$10 costs of the motion for a new trial); Macaulay v. Anthony, 127 N. Y. Supp. 420, requiring payment of all costs and disbursements to date.

75. See Kruger v. Adams & French Harvester Co., 9 Neb. 526, 4 N. W. 252, largely discretionary.

76. Ala.—*Ex parte* Dillard, 68 Ala. 594; Screws v. Upshaw, 34 Ala. 496, within four months. Cal.—Brown v. Cline, 109 Cal. 156, 41 Pac. 862, within five days. Ind.—Ammerman v. Gallimore, 50 Ind. 131 (thirty days); Watts v. Green, 30 Ind. 98. Ia.—First Nat. Bank v. Brown, 81 Iowa 208, 46 N. W. 995. Kan.—Adams Exp. Co. v. Gregg, 23 Kan. 376, thirty days.

[a] A typical order may be found in Smith v. Matthews, 21 Misc. 150, 47 N. Y. Supp. 96, 100, viz.: "The motion for new trial is granted upon defendants' paying to plaintiff's attorneys within 30 days after the entry of the order herein all the costs and disbursements taxed on the action, and in case of a failure so to do the motion is denied, with costs."

[b] Manner of Payment.—Nothing but payment in cash will suffice. A set-off for goods furnished is not sufficient. Screws v. Upshaw, 34 Ala. 496.

77. See Myers v. Lummis, 80 Ky. 456, 4 Ky. L. Rep. 301.

78. Holtum v. Greif, 144 Cal. 521, 78 Pac. 11.

Provision for extension of the time is sometimes made by statute or rule.⁷⁹

(IV.) **Failure To Pay.**—Failure to pay the costs, where payment is a condition precedent, is sufficient cause to vacate the order,⁸⁰ and it is sometimes so provided by statute.⁸¹ An order imposing costs is not necessarily, however, regarded as a condition precedent, and if the costs are not paid, the order for a new trial may, nevertheless, stand, and the costs may be collected as in case of any other judgment.⁸²

79. *Smith v. Grover*, 74 Wis. 171, 42 N. W. 112.

80. *Cal.*—*Brooks v. San Francisco & N. P. Ry. Co.*, 110 Cal. 173, 42 Pac. 570; *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194. *Ill.*—*Buntain v. Mosgrove*, 25 Ill. 152, 76 Am. Dec. 789. *Mo.* *Blumenthal v. Kurth*, 22 Mo. 173. *N. Y.* *Stokes v. Stokes*, 38 App. Div. 215, 56 N. Y. Supp. 637. *Va.*—*Boswell v. Jones*, 1 Wash. (1 Va.) 322. *Wis.* *Hoffman v. Doolittle*, 50 Wis. 505, 7 N. W. 342. *Can.*—*Pacaud v. McEwan*, 6 Ont. Pr. 20.

81. See Barnes Code (W. Va.), 1916, ch. 138, §5.

[a] **Meaning of Condition Precedent.**—Distinguishing between an order setting aside the verdict, and an order granting a new trial, the New Jersey supreme court has said: "The payment of costs, is no doubt a condition precedent; not however, to setting aside the verdict, but to the party's having a new trial. The court never say to a party, we will set aside the verdict against you, if you will pay the costs. The question, whether a verdict ought, or ought not to be set aside, although it is said to be addressed to the sound discretion of the court, is nevertheless a question of law; and when set aside, it is because justice forbids that any judgment should be rendered upon it. But the payment of costs, when it is ordered, is annexed as a condition upon which the party may have a new trial; and yet not strictly as a condition in such a sense, that if it is not performed, there shall be no new trial. It is rather an order on the party, at whose instance the verdict has been set aside, that he shall pay the costs of the first trial; which order, like other interlocutory orders, may be enforced by attachment. When a verdict has been set aside at the instance of the plaintiff and a new trial granted, on payment of costs by

him, it is true, the defendant has an additional remedy; he may apply to the court to restrain the party from proceeding to a second trial, until the costs of the former trial have been paid. It then becomes, as to the plaintiff, a condition precedent. The court may tie up his hands until he pays the costs, or if he does not pay them and bring his cause to a trial within such time as the court shall prescribe, he may be non-pressed for not going to trial." *Gilliland v. Rappleyea*, 15 N. J. L. 133, 142.

82. *Ala.*—*Ex parte Beavers*, 34 Ala. 71. *Ky.*—*Dana v. Gill*, 5 J. J. Marsh. 242, 20 Am. Dec. 255. *Miss.*—*Johnson v. Taylor, Reed & Co.*, 3 Smed. & M. 92. *N. Y.*—*Anderson v. Rome*, etc. R. R. Co., 54 N. Y. 334, 343. *Ohio.*—*Heffner v. Scranton*, 27 Ohio St. 579; *Robinson v. Kious*, 4 Ohio St. 593. *Tex.* *Fenn v. Gulf, C. & S. F. Ry. Co.*, 76 Tex. 380, 13 S. W. 273, holding that the word "condition" in the order should not be construed in its technical sense as a condition precedent, but merely as "terms" not affecting the absolute character of the part of the order granting the new trial. Compare *Town v. Guerguin*, 93 Tex. 608, 57 S. W. 565.

[a] **Not a Condition Precedent.** "We do not mean to hold that a new trial may not be granted with a stipulation for payment of costs. But such stipulation is not in the nature of a condition precedent. Whether costs are paid or not paid, the order stands; the new trial is granted; the remaining portion of the order is to be enforced, as orders or judgments are usually enforced; and an execution for costs may be had, which is the proper remedy. Even if such execution were fruitless, it would be an unwise exercise of justice to deprive a man of his legal right to a new trial because he was unable to pay for it." *Heffner v. Scranton*, 27 Ohio St. 579, 584.

c. *Increase of Inadequate Recovery.*—In some jurisdictions, the court may grant a new trial on the ground of an inadequate verdict unless the defendant shall pay an increased sum.⁸³ It is held, elsewhere, however, that the court has no right to impose such a condition.⁸⁴

d. *Decrease of Excessive Recovery.*—The right of the court to compel the successful party to remit the excess of damages awarded where the recovery is excessive, is elsewhere treated.⁸⁵ It has been held that a remittitur as to an excessive recovery of land may be directed,⁸⁶ though there are some authorities to the contrary.⁸⁷

4. *Dismissal of Proceedings.*—For failure to comply with the various requirements relating to applications for new trials, where such requirements are made mandatory by rules of court or by statute, the application will be dismissed. Thus, failure to file the motion in time,⁸⁸ or delays or defects in the service of notice of the motion, when notice is required,⁸⁹ or failure to file required evidence, such as a brief of the evidence,⁹⁰ may furnish good grounds for a motion to dismiss. Likewise, material defects in the required documentary evidence,⁹¹ or delay in procuring a settlement of the case,⁹² may be proper cause for dismissal. Moreover, proceedings to obtain a new trial will be considered abandoned when a movant unduly delays the prosecution of his motion

[b] *When Process Cannot Issue.* But where the order is in such form as to be conditional, payment being optional with the party to whom the new trial is conditionally granted, process cannot issue to compel it. See *Ex parte Beavers*, 34 Ala. 71.

83. **U. S.**—*Aultman v. Thompson*, 19 Fed. 490. **Ga.**—*Anderson v. Jenkins*, 99 Ga. 299, 25 S. E. 648. **Ill.**—*James v. Morey*, 44 Ill. 352; *Carr v. Miner*, 42 Ill. 179. **Minn.**—*Ford v. Minneapolis St. R. Co.*, 98 Minn. 96, 107 N. W. 817, holding that there was no error in trial court's granting a new trial in favor of plaintiff, who received a verdict for one dollar, unless defendant would pay one hundred and fifty dollars. **Wis.**—*West v. Milwaukee, etc. R. Co.*, 56 Wis. 318, 14 N. W. 292, holding that where an amount, readily ascertainable, is improperly excluded from the verdict, the reviewing court may permit the party against whom the verdict was returned to stipulate voluntarily for an addition to the verdict.

84. *Goldsmith v. Detroit, J. & C. Ry. Co.*, 165 Mich. 177, 130 N. W. 647; *Lorf v. Detroit*, 145 Mich. 265, 108 N. W. 661.

85. See the title "Remission of Damages."

86. **Miss.**—*Sanders v. Simmons*, 12

So. 850. **Mo.**—*Keen v. Schnedler*, 92 Mo. 516, 2 S. W. 312; *McQuiddy v. Ware*, 67 Mo. 74; *Fine v. Board of St. Louis Pub. Schools*, 39 Mo. 59. **N. H.**—*Odlin v. Gove*, 41 N. H. 465, 77 Am. Dec. 773. **Tenn.**—*Fowler v. Nixon*, 7 Heisk. 719.

87. **Ill.**—*Strean v. Lloyd*, 128 Ill. 493, 21 N. E. 533; *Lowe v. Foulke*, 103 Ill. 58. **S. C.**—*Duren v. Kee*, 50 S. C. 444, 27 S. E. 875. **Va.**—*Shiflet v. Dowell*, 90 Va. 745, 19 S. E. 848.

88. *Cook v. Cook*, 67 Ga. 381. And see *Ross v. State*, 65 Ga. 127.

89. *McMullen v. Citizens' Bank*, 123 Ga. 400, 51 S. E. 342. See, however, *Gould v. C. B. Johnston & Co.*, 123 Ga. 765, 51 S. E. 608. See *supra*, III, D, 11.

90. *Moxley v. Georgia Ry. & Elec. Co.*, 122 Ga. 493, 50 S. E. 339; *Brooks v. Proctor*, 111 Ga. 835, 36 S. E. 99; *Baker v. Johnson*, 99 Ga. 374, 27 S. E. 706. See *supra*, III, E, 9, f.

91. *Collins Park & B. R. Co. v. Ware*, 110 Ga. 307, 35 S. E. 121.

92. *Galbrith v. Lowe*, 142 Cal. 295, 75 Pac. 831; *Moore v. Kendall*, 121 Cal. 145, 53 Pac. 647; *Wright v. Snowball*, 45 Cal. 654; *Calderwood v. Brooks*, 28 Cal. 151; *Miller v. American Cent. Ins. Co.*, 2 Cal. App. 271, 83 Pac. 289.

See the title "Statement and Abstract of Case."

to a hearing.⁹³ In the absence of mandatory requirements, motions to dismiss a motion for a new trial rest largely in the discretion of the court.⁹⁴

5. **Order Granting or Refusing.**⁹⁵ — a. *In General.* — An order granting a new trial should specify the grounds upon which the order is made,⁹⁶ although it has been held that a statute making it the duty of the court to do so is merely directory.⁹⁷ If the new trial is granted only in respect to a part of the issues, the order should specify the particular issues to be retried.⁹⁸ If the motion is denied, in some jurisdictions a party, on request, is entitled to have the court file its reasons for overruling the motion.⁹⁹

b. *Effect of Order.* — By the operation of an order granting a new trial, the cause, in contemplation of law, is precisely in the same condition as if no previous trial had been held,¹ and the verdict and answers to particular questions, if any, are swept aside.² The order suspends the judgment, if entered,³ and the statutes sometimes expressly

93. Cal.—Dorcy v. Brodis, 153 Cal. 673, 96 Pac. 278; Moore v. Kendall, 121 Cal. 145, 53 Pac. 647; People v. Center, 61 Cal. 191; Boggs v. Clark, 37 Cal. 236. Ga.—Wilson v. Wilson, 142 Ga. 110, 82 S. E. 484; Mott v. Koch, 7 Ga. App. 239, 66 S. E. 553. Ill. Richardson v. Beres, 115 Ill. App. 532; Calumet Furniture Co. v. Reinhold, 51 Ill. App. 323. Can.—Mulholland v. County of Grey, 23 U. C. Q. B. 517.

See *supra*, III, D.

94. Cal.—Poggs v. Clark, 37 Cal. 236. Ga.—Equitable Mtg. Co. v. McWaters, 119 Ga. 337, 46 S. E. 437. Utah.—Burlock v. Shupe, 5 Utah 428, 17 Pac. 19.

95. For forms of order, see 9 STAND-ARD PROC. 875, and the following cases: Cal.—People v. Flood, 102 Cal. 330, 331, 36 Pac. 663; Gross v. Kelleher, 80 Cal. 519, 22 Pac. 293 (unless plaintiff remit part of the recovery); Cordor v. Morse, 57 Cal. 301, upon terms. Mich. Thomas v. Hoffman, 22 Mich. 45, 46. N. C.—State *ex rel.* Foust v. Stafford, 70 N. C. 115, modifying judgment and denying new trial. Ohio.—Lesslie v. State, 18 Ohio St. 390.

96. Cal.—Borkheim v. Fireman's Fund Ins. Co., 38 Cal. 505. Idaho. Wolfe v. Ridley, 17 Idaho 173, 104 Pac. 1014, 20 Am. & Eng. Ann. Cas. 39; State v. Barber, 15 Idaho 96, 99, 96 Pac. 116. Mo.—Edwards v. Missouri Ry. Co., 82 Mo. App. 478; State v. Edwards, 35 Mo. App. 680. N. Y.—Newbound v. Interurban St. R. Co., 42 Misc. 525, 86 N. Y. Supp. 68; Gitelson v. Weisburg, 36 Misc. 214, 73 N. Y.

Supp. 195; Murphy v. Interurban St. Ry. Co., 88 N. Y. Supp. 187. Ohio. Marietta v. Emerson, 5 Ohio St. 288.

[a] Not necessary that the order should state the grounds. Schraer v. Stefan, 80 Wis. 653, 50 N. W. 778.

97. Cal.—Borkheim v. Fireman's Fund Ins. Co., 38 Cal. 505. Colo.—Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018. Mo.—Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; State *ex rel.* Schnaider Brewing Co. v. Edwards, 35 Mo. App. 680.

98. Mountain Tunnel Gravel Min. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410. 99. Cronin v. Fire Assn. of Philadelphia, 123 Mich. 277, 82 N. W. 45.

1. Cal.—Kent v. Williams, 146 Cal. 3, 79 Pac. 527. Conn.—Lockwood v. Jones, 7 Conn. 431. Ga.—Bourquin v. Bourquin, 110 Ga. 440, 35 S. E. 710. Mo.—Williams v. Butterfield, 214 Mo. 412, 114 S. W. 13. N. J.—More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. L. 9, 69 Atl. 491. Okla. Spaulding Mfg. Co. v. Dill, 25 Okla. 395, 106 Pac. 817.

[a] In a Criminal Case.—Turner v. Territory, 15 Okla. 557, 82 Pac. 650. As to jeopardy generally, see the title "Jeopardy."

2. Ill.—Delano v. Bennett, 61 Ill. 83. Ia.—Hollenbeck v. Marshalltown, 62 Iowa 21, 17 N. W. 155; Ruble v. Atkins, 39 Iowa 694. Kan.—McCrum v. Corby, 15 Kan. 112.

3. Ark.—Langhorst v. Rogers, 88 Ark. 318, 114 S. W. 915; Randolph v. McCain, 34 Ark. 696. Cal.—Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119;

provide that if a new trial is granted, the judgment shall be thereby rendered void.⁴

6. **Rehearing.**—For good cause, the court may, in some jurisdictions, entertain a motion for the rehearing of a motion for a new trial,⁵ provided that the motion is made during the term in which the order was entered, or while the court has power over its judgment.⁶ In some states, such a motion must be made within the time an original motion for a new trial can be made.⁷

7. **Vacating Order.**—In accordance with the general rules elsewhere treated⁸ the court has judicial discretion to vacate an order granting or refusing a new trial, if such action is taken during the term the order was entered,⁹ though in some states, after entry of

Wittenbrock *v.* Bellmer, 62 Cal. 558; Bauder *v.* Tyrrel, 59 Cal. 99. **Conn.** Fleming *v.* Lord, 1 Root 214. **Ind.** State *v.* Templin, 122 Ind. 235, 23 N. E. 697. **Ia.**—Means *v.* Yeager, 96 Iowa 694, 65 N. W. 993; Low *v.* Fox, 56 Iowa 221, 19 N. W. 131. **La.**—State *v.* New Orleans Police Board, 51 La. Ann. 747, 25 So. 637. **Md.**—Truett *v.* Legg, 32 Md. 147. **Mass.**—Page *v.* Cole, 123 Mass. 93. **Okla.**—Boynton *v.* Crockett, 12 Okla. 57, 69 Pac. 869. **Ore.**—Kearney *v.* Snodgrass, 12 Ore. 311, 7 Pac. 369. **Tex.**—Wolf *v.* Sahn (Tex. Civ. App.), 135 S. W. 733.

4. U. S. Rev. Sts., 987; Cambuston *v.* United States, 95 U. S. 285, 288, 24 L. ed. 448; Brown *v.* Evans, 18 Fed. 56.

5. **Ia.**—McGowan *v.* Johnson, 33 Iowa 604. **N. Y.**—Croner *v.* Farmers' Fire Ins. Co., 18 App. Div. 263, 46 N. Y. Supp. 108; Matthews *v.* Herdtfelder, 60 Hun 521, 15 N. Y. Supp. 165, 39 N. Y. St. 486. **N. C.**—Coffield *v.* Warren, 72 N. C. 223. **Ohio.**—Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 48 N. E. 879. **R. I.**—See Timony *v.* Casey, 20 R. I. 257, 38 Atl. 370, holding that the reasons presented were insufficient to warrant a rehearing.

See *infra*, III, G, 7.

This cannot be done in some states. See *infra*, III, G, 7, as to the power of court to set aside the order.

[a] **Reinstating Verdict.**—The court has authority to reinstate a verdict on a motion to reconsider an order awarding a new trial. Evans *v.* Freeman, 149 Fed. 1020, *affirmed*, Freeman *v.* Evans, 159 Fed. 26, 86 C. A. 216.

[b] **After Judgment Satisfied.**—After a motion for a new trial has been denied, and judgment rendered, paid,

and satisfied, a motion for a rehearing on the motion for a new trial cannot be granted, as the court has no power to grant leave to re-argue the motion. Smith *v.* Ontario, 17 Blatchf. 240, 22 Fed. Cas. No. 13,086.

6. **Fla.**—Mundee *v.* Freeman, 23 Fla. 529, 3 So. 453. **Ill.**—Becker *v.* Sauter, 89 Ill. 596, cannot review the decision at a subsequent term. Remedy only by writ of error. Kan. Kingman & Co. *v.* Chubb, 8 Kan. App. 167, 55 Pac. 474. **Ky.**—Bland *v.* John, 6 Ky. L. Rep. 367. **Neb.**—See Snow *v.* Vandever, 33 Neb. 735, 51 N. W. 127. **Tex.**—San Antonio *v.* Dickman, 34 Tex. 647, no authority at subsequent term to set aside the order.

Compare 15 STANDARD PROC. 186.

But see Croner *v.* Farmers' Fire Ins. Co., 18 App. Div. 263, 46 N. Y. Supp. 108. See also Coffield *v.* Warren, 72 N. C. 223.

7. Kentucky Cent. Ry. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63; Smith *v.* Sovereign Camp, W. O. W., 179 Mo. 119, 77 S. W. 862. *Contra*, Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 48 N. E. 879.

8. See the title "Judgments."

9. **U. S.**—Grantham *v.* United States, 28 Ct. Cl. 52. **Ark.**—Brooks *v.* Hanauer, 22 Ark. 174. **Ia.**—Dawson *v.* Wisner, 11 Iowa 6. **Mass.**—Loveland *v.* Rand, 200 Mass. 142, 85 N. E. 948. **Minn.**—Beckett *v.* Northwestern Masonic Aid Assn., 67 Minn. 298, 69 N. W. 923. **Neb.**—Snow *v.* Vandever, 33 Neb. 735, 51 N. W. 127. **N. Y.**—Bishop *v.* Kingston Gas, etc. Co., 147 App. Div. 920, 131 N. Y. Supp. 1039; Matthews *v.* Herdtfelder, 60 Hun 521, 15 N. Y. Supp. 165, 39 N. Y. St. 486; Douglass *v.* Seiferd, 18 Misc. 188, 41

such an order it becomes final and the trial court's authority to modify or set it aside ceases except as otherwise provided by statute, as in case of mistake, inadvertence, or excusable neglect.¹⁰ After the expiration of such term, however, the court, in most states, has no jurisdiction over the matter.¹¹

8. Renewal of Motion.—As a rule, the court after refusing a motion for a new trial will not entertain from the same party subsequent motion upon the same grounds,¹² and although, in some jurisdictions, successive motions may properly be made upon different grounds,¹³ yet there should be exceptional reasons for a second application after the denial of an original motion.¹⁴ But where justice demands, a motion for a new trial should not be denied merely be-

N. Y. Supp. 289, 75 N. Y. St. 698. **Ohio.**—Huber Mfg. Co. v. Sweny, 57 Ohio St. 169, 48 N. E. 879. **Tex.**—Watson v. Williamson, 76 S. W. 793; Wells v. Melville, 25 Tex. 337.

Upon failure to comply with conditions, see *supra*, III, G, 3, b, (IV).

10. Cal.—Whitney v. Superior Court, etc. of San Francisco, 147 Cal. 536, 82 Pac. 37 (under Code Civ. Proc., §473); Holtum v. Greif, 144 Cal. 521, 78 Pac. 11; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173. **Nev.**—Crosby v. North Bonanza Silver Min. Co., 23 Nev. 70, 42 Pac. 583. **Okla.**—Lookabaugh v. Cooper, 5 Okla. 102, 48 Pac. 99. **Wash.**—Coyle v. Seattle Electric Co., 31 Wash. 181, 71 Pac. 733; Burnham v. Spokane Merc. Co., 18 Wash. 207, 51 Pac. 363.

[a] Merely because the order is erroneous it cannot be modified or set aside. Appeal is the proper remedy in such. Holtum v. Greif, 144 Cal. 521, 78 Pac. 11; Lookabaugh v. Cooper, 5 Okla. 102, 48 Pac. 99.

[b] By statute in Minnesota the former rule in that state has been changed to permit the court to set aside or modify its judgments or orders. Beckett v. Northwestern Masonic Aid Assn., 67 Minn. 298, 69 N. W. 923.

11. U. S.—Smith v. Ontario, 17 Blatchf. 240, 22 Fed. Cas. No. 13,086. **Ala.**—Brown v. Coleman, 1 Ala. App. 580, 55 So. 271. **Ark.**—Brooks v. Hanauer, 22 Ark. 174. **Ill.**—Becker v. Sauter, 80 Ill. 596. **Kan.**—Missouri Pac. R. Co. v. Mayberry, 63 Kan. 881, 64 Pac. 989; Kingman & Co. v. Chubb, 8 Kan. App. 167, 55 Pac. 474. **Ky.**

Louisville Rock & Lime Co. v. Kerr, 78 Ky. 12. **N. Y.**—Mellen v. Mellen, 27 Abb. N. C. 99, 16 N. Y. Supp. 191, 21 Civ. Proc. 301; Rebhun v. Swartwout, 3 N. Y. Supp. 419. **Okla.**—Owen v. District Court, 43 Okla. 442, 143 Pac. 17, Ann. Cas. 1917C, 1147. **Tex.**—Puckett v. Reed, 37 Tex. 308; Metzger v. Wendler, 35 Tex. 378; San Antonio v. Dickman, 34 Tex. 647. **Va.**—Lavell v. Gold's Admr., 25 Gratt. (66 Va.) 473.

See 15 STANDARD PROC. 187. But see Evans v. Freeman, 149 Fed. 1020 (*affirmed* in Freeman v. Evans, 159 Fed. 26, 86 C. C. A. 216), following the Pennsylvania practice allowing an order granting a new trial to be set aside at a subsequent term.

12. Cal.—People v. Center, 61 Cal. 191, 9 Pac. Coast L. J. 765. **Ga.**—Wimpy v. Gaskill, 76 Ga. 41; Malone v. Hopkins, 49 Ga. 221. **Ill.**—Neulander v. Rothschild, 67 Ill. App. 288. **Ind.**—White v. Perkins, 16 Ind. 358; Harris v. Rupel, 14 Ind. 209. **Mass.**—Com. v. Ruisseau, 140 Mass. 363, 5 N. E. 166. **Vt.**—Putnam v. Lawrence, 50 Vt. 66. **Wis.**—Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357, 21 N. W. 227; Branger v. Buttrick, 28 Wis. 450.

Compare 15 STANDARD PROC. 560, 562, note 96.

13. Ind.—White v. Perkins, 16 Ind. 358. **Ia.**—Bevering v. Smith, 121 Iowa 607, 96 N. W. 1110. **Mo.**—Thompson v. Thompson, 109 Mo. App. 462, 84 S. W. 1022. **E. I.**—Hayes v. Kenyon, 7 R. I. 531.

14. Ga.—Malone v. Hopkins, 49 Ga. 221. **Ind.**—Harrington v. State, 76 Ind. 112. **Ky.**—Hughes v. McGee, 1 A. K. Marsh. 28. **N. Y.**—Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423.

cause it is a renewed motion.¹⁵ By statute, however, a judgment may become final upon the denial of a motion for a new trial, and thus leave the court without jurisdiction to entertain a subsequent motion.¹⁶

H. REVIEW IN HIGHER COURT.—1. **Mandamus.**—Trial courts being clothed with authority in the exercise of a sound legal discretion to grant new trials, cannot be compelled by mandamus to grant such remedies,¹⁷ nor can any alleged error in granting or refusing to grant a new trial be corrected by mandamus.¹⁸ Mandamus may, however, lie to compel a judge to hear and determine a motion for a new trial. He cannot be compelled to render a particular decision, but he may properly be compelled to make some decision.¹⁹

2. **Prohibition.**—On the other hand, however, the writ of prohibition may be invoked to prevent the consideration of a motion to grant a new trial where the lower court has no power to grant it, since such an act is not merely erroneous, but is void for want of jurisdiction.²⁰

3. **Certiorari.**—Where the trial court has jurisdiction to hear the motion, its order cannot be reviewed on certiorari.²¹

4. **Error and Appeal.**—a. *Right To Review.*—At common law, the granting or the refusing of a new trial was entirely discretionary with the trial court, and error for the purpose of review could not be predicated upon the manner in which such discretion was exercised.²² No writ of error lay at common law, or under the Statute of Edw. I., to the decision on a motion for a new trial.²³

15. *Jaquish v. Kelly*, 165 App. Div. 847, 151 N. Y. Supp. 187, or even a third motion.

16. *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982.

17. *La.*—*State v. Judge*, 39 La. Ann. 664, 2 So. 215; *State v. Judge Watts*, 8 La. (O. S.) 76. *N. Y.*—*Ex parte Baily*, 2 Cow. 479. *Eng.*—*Ex parte Smyth*, 3 Ad. & El. 719, 30 E. C. L. 330, 111 Eng. Reprint 587.

See the title "Mandamus."

18. See cases in preceding note.

19. *Bridges v. Miller*, 3 Ala. 746; *State v. Stratton*, 110 Mo. 426, 19 S. W. 803. See generally the title "Mandamus."

20. *Cal.*—*White v. Superior Court*, 72 Cal. 475, 14 Pac. 87. *Mo.*—*State v. Walls*, 113 Mo. 42, 20 S. W. 883. *N. Y.* *People ex rel. Jerome v. Court of General Sessions*, 185 N. Y. 504, 78 N. E. 149. *Okla.*—*Owen v. District Court*, 43 Okla. 442, 143 Pac. 17, Ann. Cas. 1917C, 1147.

See generally the title "Prohibition."

21. *State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139. See generally the title "Certiorari."

22. *Mich.*—*People v. Judge of Superior Court*, 41 Mich. 5, 2 N. W. 180. *Miss.*—*Dulaney v. Rankin*, 47 Miss. 391. *Ore.*—*McBride v. Northern Pac. R. Co.*, 19 Ore. 64, 23 Pac. 814; *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309; *State v. Becker*, 12 Ore. 318, 7 Pac. 329. *Pa.*—*Cathcart v. Com.*, 37 Pa. 108. *Vt.*—*Newton v. Brown*, 49 Vt. 16.

[a] *Venire de novo* and new trial distinguished in this respect. See *State v. Miller*, 18 N. C. 500.

[b] When the trial was at nisi prius, the movant applied to the trial judge for an order to show cause, and if this order were obtained, the hearing was conducted at Westminster in banc, and the decision was final. *Mass.* *Miller v. Baker*, 20 Pick. 285. *Ore.* *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309. *Va.*—*Johnson v. Macon*, 1 Wash. (1 Va.) 4.

23. *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

The common law rule obtains in the federal courts, and the decision of the trial court upon a motion for a new trial is not reviewable.²⁴ In many of our states, it is also held that such orders rest in the discretion of the trial court, and that, in the absence of legislation, there is no direct appeal or writ of error from them.²⁵ In some states, however, such orders may be reviewed on appeal from the final judg-

[a] **No Exception Available to Ruling.**—(1) At common law, exceptions, incorporated in a bill of exceptions, lay only for errors of law occurring at the trial (*Walton v. United States*, 9 Wheat. [U. S.] 651, 6 L. ed. 182; *Onondaga County M. Ins. Co. v. Minard*, 2 N. Y. 98) and (2) a motion for a new trial being made after verdict and before judgment, offered no opportunity for an "exception" to any ruling made on such a motion. *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

24. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898; *Mulhall v. Keenan*, 18 Wall. (U. S.) 342, 350, 21 L. ed. 808; *Warner v. Norton*, 20 How. (U. S.) 448, 461, 15 L. ed. 950; *Hallenbeck-Hungerford Realty Corp. v. John I. Devlin Co.*, 228 Fed. 661, 143 C. C. A. 183; *Spokane & I. E. R. Co. v. Campbell*, 217 Fed. 518, 133 C. C. A. 370; *McBride v. Neal*, 214 Fed. 966, 131 C. C. A. 262; *Atlantic Coast Line R. Co. v. Thompson*, 211 Fed. 889, 128 C. C. A. 267; *Mound Valley V. B. Co. v. Mound Valley, N. G. & O. Co.*, 205 Fed. 147, 123 C. C. A. 478. See *Odell Mfg. Co. v. Tibbetts*, 212 Fed. 652, 129 C. C. A. 188.

[a] **A writ of error does not lie in the United States courts for an order in the court below granting or refusing a new trial.** *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. ed. 803; *Fishburn v. Chicago, M. & St. P. Ry. Co.*, 137 U. S. 60, 11 Sup. Ct. 8, 34 L. ed. 585; *Terre Haute & I. Ry. Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. 270, 27 L. ed. 970; *Hall v. Weare*, 92 U. S. 723, 23 L. ed. 500.

[b] **The state law does not govern** since this matter is not within the conformity act. *Coffey v. United States*, 117 U. S. 233, 6 Sup. Ct. 717, 29 L. ed. 890; *Newcomb v. Wood*, 97 U. S. 581, 584, 24 L. ed. 1085; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *United States v. Molloy*, 31 Fed. 19, 23.

25. *Ala.*—*Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; *Shelby Iron Co. v. Cobb*, 55 Ala. 636; *Spence v. Tuggle*, 10 Ala. 538; *Barr v. White*, 2 Port. 342. *Ariz.* *Pope v. Olsen*, 14 Ariz. 528, 132 Pac. 434. *Conn.*—*Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; *Magill v. Lyman*, 6 Conn. 59; *Ray v. Fitch*, 1 Root 290. *Del.*—*State v. Layton*, 3 Harr. 469. *D. C.*—*Raub v. Carpenter*, 17 App. Cas. 505; *Brown v. Bradley*, 6 App. Cas. 207. *Ky.*—*Christman v. Chess*, 102 Ky. 230, 43 S. W. 426; *Stewart v. Stewart*, 2 Men. 85. *La.*—*Wheeler v. Maillot & Co.*, 15 La. Ann. 659. *Me.*—*Moulton v. Jose*, 25 Me. 76. *Md.*—*Kirk v. Grant*, 67 Md. 418, 10 Atl. 230; *Anderson v. State*, 5 Har. & J. 174. *Mass.* *Zuccaro v. Nazzaro*, 216 Mass. 289, 103 N. E. 907. *Mich.*—*Moore v. Daiber*, 92 Mich. 402, 52 N. W. 742; *Wiest v. Luyendyk*, 73 Mich. 661, 41 N. W. 839; *Jones v. Hobson*, 37 Mich. 36. *Minn.* *Montee v. Great Northern R. Co.*, 129 Minn. 526, 151 N. W. 1101, unless based on errors occurring at the trial. *Neb.* *Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363. *Ore.*—*Beaver v. Mason, Ehrman & Co.*, 73 Ore. 36, 143 Pac. 1000; *White v. Geinger*, 70 Ore. 81, 139 Pac. 572. *P. I.*—*Veloso v. Pacheco*, 1 Phil. Isl. 271. *S. C.*—*Lott v. Southern R. Co.*, 98 S. C. 170, 82 S. E. 795; *Kirkland v. Augusta-Aiken Ry. & E. Corp.*, 93 S. C. 574, 77 S. E. 709. *Utah.* *Candland v. Mellen*, 46 Utah 519, 151 Pac. 341. *Wis.*—*Brown v. Edward P. Allis Co.*, 98 Wis. 120, 73 N. W. 656.

[a] **A writ of error does not lie for granting or refusing a new trial.** *Ala.*—*Shelby Iron Co. v. Cobb*, 55 Ala. 636. *Ill.*—*Williams v. LaValle*, 64 Ill. 110. *Ind.*—*Cook v. Otto*, 13 Ind. 380. *La.*—*Hemphill v. Braun*, 1 McGloin 326. *Md.*—*Sittig v. Birkestack*, 38 Md. 158. *N. Y.*—*Seoville v. Landon*, 50 N. Y. 686; *Carroll v. O'Shea*, 2 Misc. 437, 21 N. Y. Supp. 956, 51 N. Y. St. 579. *W. Va.*—*Damron v. Ferguson*, 32 W. Va. 33, 9 S. E. 39. *Wis.*—*Davison v. Brown*, 93 Wis. 85, 67 N. W. 42.

ment.²⁶ and, in a number of jurisdictions, they can be reviewed only in such a way.²⁷

In a number of states, the statutes authorize proceedings by appeal or error directly from orders granting or refusing new trials, either generally, or, in particular, when such motions are based upon errors of law.²⁸ However, a statute expressly authorizing an appeal from

26. **Ariz.**—Carroll v. Byers, 4 Ariz. 158, 36 Pac. 499. **Ill.**—Kennedy v. Illinois Cent. R. Co., 68 Ill. App. 601. **Ind.**—Cook v. Otto, 13 Ind. 380; Lepar v. Enderton, 9 Ind. 353. **Minn.**—Mower v. Hanford, Thayer & Co., 6 Minn. 535. **Miss.**—Brown v. Carraway, 47 Miss. 668. **S. D.**—Granger v. Roll, 6 S. D. 611, 62 N. W. 970. **Tenn.**—State v. Perry, 4 Baxt. 438. **Utah.**—Bacon v. Thornton, 16 Utah 138, 51 Pac. 153. **Wis.**—Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357, 21 N. W. 227.

[a] **New York.**—May review order on appeal from final judgment providing exceptions to alleged errors covered by the motion were taken during the trial. An application for a new trial on the ground that the verdict is against the evidence is not the subject of an exception, however, and, consequently, such a ground cannot be reviewed on appeal from final judgment. Duryea v. Vosburgh, 121 N. Y. 57, 24 N. E. 308.

[b] **Arizona.**—Where the time for an appeal from an order denying a new trial has expired, the order may be reviewed on an appeal from the judgment. Carroll v. Byers, 4 Ariz. 158, 36 Pac. 499.

[c] **Order Made After Judgment.** Although an order made before judgment may be reviewed on appeal from the final judgment, yet an order made after the judgment is not so reviewable. Gade v. Collins, 8 S. D. 322, 66 N. W. 466; Leary v. Leary, 68 Wis. 662, 32 N. W. 623; Morris v. Niles, 67 Wis. 341, 30 N. W. 353.

Are Not Final Judgments.—While such orders may, in some states, upon proper assignment of error be reviewed with other errors, if any, on appeal from final judgment, yet such orders are not, in themselves, final judgments. See *infra*, note 31.

27. **D. C.**—Kelly v. Moore, 22 App. Cas. 9 Ky.—Kennery's Admr. v. Louisville, etc. R. Co., 21 Ky. L. Rep. 532, 51 S. W. 804. **Ohio.**—Young v.

Shallenberger, 53 Ohio St. 291, 41 N. E. 518. **Utah.**—Bear River Valley Orchard Co. v. Hanley, 15 Utah 506, 50 Pac. 611.

28. See the statutes and the following: **Ala.**—Karter v. Peck, 121 Ala. 636, 25 So. 1012; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65. **Ark.**—Trowbridge v. Sanger, 4 Ark. 179. **Cal.**—Romine v. Cralle, 80 Cal. 626, 22 Pac. 296; McCreery v. Everding, 44 Cal. 284; Riddle v. Baker, 13 Cal. 295, 302. **Conn.**—Husted v. Mead, 58 Conn. 55, 19 Atl. 233. **Fla.**—Schultz v. Pacific Ins. Co., 14 Fla. 73. **Haw.**—Territory v. Cotton, 17 Hawaii 445. **Idaho.**—Schultz v. Keeler, 2 Idaho 333, 13 Pac. 481. **Ind.**—Atkinson v. Williams, 151 Ind. 431, 51 N. E. 721; Hines v. Driver, 89 Ind. 339. **Ia.**—Baldwin v. Foss, 71 Iowa 389, 32 N. W. 389; State v. Tomlinson, 11 Iowa 401; Newell v. Sanford, 10 Iowa 396. **Kan.**—Ottawa v. Washabaugh, 11 Kan. 124. **Minn.**—Montee v. Great Northern R. Co., 129 Minn. 526, 151 N. W. 1101; McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397; Schuck v. Hagar, 24 Minn. 339; Converse v. Burrows, 2 Minn. 229. **Mo.**—Ormiston v. Trumbo, 77 Mo. App. 310. **Mont.**—See Murphy v. Nett, 47 Mont. 38, 130 Pac. 451. **S. C.**—Nunnamaker v. Smith, 93 S. C. 466, 82 S. E. 675; Boyd v. Munro, 32 S. C. 249, 10 S. E. 963; Byrd v. Small, 2 S. C. 388. **S. D.**—Williams v. Chicago & N. W. R. Co., 11 S. D. 463, 78 N. W. 949. **Va.**—Carrington v. Bennett, 1 Leigh (28 Va.) 340. **W. Va.**—Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880. **Wis.**—Hanna v. Chicago, etc. R. Co., 156 Wis. 626, 146 N. W. 878; Pabst Brewing Co. v. Milwaukee Lith. Co., 156 Wis. 615, 146 N. W. 879.

[a] **Errors of Law.**—In some jurisdictions, an appeal lies only when alleged errors of law are involved in the motion for the new trial. Thus, in Minnesota, the statute explicitly provides that an order granting a new trial is not appealable unless it is expressly stated in the order or memo-

a ruling upon a new trial motion when such motion is based upon errors of law, does not apply to a motion depending upon a question of fact, as, for example, newly discovered evidence, or insufficiency of the evidence to justify the verdict.²⁹ Generally an order denying a new trial is regarded as a "final order" under a statute making such an order appealable,³⁰ but the contrary is true as to an order granting a new trial.³¹ It has been held under a statute authorizing an appeal "from an order affecting a substantial right," that an order denying a new trial is not such an order.³²

b. *Objections and Exceptions.*—The necessary preliminary steps in

random of the trial court that the order "is based exclusively on errors occurring at the trial." Gen. St. 1913, §8001; *Heide v. Lyons*, 128 Minn. 488, 151 N. W. 139; *Kommerstad v. Great Northern R. Co.*, 125 Minn. 297, 146 N. W. 975. "This statute is general in its terms, and it must apply to all orders granting new trials, whether made upon motion of the parties or the court." *Montee v. Great Northern R. Co.*, 129 Minn. 526, 151 N. W. 1101. See also: **N. Y.**—*Baldwin's Bank v. Butler*, 133 N. Y. 564, 30 N. E. 646. **N. C.**—*Carson v. Dellinger*, 90 N. C. 226; *Johnson v. Bell*, 74 N. C. 355; *Moore v. Edmiston*, 70 N. C. 471. **S. C.**—*Nunnemaker v. Smith*, 98 S. C. 466, 82 S. E. 675; *Byrd v. Small*, 2 S. C. 388.

[b] **In South Carolina**, an order granting a new trial is not appealable, except in cases where the appellate court can render judgment absolute upon the right of the appellant, if it shall determine that no error was committed in granting the new trial. *Daughty v. Northwestern R. Co.*, 92 S. C. 361, 75 S. E. 553. See also *Nunnemaker v. Smith*, 98 S. C. 466, 82 S. E. 675.

29. *Merritt v. Morse*, 113 Mass. 271; *Hubbard v. Gale*, 105 Mass. 511; *Norton v. Wilbur*, 5 Gray (Mass.) 7; *Kidney v. Richards*, 10 Allen (Mass.) 419.

30. **Conn.**—*Husted v. Mead*, 58 Conn. 55, 19 Atl. 233. **Idaho.**—*Schultz v. Keeler*, 2 Idaho 333, 13 Pac. 481. **Ind.**—*Atkinson v. Williams*, 151 Ind. 431, 51 N. E. 721. **Ia.**—*Boyce v. Timpe*, 89 N. W. 83.

[a] **Final Order.**—Under a statute allowing appeals on final orders, an order which refuses a new trial is a final order, and, as such, may be appealed from within the time allowed by the statute for the review of final orders

or judgments. *Thompson v. Wheeler & W. Mfg. Co.*, 29 Kan. 476.

31. **U. S.**—*Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374. **Ga.**—*Nunez & Co. v. Southern Exp. Co.*, 45 Ga. 314. **Ind.**—*House v. Wright*, 22 Ind. 383. **Ky.**—*Miller v. Ashcraft*, 98 Ky. 314, 32 S. W. 1085. **La.**—*Wheeler v. Maillot*, 15 La. Ann. 659. **Mich.**—*People v. Judge of Circ. Court*, 41 Mich. 5, 2 N. W. 181. **Neb.**—*Artman v. West Point Mfg. Co.*, 16 Neb. 572, 20 N. W. 873. **Ohio.**—*Young v. Shallenberger*, 53 Ohio St. 291, 41 N. E. 518; *Conord v. Runnels*, 23 Ohio St. 601.

[a] **An order granting a motion for a new trial (1) is not a final order.** It leaves the rights of litigants undetermined. The case stands as though it never had been tried. The order merely vacates the former judgment for the purpose of a new trial on the merits of the original action. *Pope v. Olsen*, 14 Ariz. 528, 132 Pac. 434; *Spicer v. Simms*, 6 Ariz. 347, 57 Pac. 610. (2) **A final order has been defined as an order that determines the action and prevents judgment.** An order granting a new trial does not come under such a designation. *Fisk v. Henarie*, 15 Ore. 89, 13 Pac. 760.

[b] **Are Not Final Judgments.**—The term "final judgment," from which error or appeal may be prosecuted, does not apply to such orders. **Ala.**—*Ex parte Sims*, 44 Ala. 248. **Conn.**—*Wallace v. Middlebrook*, 28 Conn. 464. **Ga.**—*McWhorter v. McMurrain*, 26 Ga. 164. **Ill.**—*Williams v. LaValle*, 64 Ill. 110. **La.**—*McWillie v. Perkins*, 20 La. Ann. 168. **Mo.**—*Myers v. Butterfield*, 33 Mo. 376; *Emmerson v. Harriet*, 11 Mo. 413. **Tex.**—*Dial v. Collins*, 40 Tex. 367.

32. *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

preparing the way for review must be taken in case of an appeal of a ruling on a motion for a new trial, as in all other cases. If the motion is to be resisted, on appeal, on account of failure to observe proper proceedings in the application, due objection must be made, as, for example, that the motion was not filed in time,³³ or that the required notice was not given,³⁴ except where this is regarded as a jurisdictional defect,³⁵ or that the motion does not comply with the requirements,³⁶ since such questions cannot be raised for the first time on appeal. It is essential that there should be a ruling upon the motion,³⁷ and due exception must also be taken to the ruling of the court, either in granting or refusing the motion,³⁸ in order to

33. Cal.—Hegard *v.* California Ins. Co., 72 Cal. 535, 14 Pac. 180, 359. Ind. Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1. Ia.—State *v.* Stevenson, 164 Iowa 50, 73 N. W. 360. Mont. Kenyon-Noble Lumber Co. *v.* School Dist. No. 4, 40 Mont. 123, 105 Pac. 551.

34. Ga.—Cleveland *v.* Chambliss, 54 Ga. 352. Idaho.—Naylor *v.* Lewiston & S. E. Elect. R. Co., 14 Idaho 789, 96 Pac. 573. Minn.—Chesley *v.* Mississippi & R. R. Boom Co., 39 Minn. 83, 38 N. W. 769. Mont.—See McAllister *v.* McDonald, 40 Mont. 375, 106 Pac. 882. N. Y.—Foss *v.* New York, etc. R. Co., 161 App. Div. 681, 146 N. Y. Supp. 930. N. D.—Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53. Wash.—Crooker *v.* Pacific Lounge & M. Co., 34 Wash. 191, 75 Pac. 632.

35. Marshall & Stearns Co. *v.* Deneen Building Co., 169 Cal. 229, 146 Pac. 684.

36. Kan.—Crust *v.* Evans, 37 Kan. 263, 15 Pac. 214. Mo.—Brookshier *v.* Chillicothe Town Mut. F. Ins. Co., 91 Mo. App. 599. Utah.—Rhemke *v.* Clinton, 2 Utah 438.

37. Ark.—Kearney *v.* Moose, 37 Ark. 37. Cal.—Myers *v.* Casey, 14 Cal. 542; Ingraham *v.* Gildermester, 2 Cal. 483. Ill.—Henion *v.* Vavrik, 126 Ill. App. 292; Illinois Cent. R. Co. *v.* O'Keefe, 49 Ill. App. 320. Ind. Ter. Merrill *v.* Martin, 3 Ind. Ter. 571, 64 S. W. 539. Kan.—Wilson *v.* Kestler, 34 Kan. 61, 7 Pac. 793. Ky.—Louisville Chemical Works *v.* Com., 8 Bush 179; Lyon's Exr. *v.* Logan County Bank's Assignee, 25 Ky. L. Rep. 1668, 78 S. W. 454. Neb.—Leach *v.* Renwald, 45 Neb. 207, 63 N. W. 387; Jones *v.* Hayes, 36 Neb. 526, 54 N. W. 858. Ohio.—Snyder *v.* Wanamaker, 17 Ohio Cir. Ct. 184, 9 Ohio Cir. Dec. 620. Tenn.

Memphis St. R. Co. *v.* Johnson, 114 Tenn. 632, 88 S. W. 169. Tex.—Sears *v.* Green, 1 Posey Unrep. Cas. 727.

[a] **Entry of Order.**—(1) The applicant should see that the order has been entered. Peil *v.* Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Wright *v.* Hunter, 46 N. Y. 409; May *v.* Menton, 20 Misc. 723, 45 N. Y. Supp. 1047; Chaimson *v.* Menshing, 12 Misc. 651, 33 N. Y. Supp. 271, 67 N. Y. St. 90; Nashville, etc. R. Co. *v.* Egerton, 98 Tenn. 541, 41 S. W. 1035. (2) And an appeal from an order overruling a motion will be dismissed where the record fails to disclose that the court entered the order. Ala.—Southern Ry. Co. *v.* E. L. Kendall & Co., 14 Ala. App. 242, 69 So. 328, certiorari denied, 193 Ala. 681, 69 So. 1020. Mo.—Hutson *v.* Allen, 236 Mo. 645, 139 S. W. 121. Neb.—Beels *v.* Globe Land & Inv. Co., 93 Neb. 733, 141 N. W. 812.

38. Ala.—Basenberg *v.* Lawrence, 160 Ala. 422, 49 So. 771; State *v.* Harkins, 6 Ala. 57. Ariz.—Turner *v.* Franklin, 10 Ariz. 188, 85 Pac. 1070; Koons *v.* Phoenix Min. Co., 3 Ariz. 204, 32 Pac. 266. Ark.—Moody *v.* St. Louis, etc. R. Co., 89 Ark. 103, 115 S. W. 400, 131 Am. St. Rep. 75; Hicks *v.* Wilson, 24 Ark. 628. Cal.—People *v.* Ah Sam, 41 Cal. 645. Fla.—Henry *v.* Spittler, 67 Fla. 146, 64 So. 745, Ann. Cas. 1916E, 1267; Louisville, etc. R. Co. *v.* Wade, 49 Fla. 179, 38 So. 49. Ga.—Young *v.* Germania Sav. Bank, 134 Ga. 602, 68 S. E. 321; Augusta R. Co. *v.* Andrews, 89 Ga. 653, 16 S. E. 203. Ill.—Johnson *v.* Farrell, 215 Ill. 542, 74 N. E. 760; Stern *v.* People, 96 Ill. 475; Hiitt *v.* Sharer, 34 Ill. 9; Hough *v.* Clayton, 127 Ill. App. 294; Illinois Cent. R. Co. *v.* O'Keefe, 49 Ill. App. 320. Ind. Fletcher *v.* Waring, 137 Ind. 159, 36 N. E. 896; Cox *v.* Dill, 85 Ind. 334.

obtain a review of it, unless the statute gives an exception.³⁹

c. *The Record*. — (I.) *In General*. — In order that an appellate court may review any proceedings of a court below it is necessary that all matters requisite for the intelligent consideration of such proceedings should appear on the record.⁴⁰ Consequently, in preparing the record for the review of an order granting or refusing a new trial, certain essentials must be observed, and the facts upon which the trial court acted must appear.⁴¹

(II.) *Motion and Grounds*. — The motion for the new trial, including the grounds thereof, must appear upon the record.⁴² This means a

Ia.—*Aken v. Clark*, 146 Iowa 436, 123 N. W. 379; *Lewis v. Lewis*, 75 Iowa 669, 37 N. W. 166. **Kan.**—*Great Spirit Springs Co. v. Chicago Lumber Co.*, 47 Kan. 672, 28 Pac. 714; *Atchison v. Byrnes*, 22 Kan. 65. **La.**—*State v. Hall*, 109 La. 290, 33 So. 318; *State v. Jackson*, 35 La. Ann. 769. **Mich.** *Hotchkiss v. Weinmann-Matthews Co.*, 175 Mich. 652, 141 N. W. 568; *Culver v. South Haven & E. R. Co.*, 144 Mich. 254, 107 N. W. 908, 109 N. W. 256; *Ginn v. W. C. Clark Coal Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904; *Knop v. National Fire Ins. Co.*, 101 Mich. 359, 59 N. W. 653. **Mo.**—*Owens v. Matthews*, 226 Mo. 77, 125 S. W. 1100; *State v. Irwin*, 171 Mo. 558, 71 S. W. 1015; *Recar v. Recar*, 171 Mo. App. 632, 154 S. W. 423. **Neb.**—*Tuomey v. Willman*, 43 Neb. 28, 61 N. W. 126. **Ohio.**—*Brown v. Ohio & P. Coal Co.*, 48 Ohio St. 542, 28 N. E. 669. **Okla.**—*Greer v. Moorman*, 40 Okla. 30, 135 Pac. 736; *St. Louis, I. M. & S. R. Co. v. Winsley*, 39 Okla. 374, 135 Pac. 19; *Vaughn Lumber Co. v. Missouri Min., etc. Co.*, 3 Okla. 174, 41 Pac. 81. **P. I.**—*Lopez v. Orozco*, 11 Phil. Isl. 53; *Alvaran v. Marquez*, 11 Phil. Isl. 263; *Ker & Co. v. De La Rama*, 11 Phil. Isl. 453. **W. Va.**—*Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222; *State v. Rollins*, 31 W. Va. 363, 6 S. E. 923. **Wis.**—*State v. Kneifle*, 12 Wis. 439.

[a] Technical errors in an order granting a new trial must be objected to below if they are to avail on appeal. *Guaranteed Investment Co. v. Van Metre*, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554.

39. See the statutes.

40. See, in general, the title "Appeals," Vol. II, p. 343.

41. See *Roberts v. Heffner*, 19 Tex. 129, and *infra*, this section.

42. **Ala.**—*Manly v. Sperry*, 115 Ala. 524, 22 So. 870. **Ariz.**—*Providence Gold-Min. Co. v. Marks*, 7 Ariz. 74, 60 Pac. 938. **Cal.**—*Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *Blood v. La Serena Land & W. Co.*, 150 Cal. 764, 89 Pac. 1090; *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847. **Fla.**—*Baggett v. Savannah, F. & W. R. Co.*, 45 Fla. 184, 34 So. 564. **Ga.**—*Central of Georgia R. Co. v. Tankersley*, 133 Ga. 153, 65 S. E. 367; *Lockwood v. Muhlberg*, 132 Ga. 460, 64 S. E. 655; *Davitt v. Southern Ry. Co.*, 108 Ga. 665, 34 S. E. 327. **Ill.**—*Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *Commonwealth Electric Co. v. Rooney*, 138 Ill. App. 275. **Ind.**—*Jeffersonville v. Gray*, 165 Ind. 26, 74 N. E. 611; *New Albany v. Iron Substructure Co.*, 141 Ind. 500, 40 N. E. 44; *Earnest v. Shoemaker*, 10 Ind. App. 696, 38 N. E. 543. **Ia.**—*Kennedy v. Des Moines*, 84 Iowa 187, 50 N. W. 880. **Kan.**—*List v. Jockheck*, 59 Kan. 143, 52 Pac. 420; *Giles v. Austin*, 54 Kan. 616, 38 Pac. 811; *Illingsworth v. Stanley*, 40 Kan. 61, 19 Pac. 352. **Ky.**—*Charles v. Wolford*, 140 Ky. 581, 131 S. W. 392; *Dickerson's Heirs v. Talbot's Exrs.*, 14 B. Mon. 60; *Boonton v. Floyd County*, 13 Ky. L. Rep. 877. **Minn.**—*Thoreson v. Quinn*, 126 Minn. 48, 147 N. W. 716; *Spencer v. Stanley*, 74 Minn. 35, 76 N. W. 953; *Clark v. C. N. Nelson Lumber Co.*, 34 Minn. 289, 25 N. W. 628. **Mo.**—*Grossman v. United R. Co.*, 248 Mo. 152, 154 S. W. 66; *Simcoe Realty Co. v. Wm. J. Lemp Brewing Co.*, 247 Mo. 29, 152 S. W. 31; *Rose v. Combs Tp.*, 163 Mo. 396, 63 S. W. 698. **Neb.**—*Henkel v. Boudreau*, 94 Neb. 338, 143 N. W. 236; *Brown v. Johnson*, 58 Neb. 222, 78 N. W. 515; *Muchow v. Reid*, 57 Neb. 585, 78 N. W. 263. **N. Y.**—*McDermott v. Conley*, 58 Hun 602, 11 N. Y. Supp.

copy of the motion, since a mere statement that a motion was made is not sufficient.⁴³

(III.) **Notice of Motion.**—That notice of the motion, if notice be required, was duly given, may also have to be shown upon the record.⁴⁴

(IV.) **Time of Motion.**—That the motion, or other application, was made and filed within the time prescribed by law should, likewise, appear.⁴⁵

(V.) **Order or Ruling.**—The order or ruling of the court upon the motion,⁴⁶ and that due exception was taken to the ruling of the court, either in granting or refusing the new trial,⁴⁷ are also requisites of

403, 33 N. Y. St. 560; *Dresser v. Boatmen's F. & M. Ins. Co.*, 47 Hun 153; *Gridley v. St. Francis Xavier College*, 17 N. Y. Supp. 653. **Tenn.**—Nashville, C. & St. L. Ry. Co. v. Egerton, 98 Tenn. 541, 41 S. W. 1035. **Tex.**—Western Union Tel. Co. v. Hartfield (Tex. Civ. App.), 138 S. W. 418; *Texas & N. O. R. Co. v. Faulkner* (Tex. Civ. App.), 131 S. W. 619. **Wis.**—Cottrill v. Cramer, 46 Wis. 488, 1 N. W. 106.

Whether motion is part of original record, see the statutes, and 2 STANDARD PROC. 340.

43. **Ariz.**—Sutherland v. Putnam, 24 Pac. 320. **Ga.**—Sikes v. Norman, 122 Ga. 387, 50 S. E. 134. **Kan.**—White v. Douglas, 51 Kan. 402, 32 Pac. 1092; *Illingsworth v. Stanley*, 40 Kan. 61, 19 Pac. 352. **Miss.**—New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98. **Mo.**—Harding v. Bedoll, 202 Mo. 625, 100 S. W. 638; *Bailey v. McWilliams*, 111 Mo. App. 35, 85 S. W. 618. **Okla.**—Herren v. Merrilees, 7 Okla. 261, 54 Pac. 467; *Rogers v. Bonnett*, 4 Okla. 90, 46 Pac. 599. **Tenn.**—Nashville, C. & St. L. Ry. Co. v. Egerton, 98 Tenn. 541, 41 S. W. 1035.

44. *King v. Pony Gold Min. Co.*, 28 Mont. 74, 72 Pac. 309; *Gum v. Murray*, 6 Mont. 10, 9 Pac. 447; *First Nat. Bank v. McAndrews*, 5 Mont. 251, 5 Pac. 279. *Contra*, *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *Nippert v. Warneke*, 128 Cal. 501, 61 Pac. 96, 270; *Kahn v. Wilson*, 120 Cal. 643, 53 Pac. 24; *Steve v. Bonners Ferry Lumber Co.*, 13 Idaho 384, 92 Pac. 363.

45. **Ind.**—Wallace v. Ransdell, 90 Ind. 173; *Pennsylvania Co. v. Sedwick*, 59 Ind. 336. **Ia.**—Rowen v. Sommers, 101 Iowa 734, 66 N. W. 897. **Kan.**—Julius Winkelmeyer Brewing Assn. v. Wolff, 53 Kan. 323, 36 Pac. 711. **Mo.**—State v. Sanford, 181 Mo. 134, 79 S. W.

498; *Bollinger v. Carrier*, 79 Mo. 318; *Breimeyer v. Star Bottling Co.*, 136 Mo. App. 84, 117 S. W. 119; *Widman v. American Cent. Ins. Co.*, 115 Mo. App. 342, 91 S. W. 1003; *Turney v. Ewins*, 97 Mo. App. 620, 71 S. W. 543; *Kirk v. Kane*, 97 Mo. App. 556, 71 S. W. 463; *Bram v. Miller* (Mo. App.), 67 S. W. 714; *Bates v. Ruth & Mengal Realty Co.*, 88 Mo. App. 550.

46. **Ala.**—Randall v. Worthington, 141 Ala. 497, 37 So. 594; *Southern R. Co. v. Kendall & Co.*, 14 Ala. App. 242, 69 So. 328. **Ariz.**—Fleury v. Jackson, 1 Ariz. 361, 25 Pac. 669. **Idaho.**—Havlick v. Davidson, 15 Idaho 787, 100 Pac. 91. **Ia.**—Spaulding v. Laybourn, 164 Iowa 277, 145 N. W. 521; *Kennedy v. Des Moines*, 84 Iowa 187, 50 N. W. 880. **Kan.**—McNally v. Keplinger, 37 Kan. 556, 15 Pac. 534; *Fort Scott v. Deeds*, 36 Kan. 621, 14 Pac. 268. **Mich.**—*In re Bender's Estate*, 159 Mich. 108, 123 N. W. 601. **Minn.**—Granite Sav. Bank & Tr. Co. v. Weinberg, 62 Minn. 202, 64 N. W. 380. **Miss.**—New Orleans, J. & G. N., etc. R. Co. v. Pressley, Greer & Co., 45 Miss. 66; *Melius v. Houston*, 41 Miss. 59. **Mo.**—*State v. Burckhardt*, 83 Mo. 430; *In re Moore's Est.* (Mo. App.), 119 S. W. 451. **Neb.**—Voorheis, Miller & Co. v. Leisure, 1 Neb. (Unof.) 601, 95 N. W. 676; *Chicago, R. I. & P. Ry. Co. v. Young*, 58 Neb. 678, 79 N. W., 556. **Okla.**—Lockhart v. Muskogee Refining Co., 48 Okla. 405, 150 Pac. 104; *Morris v. Caulk*, 44 Okla. 342, 144 Pac. 623; *Jones v. Midland Sav. & L. Co.*, 43 Okla. 601, 143 Pac. 667.

47. **Ark.**—Berman v. Wolf, 40 Ark. 251; *Vaden v. Ellis*, 18 Ark. 355. **Cal.**—Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527. **Ill.**—Stern v. People, 96 Ill. 475; *Deitrich v. Waldron*, 90 Ill. 115; *Drew v. Beall*, 62 Ill. 164; *Jones v. Spring Valley*, 108 Ill. App. 492. **Ind.**

the record. The grounds, or reasons, upon which the order is based, should also be made to appear, otherwise the court may refuse to review them.⁴⁸

(VI.) **Rulings During Trial.** — When the ground for the new trial is based upon the rulings of the court, the particular rulings must be shown upon the record.⁴⁹

(VII.) **Evidence.** — (A.) **AT THE TRIAL.** — When the motion for a new trial is based upon some ground that involves a consideration of the evidence, all the evidence produced at the trial must be in the record,⁵⁰

Indiana Imp. Co. v. Wagner, 138 Ind. 658, 38 N. E. 49; Scott v. State, 29 Ind. 219; Johnson v. Bell, 10 Ind. 363. **Mich.** Pearl v. Benton Tp., 136 Mich. 697, 100 N. W. 188; Gillett v. Burns, 131 Mich. 616, 92 N. W. 104. **Mo.**—Wentzville Tobacco Co. v. Walker, 123 Mo. 662, 27 S. W. 639; State v. Harvey, 105 Mo. 316, 16 S. W. 886; McIrvine v. Thompson, 81 Mo. 647; Wilbrandt v. Laclede Gas Light Co., 135 Mo. App. 220, 115 S. W. 497; Bank of Liberal v. Anderson, 100 Mo. App. 567, 75 S. W. 189; Kirk v. Kane, 97 Mo. App. 556, 71 S. W. 463.

48. **Cal.**—Tibbetts v. Bower, 121 Cal. 7, 53 Pac. 359. **Idaho.**—Sweetzer v. Mellick, 5 Idaho 783, 51 Pac. 985. **Kan.** Smith v. Freeman, 59 Kan. 775, 52 Pac. 865. **Mass.**—Holt v. Roberts, 175 Mass. 558, 56 N. E. 702; Coffing v. Dodge, 169 Mass. 459, 48 N. E. 840. **Mich.**—*In re Bender's Estate*, 159 Mich. 108, 123 N. W. 691; Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540, 108 N. W. 988; Gillett v. Burns, 131 Mich. 616, 92 N. W. 104; Griffin v. McKnight, 116 Mich. 468, 74 N. W. 650. **N. Y.**—Courtney v. Baker, 60 N. Y. 1; McDermott v. Conley, 58 Hun 602, 11 N. Y. Supp. 403, 33 N. Y. St. 560. **Wis.**—Keller v. Gilman, 96 Wis. 445, 71 N. W. 809; Clascgens Co. v. Silber, 87 Wis. 357, 58 N. W. 756.

49. *Early v. Hamilton*, 75 Ind. 376; *State v. Harty*, 80 Iowa 769, 45 N. W. 903.

50. **Ark.**—Collins v. McPeak, 10 Ark. 556. **Cal.**—Matter of Yoakam's Estate, 103 Cal. 503, 37 Pac. 485. **Fla.** Acosta v. Gingles, 65 Fla. 507, 62 So. 582. **Ga.**—Johnson v. Perry, 121 Ga. 68, 48 S. E. 686; Johnson v. Willingham, 110 Ga. 307, 35 S. E. 117; Savannah Chemical Co. v. Bragg & Son, 14 Ga. App. 371, 80 S. E. 858. **Ill.** Chicago, P. & S. W. R. Co. v. Marseilles, 107 Ill. 313. **Ind.**—Jefferson-

ville v. Gray, 165 Ind. 26, 74 N. E. 611; Marks v. Mariotte, 51 Ind. App. 281, 99 N. E. 501. **Ia.**—Carlson v. Hall, 124 Iowa 121, 99 N. W. 571; *State v. Harty*, 80 Iowa 769, 45 N. W. 903; *Bowen v. Hale*, 4 Iowa 430. **Kan.**—Chicago, R. I. & P. R. Co. v. Mosher, 76 Kan. 599, 92 Pac. 554; *State v. Kness*, 56 Kan. 478, 43 Pac. 782; *Hoopes v. Buford & G. Imp. Co.*, 45 Kan. 549, 26 Pac. 34. **La.**—*State v. Spooner*, 41 La. Ann. 780, 6 So. 879. **Mass.**—Spaulding v. Knight, 118 Mass. 528. **Mich.**—McDonald v. Born, 121 Mich. 595, 80 N. W. 575. **Mo.**—Title Guaranty & Sur. Co. v. Drennon, 181 Mo. App. 198, 167 S. W. 1181; *McAntire v. Hewitt*, 75 Mo. App. 304. **N. Y.**—Haebler v. Luttgen, 158 N. Y. 693, 53 N. E. 1125; *Hochberger v. Baum*, 46 Misc. 425, 92 N. Y. Supp. 244. **Ohio.**—*Hoyt Dry Goods Co. v. Thomas*, 19 Ohio Cir. Ct. 638, 10 Ohio Cir. Dec. 341. **Tex.**—*Jackson v. State (Tex. Crim.)*, 159 S. W. 846; *Shannon v. Marchbanks*, 35 Tex. Civ. App. 615, 80 S. W. 860. **Va.**—*Lemons v. Harris*, 115 Va. 809, 80 S. E. 740; *Mallory v. Taylor*, 90 Va. 348, 18 S. E. 438. **Wis.** *Carroll v. Hangartner*, 66 Wis. 511, 29 N. W. 210.

[a] **Unsupported by or Contrary to Evidence.**—An order granting a new trial on the ground that the verdict was unsupported by, or was contrary to, evidence cannot be reviewed on a mere allegation that such a ruling was error. *Potts v. Bonds*, 10 S. C. 498.

[b] **Verdict Contrary to Law.**—The evidence given on the trial must be brought up in order to review a decision on a motion grounded on the reason that the verdict was contrary to law. *Dyer v. Hatch*, 1 Ark. 339.

[c] **Amount or Excessiveness of Damages.**—It is not possible to review the question of the amount or the excessiveness of damages unless all the evidence is in the record. **Ark.**—*Wil-*

and the record must affirmatively show that it contains all the evidence.⁵¹

(B.) AT THE HEARING. — In order that the appellate court may review the order, it is also necessary that the evidence considered on the hearing should appear on the record.⁵² Thus where the motion was based on newly discovered evidence,⁵³ misconduct of the jurors,⁵⁴ or of the prevailing party,⁵⁵ or surprise and irregularities,⁵⁶ the evidence used at the hearing must be incorporated in the record.

(VIII.) Instructions. — Where the motion for the new trial is based upon errors in giving or refusing instructions, the instructions in question must appear of record.⁵⁷

Liams v. State, 10 Ark. 256. **Colo.** *Marlow v. Kuhlbeck*, 2 Colo. 602. **Ind.**—*Harness v. Turley*, 143 Ind. 420, 42 N. E. 813; *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414. **Ia.**—*Parsons v. Chapman*, 11 Iowa 294. **Ky.**—*Wickliffe v. Carroll*, 14 B. Mon. 169. **Neb.** *Zimmerman v. Klingeman*, 31 Neb. 495, 48 N. W. 268. **Wis.**—*Cunningham v. Gallagher*, 61 Wis. 170, 20 N. W. 925.

[d] **Newly Discovered Evidence.**—A motion for a new trial on the ground of newly discovered evidence cannot be reviewed unless all the evidence produced at the trial is in the record. **Ark.**—*Collins v. McPeak*, 10 Ark. 556. **Cal.**—*Sirkus v. Central R. Co.*, 95 Cal. xvii, 30 Pac. 790. **Ind.**—*Harsh v. Kegley*, 72 Ind. 398; *Jackson v. Fowley*, 63 Ind. 85; *Cleaveland v. State*, 20 Ind. 444. **Kan.**—*Thom v. Davis*, 16 Kan. 22. **La.**—*State v. Belden*, 35 La. Ann. 823. **Minn.**—*Seofield v. Walrath*, 35 Minn. 356, 28 N. W. 926. **Tenn.** *Turnley v. Evans*, 3 Humph. 222. **Tex.** *Yeiser v. Burdett*, 10 Tex. Civ. App. 155, 29 S. W. 912. **Wis.**—*Carroll v. Hangartner*, 66 Wis. 511, 29 N. W. 210.

[e] **Not Required When.**—Where the order can be reviewed without the entire evidence, it is not necessary that all the evidence should be in the record. *Johnson v. Wiley*, 74 Ind. 233.

51. **Ia.**—*Sowdon & Co. v. Craig*, 21 Iowa 580. **Kan.**—*Blair v. Fields*, 5 Kan. 58. **Mo.**—*Hughes v. Ellison*, 5 Mo. 110. **N. Y.**—*Revelski v. Droesch*, 6 App. Div. 190, 39 N. Y. Supp. 1008.

52. **Ala.**—*Southern R. Co. v. Foster*, 7 Ala. App. 487, 60 So. 993. **Ark.**—*Matthews v. Lanier*, 33 Ark. 91. **Cal.**—*Pereira v. City Sav. Bank*, 128 Cal. 45, 60 Pac. 524; *Union Lumber Co. v. Webster*, 15 Cal. App. 165, 113 Pac. 891. **Colo.**—*Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103; *Rudolph v.*

Smith, 18 Colo. App. 496, 72 Pac. 817. **Ga.**—*Pharr v. Davis*, 133 Ga. 759, 66 S. E. 917; *Hyfield v. Sims*, 87 Ga. 280, 13 S. E. 554. **Ia.**—*Stover v. Flower*, 120 Iowa 514, 94 N. W. 1100; *Wagner v. Condron*, 73 Iowa 753, 33 N. W. 159. **Mont.**—*King v. Pony Gold Min. Co.*, 28 Mont. 74, 72 Pac. 309; *Tague v. Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Raymond v. Thexton*, 7 Mont. 313, 17 Pac. 260. **Neb.**—*Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456, 95 N. W. 1057. **Ohio.**—*Henning v. Bartz*, 25 Ohio Cir. Ct. 15; *Hoyt Dry Goods Co. v. Thomas*, 19 Ohio Cir. Ct. 638, 10 Ohio Cir. Dec. 341. **Wash.**—*Ritter v. Seattle*, 82 Wash. 325, 144 Pac. 61; *Haines v. Kelley*, 57 Wash. 219, 106 Pac. 776. **Wis.** *Hoffman v. Chicago, M. & St. P. Ry. Co.*, 86 Wis. 471, 56 N. W. 1093.

[a] **Minutes of the Court.**—The appellate court will not reverse an order granting a new trial for the alleged incompetency of a juror where the motion was heard on the minutes of the court, and such minutes are not made a part of the record. *Bowen v. Malbon*, 20 Wis. 491.

53. **Ind.**—*Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529. **Kan.** *Hopkins v. Watson*, 67 Kan. 858, 74 Pac. 233; *Thom v. Davis*, 16 Kan. 22. **Neb.**—*National Lumb. Co. v. Ashby*, 41 Neb. 292, 59 N. W. 913.

54. **Colo.**—*Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103. **Ind.**—*Harper v. State*, 101 Ind. 109. **Wis.**—*Hoffman v. Chicago, M. & St. P. Ry. Co.*, 86 Wis. 471, 56 N. W. 1093.

55. *Cincinnati & Ft. W. R. Co. v. McClelland*, 15 Ind. 225.

56. *Leete v. Sutherland*, 20 Nev. 71, 15 Pac. 472.

57. **Ark.**—*Dyer v. Hatch*, 1 Ark. 339. **Ind.**—*Early v. Hamilton*, 75 Ind. 376.

(IX.) **Assignment of Errors.** — In connection with the appeal there must be an assignment of errors, and the order of the court in granting or refusing a new trial must be assigned as error.⁵⁸ If the motion was based on several grounds a general assignment of error is insufficient; it should set forth the different grounds separately.⁵⁹ In some jurisdictions, however, a general assignment of error in overruling the motion is held sufficient.⁶⁰

d. *Nature and Scope of Review.* — (I.) **In General.** — The general principle that appellate courts will not review questions that could have been but were not brought to the attention of the trial court by a motion for a new trial, has been previously considered.⁶¹

On error or appeal from an order granting or refusing a new trial generally the appellate court reviews merely the decision upon the motion, that is, whether or not the lower court erred in granting or refusing the motion.⁶² No grounds for a new trial will be considered

Ky.—*Rhodes v. Weldon*, 18 Ky. L. Rep. 222, 35 S. W. 1129.

See 2 STANDARD PROC. 358.

58. **Ind.**—*Huffman v. Indiana Nat. Bank*, 51 Ind. 394; *Bartholomew v. Preston*, 46 Ind. 286. **Ia.**—*Olmsted v. National Life Ins. Co.*, 55 Iowa 742, 7 N. W. 403. **Kan.**—*Roper v. Ferris*, 48 Kan. 583, 29 Pac. 1146; *McPherson v. Manning*, 43 Kan. 129, 23 Pac. 199; *Carson v. Funk*, 27 Kan. 524. **S. D.** *Pierce v. Manning*, 2 S. D. 517, 51 N. W. 332.

See the title "**Errors, Assignment Of**," and particularly, 8 STANDARD PROC. 618, 623.

59. See 8 STANDARD PROC. 623, and the following: **U. S.**—*Condran v. Chicago*, etc. R. Co., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749. **Ala.**—*Dillard v. Savage*, 98 Ala. 598, 13 So. 514. **Ariz.**—*Miami Copper Co. v. Strohl*, 14 Ariz. 410, 130 Pac. 605. **Ky.**—*Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186. **Minn.**—*Lytle v. Prescott*, 57 Minn. 129, 58 N. W. 688; *Stevens v. City of Minneapolis*, 42 Minn. 136, 43 N. W. 842.

[a] A reference to the grounds for a new trial by the numbers by which they are designated in the motion may be a sufficient assignment of error; as, for example, an assignment that the court erred in overruling the first, second and third grounds of the motion. See *King v. Chicago, R. I. & P. Ry. Co.*, 88 Iowa 704, 54 N. W. 294; *Kitterman v. Chicago, M. & St. P. Ry. Co.*, 69 Iowa 440, 30 N. W. 174. See, however, **Ind.**—*Ohio & M. Ry. Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258.

Ia.—*Low v. Fox*, 56 Iowa 221, 9 N. W. 131. **Ky.**—*Culbertson v. McCullom*, 1 Ky. L. Rep. 267.

[b] "That the court erred in refusing the special instructions asked by the defendant" is too indefinite as an assignment of error when predicated upon a similar statement of ground in the motion. *Memphis St. R. Co. v. Johnson*, 114 Tenn. 632, 88 S. W. 169.

60. See 8 STANDARD PROC. 624, note 18, and the following. **Ill.**—*Supple v. Agnew*, 202 Ill. 351, 66 N. E. 1069; *Ottawa, etc. R. Co. v. McMath*, 91 Ill. 104. **Ind.**—*Standish v. Bridgewater*, 159 Ind. 386, 65 N. E. 189; *Kernodle v. Gibson*, 114 Ind. 451, 17 N. E. 99. **Okla.**—*Hodges v. Alexander*, 44 Okla. 598, 145 Pac. 809; *Boyd v. Bryan*, 11 Okla. 56, 65 Pac. 940. **S. D.**—*Ede v. Ward*, 32 S. D. 351, 143 N. W. 269; *Pierce v. Manning*, 2 S. D. 517, 51 N. W. 332.

61. See *supra*, I, B, 9.

62. *Barker v. Wing*, 58 Barb. (N. Y.) 73.

[a] Nothing can be considered on the appeal from an order denying a new trial that does not go to show that a re-examination of some issue of fact is necessary for the protection of the rights of the appealing party. *Sharp v. Bowie*, 142 Cal. 462, 467, 76 Pac. 62, 66, quoted in *In re Keating's Estate*, 162 Cal. 406, 122 Pac. 1079.

[b] The sufficiency of findings by the court to support either conclusions of law, or the judgment, can be reviewed only on an appeal from the judgment, and cannot be considered on an appeal from an order denying a

except those set forth in the motion for the new trial,⁶³ and, in most jurisdictions, the only alleged errors reviewed are those specified in the motion.⁶⁴ Some cases, however, contrary to the general rule, hold that an appeal from such an order brings up the whole record for review, and any errors in connection with the proceedings, presented therein, may be reviewed.⁶⁵

(II.) **Matters of Pleading.**—The sufficiency of a complaint,⁶⁶ or, in a criminal case, an indictment,⁶⁷ or rulings upon demurrers,⁶⁸ or rulings or orders upon other matters of pleading,⁶⁹ cannot be reviewed on an appeal from an order granting or denying a new trial.

new trial. **Cal.**—*Mentone Irr. Co. v. Redlands Elect. L. & P. Co.*, 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 582, 17 Ann. Cas. 1222; *Great Western Gold Co. v. Chambers*, 153 Cal. 307, 310, 95 Pac. 151. *Compare* *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707. **Mont.** *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75. **N. Y.**—*Bridenbecker v. Bridenbecker*, 75 App. Div. 6, 77 N. Y. Supp. 802.

63. **Ala.**—*Mobile v. Murphree*, 96 Ala. 141, 11 So. 201. **Ark.**—*Mills v. Jones*, 27 Ark. 506. **Cal.**—*Himmelman v. Hoadley*, 44 Cal. 213; *Hawkins v. Abbott*, 40 Cal. 639. **Conn.**—*White v. Howd*, 66 Conn. 264, 33 Atl. 915. **Ill.** *Hintz v. Graupner*, 138 Ill. 153, 27 N. E. 935; *Ottawa, O. & F. R. V. R. Co. v. McMath*, 91 Ill. 104. **Ind.**—*Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475; *Gray v. Gwinn*, 30 Ind. 409. **Ia.**—*Thomas v. Illinois Cent. R. Co.*, 169 Iowa 337, 151 N. W. 387, 389. **Kan.**—*Leavenworth, N. & S. Ry. Co. v. Whitaker*, 42 Kan. 634, 22 Pac. 733. **Mo.**—*Bollinger v. Carrier*, 79 Mo. 318; *Middleton Grocer Co. v. Day*, 54 Mo. App. 419. **N. C.**—*Leak v. Covington*, 99 N. C. 559, 6 S. E. 241. **Ohio.**—*Remington v. Harrington*, 8 Ohio 507.

64. **U. S.**—*Kerr v. Clappitt*, 95 U. S. 188, 24 L. ed. 493. **Ala.**—*Mobile v. Murphree*, 96 Ala. 141, 11 So. 201. **Cal.** *Andrews v. Wilbur*, 109 Cal. xvi, 41 Pac. 790; *Evans v. Paige*, 102 Cal. 132, 36 Pac. 406. **Conn.**—*Shoninger v. Peabody*, 59 Conn. 588, 22 Atl. 437. **Ohio.** *Marietta & C. R. Co. v. Strader & Co.*, 29 Ohio St. 448. **S. C.**—*Webber v. Ahrens*, 36 S. C. 585, 15 S. E. 732. **Wis.**—*Smith v. Welch*, 10 Wis. 91.

[a] **Assignments of error** (1) upon grounds not appearing in the motion will not be considered (*Memphis St. R. Co. v. Johnson*, 114 Tenn. 632, 88 S. W. 169), (2) since all grounds not

so specified, and the ruling thereon assigned of error, will be deemed waived. *Frame v. Murphy*, 56 Ill. App. 555; *Allen v. State*, 74 Ind. 216; *Branham v. Record*, 42 Ind. 181. See the title "Errors, Assignment of."

65. **Minn.**—See *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334. **Mont.**—*Wolf v. Great Falls Water Power, etc. Co.*, 15 Mont. 49, 38 Pac. 115. **N. Y.**—*Tate v. McCormick*, 23 Hun 218; *Hynes v. McDermott*, 7 Abb. N. C. 98, 9 Daly 4; *Gaffney v. Chapman*, 4 Robt. 275.

[a] All rulings and questions that were open for consideration on the motion for a new trial are open for review on the appeal. *Smith v. Bowersock*, 95 Kan. 96, 147 Pac. 1118; *Triple Tie Benefit Assn. v. Wood*, 78 Kan. 812, 98 Pac. 219.

66. *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119; *Gray v. Singer*, 137 Ind. 257, 36 N. E. 209.

[a] **Exception to Rule.**—Where, however, there is an appeal from an order granting a new trial because of error in overruling a motion for a nonsuit, such order being based "on the sole ground (as appears from the record) that the contract sued on is contrary to public policy," the sufficiency of the complaint is the only thing that can be considered on appeal. *Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 9 L. R. A. 483.

67. *People v. Turner*, 39 Cal. 370. See 12 STANDARD PROC. 661, note 93.

68. **Cal.**—*Goodnow v. Parker*, 112 Cal. 437, 44 Pac. 738; *Heilbron v. Centerville & K. Irr. Ditch Co.*, 76 Cal. 8, 17 Pac. 932. **Ind.**—*Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259. **Wis.** *Flanagan v. Chicago & N. W. Ry. Co.*, 45 Wis. 98.

69. **Ind.**—*Standard Oil Co. v. Bow-*

(III.) **Grounds for Granting Motion.**—The local statute, or practice, may limit the review to the ground or reason specified in the order unless a cross-bill of exceptions is filed to cover the other grounds set forth in the motion.⁷⁰ Generally, however, the order of the trial court will be sustained if any one of the grounds set out in the motion is sufficient, regardless of the reason assigned by the court.⁷¹ Moreover, where the trial court makes a general order granting the motion without specifying any particular ground, the order will be affirmed if any one of the grounds set out in the motion was well taken.⁷² However, where no sufficient reason appears for granting a new trial, the order will be reversed on appeal.⁷³

ker, 141 Ind. 12, 40 N. E. 128. **Minn.** Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Winona v. Minnesota Ry. Const. Co., 27 Minn. 415, 6 N. W. 795, 8 N. W. 148. **Mont.**—Scheerrer v. Hale, 9 Mont. 63, 22 Pac. 151. **N. Y.** Hendricks v. Decker, 35 Barb. 298.

70. Georgia R. Co. v. Letchworth, 73 Ga. 88; Singleton v. Southwestern R. R., 70 Ga. 464, 48 Am. Rep. 574.

71. **Cal.**—Simon Newman Co. v. Lasing, 141 Cal. 174, 74 Pac. 761; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636. **Fla.**—Allen v. Lewis, 43 Fla. 301, 31 So. 286. **Ga.**—Reid v. Whitfield, 48 Ga. 187. **Ia.**—Wightman v. Butler County, 83 Iowa 691, 49 N. W. 1041. **Kan.**—Scott v. Sloan, 72 Kan. 545, 84 Pac. 117; McCreary v. Cockrill, 3 Kan. 37. **Ky.**—Siller v. Cooper, 4 Bibb 90. **Minn.**—Poirier Mfg. Co. v. Griffin, 104 Minn. 239, 116 N. W. 576; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Morrow v. St. Paul City Ry. Co., 65 Minn. 382, 67 N. W. 1002. **Mo.**—Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79; Hewitt v. Steele, 118 Mo. 463, 473, 24 S. W. 440. **Mont.**—Beasley v. Berry, 33 Mont. 477, 84 Pac. 791; Menard v. Montana Cent. Ry. Co., 22 Mont. 340, 56 Pac. 592. **N. Y.**—Ross v. Metropolitan St. R. Co., 104 App. Div. 378, 93 N. Y. Supp. 679. **N. D.**—Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314. **W. Va.** Shrewsbury v. Miller, 10 W. Va. 115.

[a] **Insufficiency Must Be Shown.** An order granting a new trial will be affirmed unless it is shown, where two or more grounds for such order are set forth, that none of the grounds was sufficient. Ryan v. Topeka Bridge Co., 7 Kan. 207. And see Howell v. Pugh, 25 Kan. 96. See, however, Millar v.

Madison Car Co., 130 Mo. 517, 31 S. W. 574.

[b] **The implication from a recital in the record** that the motion was granted solely upon the ground stated, is that the trial court was of the opinion that none of the other grounds was well taken. Sutter v. International Harvester Co., 81 Kan. 452, 106 Pac. 29.

[c] **Even though the order declare in terms** (1) that the motion is granted for one or more reasons only, the appellate court is not precluded from considering any other assignment upon which the motion should have been granted. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124. (2) This rule is subject to the one limitation that the trial court may limit its order granting the motion so as to exclude, as a ground for its action, the insufficiency of the evidence, but such exclusion, to be effectual, must be declared in the order itself. Weissner v. Southern Pacific R. Co., 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636.

72. Wolfe v. Ridley, 17 Idaho 173, 104 Pac. 1014, 20 Am. & Eng. Ann. Cas. 39; Buckle v. McConaghy, 12 Idaho 733, 88 Pac. 100; Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440. See, however, Millar v. Madison Car Co., 130 Mo. 517, 31 S. W. 574, statute requiring grounds for order to be inserted in the same.

[a] **The presumption is that it was granted for a valid reason** if any of the grounds would sustain the motion. Oullahan v. Starbuck, 21 Cal. 413; White v. Beck, 64 Iowa 122, 19 N. W. 872.

73. **Ark.**—Porter v. Doe *ex dem.* Hanley, 10 Ark. 186. **Kan.**—Atchison, T. & S. F. R. Co. v. Brown, 51 Kan. 6, 32 Pac. 630. **Mo.**—Moreland v. Mc-

(IV.) **Presumptions.**—As a rule, in absence of anything to the contrary in the record, the regularity of the proceedings to procure a new trial, as also upon the hearing, will be presumed.⁷⁴ Likewise, the order granting,⁷⁵ or refusing,⁷⁶ a new trial will be presumed to be correct in absence of a positive showing to the contrary in the record.

(V.) **Discretion of Trial Court.**—It has already been stated that the power to grant or to refuse a motion for a new trial rests in the judicial discretion of the trial court.⁷⁷ Moreover, when an appeal is allowed from such an order, the presumption is always in favor of the proper exercise of such discretionary power.⁷⁸ Consequently, the court's decision will not be disturbed except in cases of manifest abuse.⁷⁹ Moreover, a stronger showing must be made to obtain the

Dermott, 10 Mo. 605; Kaufman-Wilkinson Lumb. Co. v. Christophel, 59 Mo. App. 80. **N. Y.**—*In re Livingston*, 34 N. Y. 555, 2 Abb. Pr. (N. S.) 1, 32 How. Pr. 20.

74. **Cal.**—*Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318. **Colo.** *Peck v. Alexander*, 40 Colo. 392, 91 Pac. 38. **Ga.**—*Cothran v. Brower*, 71 Ga. 357; *Baldwin v. Daniel*, 69 Ga. 782. **Mont.**—*Curn v. Perkins*, 40 Mont. 588, 107 Pac. 901; *Sanden v. Northern Pac. R. Co.*, 39 Mont. 209, 102 Pac. 145; *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99.

75. **Ill.**—*Brenner v. Coerber*, 42 Ill. 497. **Ind.**—*Hornady v. Shields*, 119 Ind. 201, 21 N. E. 554. **Kan.**—*Eskridge v. Lewis*, 51 Kan. 376, 32 Pac. 1104. **Ky.**—*Bank of Commonwealth v. Hiles*, 4 Dana 598. **Mont.**—*Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, 7 L. R. A. 471. **W. Va.** *Robertson v. Harmon*, 47 W. Va. 500, 35 S. E. 832.

76. **U. S.**—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. ed. 436. **Ala.**—*Birmingham R., etc. Co. v. Mason*, 144 Ala. 387, 39 So. 590. **Ark.**—*Marshall Bank v. Turney*, 105 Ark. 116, 150 S. W. 693; *Turner v. Huggins*, 14 Ark. 21. **Cal.** *Boin v. Spreckels Sugar Co.*, 155 Cal. 612, 102 Pac. 937. **Ga.**—*Atkins v. Winter*, 122 Ga. 644, 50 S. E. 487; *Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203; *Augusta-Aiken Ry. & E. Corp. v. Sibert*, 12 Ga. App. 163, 76 S. E. 1044. **Ind.**—*Welch v. State*, 164 Ind. 104, 72 N. E. 1043; *Indianapolis v. Tansell*, 157 Ind. 463, 62 N. E. 35; *Annadall v. Union Cement, etc. Co.*, 42 Ind. App. 264, 84 N. E. 359. **Ia.**

Bowell v. Draper, 148 Iowa 725, 129 N. W. 54; *Emery v. Emery*, 54 Iowa 106, 6 N. W. 152. **Kan.**—*Brown v. Mechanics' Bldg. & L. Assn.*, 63 Kan. 888, 66 Pac. 986. **Ky.**—*Gist v. Higgins*, 1 Bibb 303. **S. D.**—*French v. Chicago, B. & Q. R. Co.*, 25 S. D. 125, 128 N. W. 498; *Westphal v. Nelson*, 25 S. D. 100, 125 N. W. 640.

[a] When the record does not show that the motion was filed in time, an order refusing a new trial will be upheld since it will be presumed to have been denied for such reason. **Kan.** *Soderstrom v. McWilliams*, 63 Kan. 888, 66 Pac. 1001. **Ky.**—*Carroll v. Ward's Admr.*, 11 Ky. L. Rep. 327. **Mo.** *State v. Carondelet Sav. Bank*, 6 Mo. App. 582.

77. See *supra*, III, G, 2.

78. *Hanson v. Barnhisel*, 11 Cal. 340.

[a] **Discretion Restricted by Legal Principles.**—The discretion vested in the trial court to grant a new trial is neither an arbitrary nor a general discretion. It is based upon the theory that the judge who tries a case, having the parties, their witnesses and counsel, before him, with opportunity to observe their demeanor and conduct during the trial, and to note all incidents occurring during its progress likely to affect the results thereof, is better qualified to judge whether a fair trial has been had, and substantial justice done, than the appellate tribunal. But the fact that the legislative assembly passed a law giving the right of appeal from such orders indicates a purpose to restrict the rulings upon the subject to the application of legal principles. *Clifford v. Denver, S. P. & P. R. Co.*, 12 Colo. 125, 20 Pac. 333.

79. **U. S.**—*New York, L. E. & W. R. Co. v. Winter's Admr.*, 143 U. S.

reversal of an order granting a new trial than where a motion for a new trial has been refused,⁸⁰ and the appellate court will not re-

60, 12 Sup. Ct. 356, 36 L. ed. 71; National Bank v. United States, 224 Fed. 679, 140 C. C. A. 219; Buckeye Powder Co. v. Du Pont, etc. P. Co., 223 Fed. 881, 139 C. C. A. 319; Odell Mfg. Co. v. Tibbetts, 212 Fed. 652, 129 C. C. A. 188. **Ala.**—Yarbrough v. Carter, 179 Ala. 356, 60 So. 833; Davis Wagon Co. v. Cannon, 129 Ala. 301, 29 So. 841; Davis v. Clausen, 7 Ala. App. 381, 62 So. 267. **Ark.**—Taylor v. Grant Lumber Co., 94 Ark. 566, 127 S. W. 962; Armstrong v. State, 54 Ark. 364, 15 S. W. 1036. **Cal.**—Frost v. Los Angeles R. Co., 165 Cal. 365, 132 Pac. 442; McCarthy v. Phelan, 132 Cal. 404, 64 Pac. 570. **Conn.**—Brodie v. Connecticut Co., 87 Conn. 363, 87 Atl. 798; Hall v. Tice, 86 Conn. 684, 86 Atl. 560; Hoyt v. Smith, 28 Conn. 466. **Fla.**—Beverly v. Hardaway, 66 Fla. 177, 63 So. 702; Reddick v. Joseph, 35 Fla. 65, 16 So. 781. **Ga.**—Massey v. Cleveland, 141 Ga. 774, 82 S. E. 136; Tate v. Little, 141 Ga. 799, 82 S. E. 129; Flanders v. Wood, 113 Ga. 635, 38 S. E. 975. **Ill.**—Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623; Gebhard v. Brewers' Malting Co., 185 Ill. App. 256. **Kan.**—White v. Chicago, R. I. & P. R. Co., 91 Kan. 526, 138 Pac. 589; Elvin v. Blubaugh, 89 Kan. 726, 132 Pac. 994; Sanders v. Wakefield, 41 Kan. 11, 20 Pac. 518. **Me.**—Hewey v. Nourse, 54 Me. 256. **Md.**—Bradley v. Bradley, 123 Md. 506, 91 Atl. 685; Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33. **Mass.**—Casavant v. Sherman, 213 Mass. 23, 99 N. E. 475; Parker v. Griffith, 172 Mass. 87, 51 N. E. 462. **Mich.**—Druck v. Antrim Lime Co., 177 Mich. 364, 143 N. W. 59; Goodyear v. Detroit United Ry., 177 Mich. 129, 143 N. W. 14; Raymond v. Day, 111 Mich. 443, 69 N. W. 832. **Miss.**—Frizell v. White, 27 Miss. 198. **Mo.**—Lorenzen v. United R. Co., 249 Mo. 182, 155 S. W. 30; Gibson v. Ducker, 170 Mo. App. 135, 155 S. W. 462; Allen v. St. Louis, etc. R. Co., 167 Mo. App. 498, 151 S. W. 762. **Neb.**—Christensen v. Omaha & C. B. St. R. Co., 85 Neb. 694, 124 N. W. 96; Wells v. Cochran, 84 Neb. 278, 120 N. W. 1123; Wheeler v. Olson, 37 Neb. 562, 56 N. W. 309. **N. J.**—Delaware, L. & W. R. Co. v. Neville, 51

N. J. L. 332, 17 Atl. 836, 19 Atl. 538. **N. Y.**—Hastings v. Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289; Crocker-Wheeler Co. v. Genesee Recreation Co., 160 App. Div. 373, 145 N. Y. Supp. 477. **Ohio.**—Beatty v. Hatcher, 13 Ohio St. 115. **Pa.**—Bell v. Pittsburgh Steel Co., 243 Pa. 83, 89 Atl. 813; McCready v. Gans, 242 Pa. 364, 89 Atl. 459; De Grote v. De Grote, 175 Pa. 50, 34 Atl. 312. **Tex.**—Ft. Worth v. Charbonneau (Tex. Civ. App.), 166 S. W. 387; Radford v. Lyon, 65 Tex. 471. **Va.**—Cardwell v. Norfolk & W. R. Co., 114 Va. 500, 77 S. E. 612; South-West Imp. Co. v. Andrew, 86 Va. 270, 9 S. E. 1015. **Wis.**—Diana Shooting Club v. Kohl, 156 Wis. 257, 145 N. W. 815; Miller Brew. Co. v. Milwaukee, 155 Wis. 81, 143 N. W. 1066; Warder, etc. Co. v. Angell, 99 Wis. 298, 74 N. W. 789.

And see the title "Appeals," vol. II, p. 454.

[a] Such a discretion does not mean a mere whim or caprice, but it means an honest attempt, in the exercise by the judge of his duty and power to see that justice is done, to establish a legal right. *Johnson v. Grayson*, 230 Mo. 380, 130 S. W. 673.

[b] **Newly Discovered Evidence.** The granting of a new trial on the ground of newly discovered evidence is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in case of evident abuse. *Linforth v. San Francisco Gas & E. Co.*, 156 Cal. 58, 103 Pac. 320, 19 Am. & Eng. Ann. Cas. 1230; *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *Hausmann v. Sutter St. R. Co.*, 139 Cal. 174, 72 Pac. 905; *Harralson v. Barrett*, 99 Cal. 610, 34 Pac. 342.

80. **Ala.**—*Richardson v. Birmingham Cotton Mfg. Co.*, 116 Ala. 381, 22 So. 478. **Ga.**—*Harper v. Wilkes*, 76 Ga. 106; *Buchanon v. Higginbotham*, 42 Ga. 198. **Ind.**—*House v. Wright*, 22 Ind. 383. **Ia.**—*Hydinger v. Chicago, B. & Q. R. Co.*, 126 Iowa 222, 101 N. W. 746; *Tathwell v. Cedar Rapids*, 122 Iowa 50, 97 N. W. 96; *Mally v. Mally*, 114 Iowa 309, 86 N. W. 262. **Kan.**—*Busalt v. Doidge*, 91 Kan. 37, 136 Pac. 904; *Iretton v. Iretton*, 62 Kan.

verse such an order unless it appears that the court acted arbitrarily or committed some error of law.⁸¹ Nevertheless, in a clear case of abuse of discretion in the trial court, an appellate court will not hesitate to reverse the judgment and to correct the error.⁸²

(VI.) **Review of Evidence.**—In connection with the appellate consideration of orders granting or refusing new trials, the general principles that an appellate court is not a trier of facts, but passes upon questions of law,⁸³ is often emphasized by the courts.⁸⁴ Moreover, with

358, 63 Pac. 429. **Ky.**—*Hurt v. Louisville & N. R. Co.*, 116 Ky. 545, 76 S. W. 502; *Butts v. Christy*, 23 Ky. L. Rep. 2355, 67 S. W. 377. **Mo.**—*Fitzjohn v. St. Louis Transit Co.*, 183 Mo. 74, 81 S. W. 907; *Allen v. St. Louis, etc. R. Co.*, 167 Mo. App. 498, 151 S. W. 762. **Va.**—*Marshall's Admr. v. Valley R. Co.*, 97 Va. 653, 99 Va. 798, 34 S. E. 455. **W. Va.**—*Varney v. Hutchinson Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 203; *Laidley v. Kanawha County Court*, 44 W. Va. 566, 30 S. E. 109. **Can.**—*Reiffenstein v. Dey*, 28 Ont. L. Rep. 491; *Somers v. Livingston*, 24 U. C. Q. B. 64.

[a] It is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial. *Quinn v. Kenyon*, 22 Cal. 82.

[b] **Reason for the Rule.**—"Where a new trial has been granted, both parties have another opportunity of having a fair and impartial trial upon the merits of the action. But where a new trial has been refused, the matter is ended unless a reversal can be had." *Nolen v. McCue*, 92 Kan. 870, 142 Pac. 958, 959; *Atyeo v. Kelsey*, 13 Kan. 212.

81. **Cal.**—*Schramm v. Southern Pac. Co.*, 87 Cal. 425, 25 Pac. 481. **Ia.** *Shaw v. Sweeney*, 2 G. Gr. 587. **Kan.** *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518. **N. Y.**—*Osborn v. Nelson*, 59 Barb. 375.

82. **Ga.**—*Gregory v. Georgia Granite R. Co.*, 132 Ga. 587, 64 S. E. 686; *Seaboard Air Line Ry. v. Randolph*, 129 Ga. 796, 59 S. E. 1110. **Ia.**—*Ideal Cream S. Repair Wks. v. Des Moines*, 167 Iowa 517, 149 N. W. 640; *Rice v. Friend Bros. Co.*, 146 N. W. 748; *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13, 49 L. R. A. (N. S.) 443. **Kan.**—See *Woodmen of the World v. Thiebaud*, 65 Kan. 332, 69 Pac. 348. **Ky.**—*Crowley v. Louisville & N. R. Co.*, 107 Ky. 575, 55 S. W.

434. **Mo.**—*Adam Roth Grocery Co. v. Hotel Monticello Co.*, 183 Mo. App. 429, 166 S. W. 1125; *Wilt v. Coughlin*, 176 Mo. App. 275, 161 S. W. 888. **N. Y.**—*Taylor v. Glens Falls Auto. Co.*, 161 App. Div. 442, 146 N. Y. Supp. 699. **Va.**—*Pleasants v. Clements*, 2 Leigh (29 Va.) 474. **Wash.**—*Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416; *Tham v. J. T. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711. **W. Va.**—*Robinson v. Kistler*, 62 W. Va. 489, 59 S. E. 505. **Wis.**—*Oconto Brewing Co. v. Cayouette*, 138 Wis. 664, 120 N. W. 497.

[a] **Must Be a Legal Ground for the Motion.**—In the case of *Clifford v. Denver, S. P. & P. R. Co.*, 12 Colo. 125, 20 Pac. 333, the supreme court said: "The general rule so often announced, that a stronger presumption obtains in favor of an order granting than one denying a new trial, is urged in the present case as a strong reason why the ruling should not be disturbed. This rule should also be limited to cases wherein the ground on which the new trial was granted constitutes a legal ground for such order, and the alleged causes have an actual existence."

[b] **When the bill of exceptions sets out the ground or reason on which the trial court acted**, this court will reverse the judgment, if those grounds and reasons appear to be clearly insufficient, although generally it takes a stronger case to reverse an order granting than it does one refusing a new trial. *Black's Admr. v. Thomas*, 21 W. Va. 709; *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452. 83. **Mass.**—*Greene v. Farlow*, 138 Mass. 146; *Merritt v. Morse*, 113 Mass. 271. **N. C.**—*Munden v. Casey*, 93 N. C. 97; *Carson v. Dellinger*, 90 N. C. 226. **S. C.**—*State v. Haines*, 36 S. C. 504, 15 S. E. 555; *Johnston v. Holmes*, 32 S. C. 434, 11 S. E. 208.

84. See the title "Appeals," vol. II, p. 434, et seq.

respect to the insufficiency, weight, and conflict of evidence, great deference is given to the opinion of the trial court,⁸⁵ and orders granting or refusing new trials upon such grounds will seldom be disturbed.⁸⁶ Also, an order granting a new trial on the ground of the insufficiency of the evidence requires a stronger showing to warrant its reversal than one refusing a new trial on such ground.⁸⁷ Where, however, the evidence presents a substantial conflict, and the trial judge who saw and heard the witnesses has refused a new trial, the order will usually be affirmed.⁸⁸

85. See the title "Appeals," vol. II, p. 448.

86. **Ark.**—Arkadelphia Lumber Co. v. Posey, 74 Ark. 377, 85 S. W. 1127. **Cal.**—Crawford v. Harris, 113 Cal. xvii, 45 Pac. 819; Symons v. Bunnell, 20 Pac. 859. **Ga.**—Savannah, etc. R. Co. v. Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187; Grace v. Martin, 83 Ga. 245, 9 S. E. 841. **Ill.**—Phillips v. Scales Mound, 195 Ill. 353, 63 N. E. 180; Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181. **Ind.**—Hamm v. Romaine, 98 Ind. 77; Miller v. Miller, 61 Ind. 471. **Ia.**—Kelly v. Cummins, 143 Iowa 148, 121 N. W. 540; Wightman v. Butler County, 83 Iowa 691, 49 N. W. 1041. **Kan.**—Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273. **Ky.**—Conley v. Central Ky. Tract. Co., 152 Ky. 764, 154 S. W. 41. **Mo.**—Dean v. Wabash R. Co., 229 Mo. 425, 129 S. W. 953; Cornet v. Cabrilliac, 228 Mo. 212, 126 S. W. 1030. **N. Y.**—Crocker-Wheeler Co. v. Genesee Recreation Co., 160 App. Div. 373, 145 N. Y. Supp. 477; Haight v. Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193. **Tex.**—San Antonio Tract. Co. v. Cassanova (Tex. Civ. App.), 154 S. W. 1190; McAnally v. Vickry (Tex. Civ. App.), 79 S. W. 857. **Can.**—McKinstry v. Furby, 24 U. C. Q. B. 176; Moore v. Gurney, 22 U. C. Q. B. 209.

See the title "Appeals," vol. II, p. 447.

[a] In granting new trials because the verdict is against the weight of evidence, the trial court is possessed of a peculiar and high discretion which will not be reviewed except in case of judicial abuse. **Cal.**—Baxter v. McKinlay, 16 Cal. 76. **Fla.**—Germania Fire Ins. Co. v. Stone, 21 Fla. 553. **Ind.**—Lambert v. Sandford, 2 Blackf. 137, 18 Am. Dec. 149; Weil v. Morris, 13 Ind. App. 278, 41 N. E. 463. **Kan.**

Jones v. Inness, 32 Kan. 177, 4 Pac. 95. **Mo.**—Gray v. Missouri Lumber, etc. Co., 177 S. W. 595; Higgins v. Higgins, 243 Mo. 164, 147 S. W. 962; Casey v. St. Louis Transit Co., 186 Mo. 229, 85 S. W. 357. **N. H.**—Lawrence v. Towle, 59 N. H. 28. **S. C.**—Williams v. Mower, 29 S. C. 332, 7 S. E. 505; Robertson v. Lyon, 24 S. C. 266. **Va.**—Weaver v. Bliven, 82 Va. 53. **Wis.**—Manegold v. Grange, 70 Wis. 575, 36 N. W. 263.

[b] Because Verdict Contrary to Evidence.—Godfrey v. Godfrey, 127 Wis. 47, 106 N. W. 814; Eggen v. Fox, 124 Wis. 534, 102 N. W. 1054; Couror Co. v. Goodwillie, 120 Wis. 603, 98 N. W. 528.

[c] But if the judgment is manifestly erroneous, it should be reviewed and reversed on appeal. Ruckman v. Ormond, 42 Ore. 209, 70 Pac. 707; State v. Hill, 39 Ore. 90, 65 Pac. 518.

[d] Order Granting New Trial for Excessive Damages.—Pratt v. Pioneer Press Co., 32 Minn. 217, 13 N. W. 836, 20 N. W. 87.

87. **Idaho.**—Wolfe v. Ridley, 17 Idaho 173, 104 Pac. 1014, 20 Am. & Eng. Ann. Cas. 39. **Ind.**—House v. Wright, 22 Ind. 383. **Ia.**—New York Piano Forte Co. v. Mueller, 38 Iowa 552; Roberts v. Jones, 30 Iowa 525. **Kan.**—Ottawa v. Washabaugh, 11 Kan. 124. **S. D.**—Alt v. Chicago & N. W. Ry. Co., 5 S. D. 20, 57 N. W. 1126. **W. Va.**—Reynolds v. Tompkins, 23 W. Va. 229.

88. **Ga.**—Erskine & Co. v. Duffy, 76 Ga. 602; Bennett v. Hazlehurst Merc. Co., 8 Ga. App. 591, 69 S. E. 1084. **Idaho.**—Wolfe v. Ridley, 17 Idaho 173, 104 Pac. 1014, 20 Am. & Eng. Ann. Cas. 39. **Ind.**—Mitchell v. Chambers, 55 Ind. 289; Harding v. Whitney, 40 Ind. 379. **Ia.**—Gelwicks v. Gelwicks, 160 Iowa 675, 142 N. W. 409; McNamara v.

e. *Disposition of Cause.*—The general principles relating to the disposal of a cause on appeal have been previously considered in this work.⁸⁹ Ordinarily, where appellant pays no attention to his case in the appellate court, the decision of the lower court will be affirmed without an examination of the record.⁹⁰

Where the sole question before the appellate court is the alleged error of the lower court in granting or refusing a new trial, the court may affirm or reverse the order but will not, ordinarily render judgment,⁹¹ and upon the reversal of an order refusing a new trial, the case is ordinarily remanded for retrial, the effect of the reversal being to vacate the judgment just as if there had been a direct appeal from the judgment.⁹² In some jurisdictions, however, judgment absolute should be rendered against the appellant, either because only cases in which this is a proper judgment, can be appealed,⁹³ or because appellant is required to stipulate that such a judgment may be rendered.⁹⁴

Dratt, 40 Iowa 413. **Mo.**—Van Hoose *v.* Southwestern Mach. Co., 169 Mo. App. 54, 154 S. W. 165; Kelleher *v.* United R. Co., 147 Mo. App. 553, 126 S. W. 796. **Neb.**—Felton *v.* Moffett, 29 Neb. 582, 45 N. W. 930; Everton *v.* Esgate, 24 Neb. 235, 38 N. W. 794. **N. Y.**—Chamberlain *v.* Olean St. R. Co., 100 App. Div. 509, 90 N. Y. Supp. 851; Stevens *v.* Gilbert, 120 N. Y. Supp. 114. **Pa.**—Heiss *v.* Bailey, 20 Lane. L. Rev. 51. **S. D.**—Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577. **Tex.**—Es-sary *v.* State, 53 Tex. Crim. 596, 111 S. W. 927; Hannah *v.* Chadwick, 2 Wills. Civ. Cas. §517. **Wash.**—Johnson *v.* Bank of Pasco, 78 Wash. 59, 138 Pac. 295. **Eng.**—Feise *v.* Parkinson, 4 Taunt. 640, 13 Rev. Rep. 710, 128 Eng. Reprint 482.

89. See the title "Appeals," vol. II, p. 476, et seq. See also the title "Mandate and Proceedings Thereafter."

90. Fulton *v.* Day, 8 Nev. 80. And see King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; Märkle *v.* Hunt, 12 Ind. App. 353, 40 N. E. 280.

91. See the following cases: **Cal.** Alpers *v.* Hunt, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 9 L. R. A. 483. **Ia.**—Payne *v.* Chicago, R. I. & P. R. Co., 47 Iowa 605. **Mo.**—McMenamy *v.* Kampelmann, 200 S. W. 1075. **N. Y.**—Barker *v.* Wing, 58 Barb. 73. **Ohio.**—Gay *v.* Davey, 47 Ohio St. 396, 25 N. E. 425; Stivers *v.* Borden, 20 Ohio St. 232.

[a] **Appeal After Erroneously**

Awarded Second Trial.—Where a new trial was erroneously awarded by the trial court, and on the second trial there was a verdict for the party obtaining the new trial, upon appeal the appellate court will order the second verdict to be set aside and judgment entered on the first. Curry *v.* Fetter, 15 Ky. L. Rep. 494.

[b] **If the trial court grants a new trial upon insufficient grounds,** (1) the order will be reversed (Jones *v.* Coop-erider, 1 Blackf. [Ind.] 47), (2) unless it appears that upon remand a new trial must be granted the other party. Sutler *v.* International Harvester Co., 81 Kan. 452, 106 Pac. 29.

[c] **Where the lower court grants a new trial upon conditions,** such as the payment of costs, but the order should have been granted absolutely and without condition, it will be reversed. Spore *v.* Leeper, 27 Kan. 68.

92. Fulton *v.* Hanna, 40 Cal. 278; Minnesota Valley R. Co. *v.* Doran, 15 Minn. 240.

93. Nunnemaker *v.* Smith, 98 S. C. 466, 82 S. E. 675.

94. Tousey *v.* Hastings, 194 N. Y. 79, 86 N. E. 831; Van Slyck *v.* Warner, 192 N. Y. 547, 84 N. E. 724; *In re Valentine*, 136 N. Y. 623, 32 N. E. 635; Williams *v.* Delaware, L. & W. R. Co., 127 N. Y. 643, 27 N. E. 404; Beman *v.* Todd, 124 N. Y. 114, 26 N. E. 326.

[a] **Where no stipulation is given,** judgment absolute cannot be rendered. Hart *v.* North German Lloyd S. S. Co.,

Where the new trial proceedings are begun by petition, upon which there has been a trial, if the action of the court below upon this matter is not supported by the evidence, it will be reversed and remanded for a retrial of the issue as to the right to a new trial.⁹⁵ If the verdict conflicts with the instructions the courts which follow the rule that the jury must follow the instructions even though erroneous,⁹⁶ will not review the instructions to determine whether they are erroneous or correct.⁹⁷

IV. PROCEEDINGS AT NEW TRIAL. — A. IN GENERAL. — As previously stated, the effect of an order granting a new trial is to leave the parties just as if no trial had taken place;⁹⁸ consequently, the new trial proceeds as if it were an original action.⁹⁹ The cause is docketed,¹ and due notice served upon the adverse party.² The pleadings may be amended, conformably to the rules, at the discretion of the court,³ and, likewise, new parties may be added.⁴

108 App. Div. 279, 95 N. Y. Supp. 733.

95. *Dryden v. Wyllis*, 53 Iowa 390, 5 N. W. 518.

96. See *supra*, II, F, 2.

97. **Ia.**—*Boyer v. Riley*, 41 Iowa 13; *Sullivan v. Otis*, 39 Iowa 328. **Mont.** *McAllister v. Rocky Fork Coal Co.*, 31 Mont. 359, 78 Pac. 595. **Neb.**—*Standiford v. Green*, 54 Neb. 10, 74 N. W. 263; *Omaha & R. Valley R. Co. v. Hall*, 33 Neb. 229, 50 N. W. 10.

98. See *supra*, III, G. 5, b; and *infra*, IV, C to E.

Limiting the issues, see *infra*, IV, B.

99. **Ill.**—*Brenner v. Coerber*, 42 Ill. 497. **Md.**—*Mahoney v. Ashton*, 4 Har. & McH. 295. **Mass.**—*Dows v. Swett*, 127 Mass. 364. **Tex.**—*O'Neill v. Brown*, 61 Tex. 34. **Vt.**—*Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

[a] **Time of New Trial.**—(1) A new trial may take place at the same time of court as the original trial. *Craft v. Com.*, 24 Gratt. (65 Va.) 602. (2) In a criminal case, however, the defendant should have reasonable time in which to prepare for the new trial. *Lott v. State*, 41 Tex. 121.

1. *State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438.

2. **Ind.**—*Skeen v. Muir*, 34 Ind. 310. **La.**—*State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438. **N. Y.**—*Mottram v. Mills*, 1 Sandf. 671. **N. D.**—*Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741.

[a] Where, however, the order is made in open court, and the adverse party files a written exception to the order when made, he is as fully apprised of the order as if he had been formally served with a copy, and no formal service, in such a case, is necessary. *Kayser v. Hartnett*, 67 Wis. 250, 30 N. W. 363.

[b] By the statute, the action remains on the calendar as it stood before the first trial, and service of a second notice is not necessary. *Connor v. Corson*, 13 S. D. 550, 83 N. W. 588, rehearing denied, 13 S. D. 618, 84 N. W. 191.

3. **U. S.**—*Clark v. Sohler*, 1 Woodb. & M. 368, 5 Fed. Cas. No. 2,835. **Cal.** See *Schehr v. Berkey*, 166 Cal. 157, 135 Pac. 41; *San Jose Safe Deposit Bank v. Bank of Madera*, 156 Cal. 38, 103 Pac. 225. **D. C.**—*Fague v. Corcoran*, 3 Mackey 199. **Ill.**—*Brown v. Smith*, 24 Ill. 196. **Mass.**—*Carlisle v. Weston*, 1 Mete. 26; *Valentine v. Farnsworth*, 21 Pick. 176; *Stanwood v. Scovel*, 4 Pick. 422. **Mich.**—*Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. 584; *Chapman v. Colby Bros. & Co.*, 47 Mich. 46, 10 N. W. 74. **Neb.**—*Wallingford v. Burr*, 17 Neb. 137, 22 N. W. 350. **N. Y.** *Getty v. Spaulding*, 58 N. Y. 636. **Utah.** *Collet v. Beutler*, 27 Utah 540, 76 Pac. 707. **Wis.**—*Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588. **Can.**—*Hamilton v. Moore*, 33 U. C. Q. B. 100.

Changing Cause of Action.—See *infra*, IV, C, and the title "New Cause of Action or Defense."

4. **Ind.**—*Brown v. Cody*, 115 Ind.

In a criminal case, the accused may be tried upon the same indictment or information,⁵ but a second arraignment and plea is not necessary at the new trial.⁶

B. ISSUES.—Where the new trial goes to the whole case, it must be retried from the beginning upon all the issues of fact which are involved.⁷ Where, however, the new trial is limited to a part of the issues, or to less than all of the parties, the proceedings are confined to the issues, or parties, affected by the order.⁸

C. HOW AFFECTED BY FORMER TRIAL.—As a rule, the new trial is not affected by the former proceedings, verdict, or judgment,⁹ and it is sometimes so provided by statute.¹⁰ A defendant may plead defenses other than those pleaded on the former trial,¹¹ although it is held that a plaintiff cannot change the former theory of his case to an entirely inconsistent theory.¹²

484, 18 N. E. 9. **Ky.**—Combs' Admx. v. Krish, 27 Ky. L. Rep. 154, 84 S. W. 562. **N. Y.**—Martin v. Lake, 3 Hill 475.

5. State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374.

The effect of a verdict in a criminal case as a former jeopardy is treated elsewhere in this work. See 14 STANDARD PROC. 584, 592, 616.

6. **Ga.**—Hayes v. State, 58 Ga. 35. **La.**—State v. Boyd, 38 La. Ann. 374. **Mo.**—State v. Simms, 71 Mo. 538. **N. Y.** People v. McElvaine, 125 N. Y. 596, 26 N. E. 929. **Va.**—Curtis v. Com., 87 Va. 589, 13 S. E. 73.

7. **Cal.**—Gunter v. Laffan, 7 Cal. 588. **Conn.**—Zaleski v. Clark, 45 Conn. 397. **Ga.**—Bourquin v. Bourquin, 110 Ga. 440, 35 S. E. 710. **Ind.**—Lake Shore & M. S. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1. **Me.**—Tuttle v. Gates, 24 Me. 395. **Mo.** Deiermann v. Bemis Bros. Bag Co., 144 Mo. App. 474, 129 S. W. 229. **Ohio.** Dayton & U. R. Co. v. Dayton, etc. Traction Co., 72 Ohio St. 429, 74 N. E. 195. **Can.**—Canadian Pac. R. Co. v. Blain, 36 Can. Sup. Ct. 159.

8. **Ark.**—Lavender v. Hudgens, 32 Ark. 763. **Cal.**—Duff v. Duff, 101 Cal. 1, 35 Pac. 437. **Mass.**—Pratt v. Boston Heel & Leather Co., 134 Mass. 300; Wayland v. Ware, 109 Mass. 248. **N. H.** Ela v. Ela, 72 N. H. 216, 55 Atl. 358. **N. J.**—More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. L. 9, 69 Atl. 491. **Ohio.**—Sprague v. Childs, 16 Ohio St. 107.

Verdict in criminal case as an acquittal of part of the charge and a limitation of issues on new trial, see

14 STANDARD PROC. 574, 592, and generally the title "Jeopardy."

9. **Mich.**—Shippy v. Au Sable, 85 Mich. 280, 48 N. W. 584. **Neb.**—Earl v. Reid, 32 Neb. 45, 48 N. W. 894. **Va.** Crawford v. Morris, 5 Gratt. (46 Va.) 96.

See *infra*, IV, D and E.

[a] **Judgment Against Co-Party Not Evidence.**—Where in an action against two railway companies for negligence, a new trial was granted to one company against whom judgment was rendered, the judgment in favor of the other company could not be admitted to show contributory negligence on part of plaintiff. Thompson v. Chicago, St. P. & K. C. Ry. Co., 71 Minn. 89, 73 N. W. 707.

Verdict in criminal case as a former jeopardy, see 14 STANDARD PROC. 584, 592, 616.

10. See the statutes and Cal. Pen. Code, §1180.

11. Moulou v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. ed. 447. See Howey v. Fisher, 122 Mich. 43, 80 N. W. 1004, and the title "New Cause of Action or Defense."

12. **Conn.**—Taylor v. Keeler, 51 Conn. 397. **Ind.**—Lake Shore & M. S. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1. **Mass.**—Williams v. Henshaw, 12 Pick. 378, 23 Am. Dec. 614. **Mich.**—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443, 146 N. W. 396; Hamilton v. Frothingham, 71 Mich. 616, 40 N. W. 15. **Mo.**—Bange v. Supreme Council L. H., 153 Mo. App. 154, 132 S. W. 276.

D. CONDUCT OF THE TRIAL.—The new trial should be conducted with as little prejudice to either party as if it had never been heard before.¹³ A new jury is impaneled,¹⁴ the burden of proof remains as on the former trial,¹⁵ unless it has been changed by a change in the pleadings or issues,¹⁶ and, as a rule, the evidence is presented anew.¹⁷ Moreover, proper evidence not produced at the former trial may be admitted.¹⁸ Where the new trial is confined to a part of the former issues, the evidence should be likewise limited.¹⁹

A party is not ordinarily estopped as to matters of evidence by his action on the former trial,²⁰ nor is the court not bound by its rulings at the former trial,²¹ and inadmissible evidence should not be admitted even if received at the former trial.²² The court should not

See the title "New Cause of Action or Defense," and *supra*, IV, A.

13. *Gott v. Judge of Superior Court*, 42 Mich. 625, 4 N. W. 529.

As to conduct of new trial granted by appellate court, see the titles "Law of the Case;" "Mandate and Proceedings Thereafter."

[a] It is censurable misconduct for counsel in his argument to refer to the jury in the first trial. *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497. See generally the title "Arguments."

14. As to impaneling jury, see the title "Juries and Jurors."

[a] **Former Jurors Not Eligible.** *Rex v. Mawbey*, 6 T. R. 619, 101 Eng. Reprint 736; *Argent v. Darrell*, 2 Salk. 648, 91 Eng. Reprint 551.

15. *Snow v. Vandever*, 33 Neb. 735, 51 N. W. 127; *McCorkle v. Everett*, 16 Tex. Civ. App. 552, 41 S. W. 136.

16. See *supra*, IV, A to C.

17. *Williamson v. Randolph*, 111 App. Div. 539, 97 N. Y. Supp. 949.

[a] **By Statute.**—*Turner v. Territory*, 15 Okla. 557, 82 Pac. 650. See also the statutes.

Depositions.—Use on second trial, see 7 STANDARD PROC. 498. Use of depositions taken upon motion for new trial, in new trial, see 7 STANDARD PROC. 398.

[b] But a new trial granted on the ground of wrong findings of fact and conclusions of law drawn from the testimony, does not require the evidence *de novo*. The court should make correct findings and conclusions from the evidence as presented. *Russell v. Dufresne*, 1 Alaska 575.

18. **U. S.**—*Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637. **N. Y.** *Carroll v. Tucker*, 7 Misc. 482, 27 N. Y. Supp. 985, 58 N. Y. St. 44. **S. C.**

Pratt v. Timmerman, 69 S. C. 186, 48 S. E. 255, reference to take further testimony in equity suit.

[a] **Affidavit Supporting Motion for New Trial.**—Where the affiant is present as a witness at the new trial, his affidavit used in support of the motion for a new trial is not admissible. *Murray v. Weber*, 103 Iowa 477, 72 N. W. 759.

19. *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437. See *supra*, IV, B.

20. See 9 ENCY. OF EV. 41, 45.

Objections to depositions taken for and used on first trial, see 7 STANDARD PROC. 451.

21. See *infra*, this note and section, and 18 STANDARD PROC. 796, 808, et seq.

[a] Thus, rulings on the former trial requiring a party to elect between the counts of his declaration or petition, are not binding upon the new trial. *Louisville R. Co. v. Will's Admx.*, 23 Ky. L. Rep. 1961, 66 S. W. 628; *Gott v. Judge of Superior Court*, 42 Mich. 625, 4 N. W. 529.

[b] **Discretionary Granting of Jury Trial.**—Where a suit is of an equitable nature, plaintiff having no inherent right to a jury trial, the fact that the court called, in its discretion, a jury in the first trial, does not make it incumbent upon the court to call another jury upon the second trial. *Wingate v. Ferris*, 50 Cal. 105.

22. **U. S.**—*Riggs v. Tayloe*, 2 Cranch C. C. 687, 20 Fed. Cas. No. 11,832, judgment reversed, *Tayloe v. Riggs*, 1 Pet. 591, 7 L. ed. 275. **Ga.**—*Dyson v. Knight*, 130 Ga. 573, 61 S. E. 468, 124 Am. St. Rep. 179. **N. Y.**—*Deuterman v. Gainsborg*, 54 App. Div. 575, 66 N. Y. Supp. 1009, affirmed, *Deuterman v. Pollock*, 172 N. Y. 595, 64 N. E. 1120.

invade the province of the jury notwithstanding the failure of the previous jury to properly exercise this function.²³

E. VERDICT. — The former verdict should not be referred to either in evidence or in argument.²⁴ On the second trial the jury may award damages in excess of those allowed on the first.²⁵

V. NUMBER OF NEW TRIALS. — A. AT COMMON LAW. — 1. In General. — The granting of a new trial does not exhaust the discretion of the trial judge to grant another new trial,²⁶ and, unless restricted by statute, there is no limit to the number of successive new trials that may be granted.²⁷ However, the discretionary power of the court to grant even a second new trial should be exercised with caution.²⁸

2. Successive Concurring Verdicts. — While another new trial may be granted even after two concurring verdicts,²⁹ yet courts rarely grant a new trial after two verdicts upon the facts in favor of the same party

Wis.—*Slauson v. Goodrich Transportation Co.*, 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825.

23. See *infra*, this note.

[a] Although the evidence on the second trial is substantially the same as on the prior trial, a new trial having been granted on the ground that the verdict was not sustained by the evidence, the evidence should nevertheless be left to the jury since defendant is not entitled to a directed verdict. *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497.

[b] Although former verdicts on the same evidence have been set aside as excessive, the court cannot invade the prerogative of the jury and instruct them not to return a verdict beyond a certain sum. *Illinois Cent. R. Co. v. Minor*, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627.

Effect of ruling in higher court on the law of the case and sufficiency of evidence to sustain verdict, see the titles "Law of the Case;" "Mandate and Proceedings Thereafter."

24. See the statutes and the following: *Ind.*—*Ex parte Bradley*, 48 Ind. 548. *Kan.*—*State v. Hart*, 33 Kan. 218, 6 Pac. 288; *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469. *Mo.*—*State v. Leabo*, 89 Mo. 247, 1 S. W. 288; *Lane v. Kingsberry*, 11 Mo. 402.

[a] Duty of Jury.—The previous adjudication is wiped out, and the new jury should not in any manner be influenced by the action of the former jury. *Nohrden v. Northeastern R. R.*

Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826.

25. *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

26. *Morgan v. Lamb*, 16 Ga. App. 484, 85 S. E. 792.

27. *Ga.*—*Vassie v. Central of Ga. R. Co.*, 135 Ga. 8, 68 S. E. 782; *Vickery v. Central R. & Bkg. Co.*, 89 Ga. 365, 15 S. E. 464. *Ill.*—*Wolbrecht v. Baumgarten*, 26 Ill. 291. *Kan.*—*Brown v. Atchison, etc. Ry. Co.*, 29 Kan. 183. See *Richolson v. Freeman*, 56 Kan. 463, 43 Pac. 772. *Mass.*—*Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974; *Brooks v. Somerville*, 106 Mass. 271; *Coffin v. Phenix Ins. Co.*, 15 Pick. 291, 295. *Mo.*—*State v. Horner*, 86 Mo. 71. *N. J.*—*Brown v. Paterson Parchment Paper Co.*, 69 N. J. L. 474, 55 Atl. 87.

28. *Ga.*—*Morgan v. Lamb*, 16 Ga. App. 484, 85 S. E. 792; *Wheeler v. Albany & N. R. Co.*, 6 Ga. App. 270, 64 S. E. 1114; *Stewart v. Central of Ga. R. Co.*, 3 Ga. App. 397, 60 S. E. 1. *N. Y.*—*Whitaker v. White*, 67 Hun 652, 22 N. Y. Supp. 240, 51 N. Y. St. 787. *Wyo.*—*Emery v. Hawley*, 1 Wyo. 303. *Can.*—*Harris v. Robinson*, 25 U. C. Q. B. 247.

29. *Goodwin v. Gibbons*, 4 Burr. 2108, 98 Eng. Reprint 100.

[a] Two Verdicts Not Controlling. Although the fact that two juries have reached the same result is significant, yet it is not controlling. *Silverstone v. London Assur. Corp.*, 187 Mich. 333, 153 N. W. 802.

except for error of law.³⁰ Thus, it is seldom that after two concurring verdicts a new trial will be granted on the ground that the verdict is contrary to the weight of evidence.³¹ However, the mere fact that even three successive verdicts for the same party has been returned, does not of itself make it the legal duty of the court to allow the last verdict to stand if unsupported by evidence,³² and where there is no evidence to sustain the verdict,³³ or where juries manifestly disregard the instructions of the court, it is the duty of the court to set aside any number of verdicts.³⁴

B. STATUTORY RESTRICTIONS. — 1. In General. —In some states, the statutes regulate the number of new trials that may be granted. The most common provision is to the effect that not more than two new trials shall be granted to the same party in the same cause.³⁵ Other statutes provide that for certain expressed causes not more than two new trials shall be allowed,³⁶ while still other statutes provide

30. *Chambers v. Robinson*, 2 Strange 692, 93 Eng. Reprint 787; *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Reprint 552. See *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. ed. 1032.

31. **U. S.**—*Clark v. Barney Dumping Co.*, 109 Fed. 235; *Milliken v. Ross*, 9 Fed. 855, 4 Woods 69. **Ga.**—*Hendricks v. Southern R. Co.*, 123 Ga. 342, 51 S. E. 415; *McLean v. Clark*, 52 Ga. 455; *Lowe Co. v. Teasley & Co.*, 4 Ga. App. 155, 60 S. E. 1077. **Ill.**—*Wolbrecht v. Baumgarten*, 26 Ill. 291. **Kan.**—*Pacific R. Co. v. Nash*, 7 Kan. 280. **Me.**—*Handly v. Call*, 30 Me. 9. **Mass.**—*Coffin v. Phenix Ins. Co.*, 15 Pick. 291. **Mich.**—*Hyde v. Haak*, 132 Mich. 364, 93 N. W. 876. **Minn.**—*Atwood Lumber Co. v. Watkins*, 94 Minn. 464, 103 N. W. 332; *Buenemann v. St. Paul, M. & M. Ry. Co.*, 32 Minn. 390, 20 N. W. 379. **N. Y.**—*Fowler v. Aetna Fire Ins. Co.*, 7 Wend. 270; *Laes v. James Everard's Breweries*, 107 App. Div. 250, 95 N. Y. Supp. 25, 17 N. Y. Ann. Cas. 202. **S. C.**—*Watson v. Hamilton*, 6 Rich. 75. **Tex.**—*Wiley v. Atchison, etc. R. Co.*, 103 Tex. 336, 127 S. W. 166. **Va.**—*Adams v. Hubbard*, 25 Gratt. (66 Va.) 129. **Eng.**—*Foster v. Steele*, 3 Bing. (N. C.) 892, 32 E. C. L. 409, 5 Scott 25, 3 Hodges 231, 6 L. J. C. P. 265, 132 Eng. Reprint 654. **Can.**—*Shea v. Portulance*, 5 Newfoundl. 171.

[a] *Lord Mansfield*, in *Swinerton v. Marquis of Stafford*, 3 Taunt. 233, 128 Eng. Reprint 92, held that, although the judge who last tried the cause thought the evidence against the verdict preponderated, nevertheless,

when the evidence was conflicting, the court ought to refuse to grant a second new trial, remarking that "it could be never right for us to make no weight of two verdicts of a jury in order to take the chance of a third."

32. *Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974.

33. **Mass.** — *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543. **Pa.**—*Howard Express Co. v. Wile*, 64 Pa. 201. **E. I.**—*Rounds v. Humes*, 7 R. I. 535. **Tex.**—*Gibson v. Hill*, 23 Tex. 77.

34. **U. S.**—*Milliken v. Ross*, 9 Fed. 855, 4 Woods 69, refusing, however, in this case a third trial where there had been two concurring verdicts upon substantially the same testimony. **Ga.**—*Monroe Female University v. Broadfield*, 30 Ga. 1. **Me.**—*McKay v. New England Dredging Co.*, 93 Me. 201, 44 Atl. 614. **N. C.**—*Hamilton v. Bullock*, 3 N. C. 224. **Pa.**—*Howard Express Co. v. Wile*, 64 Pa. 201. **Can.**—*Kerby v. Lewis*, 1 U. C. Q. B. 66, 285, 6 U. C. Q. B. O. S. 489; *Holmes v. McKechin*, 23 U. C. Q. B. 321.

35. See the statutes and the following: **Ind.**—*Charles v. Malott*, 65 Ind. 184. **Miss.**—*Bowers v. Ross*, 55 Miss. 213. **Va.**—*Spriggs v. Jamerson*, 115 Va. 250, 78 S. E. 571. **W. Va.**—*Waterson v. Moore*, 23 W. Va. 404.

[a] **Statute Constitutional.** — See *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. ed. 1032, construing the Tennessee statute.

36. See the statutes and *Bardstown v. Nelson*, 121 Ky. 737, 90 S. W. 246.

that, except in case of certain enumerated grounds, the number shall be limited to two,³⁷ or even one new trial.³⁸

2. Construction.—There is much diversity of opinion in the construction of statutes regulating the number of new trials.³⁹ In some states, a statute providing that not more than two new trials shall be granted, no exceptions being expressed in the statute, is held not to restrict the common law right of the courts to grant new trials for errors of law;⁴⁰ but it has been held that such a statute is restrictive generally, and that not more than two new trials can be granted to the same party, although one or both of the verdicts were set aside for errors of law.⁴¹

A statute in terms limited to new trials on specified grounds does not prevent the granting of new trials on other grounds.⁴² Nor does a statute specifically excepting certain grounds, prevent new trials on the excepted grounds;⁴³ and it has been held that such a statute

37. See the statutes and *Louisville & N. R. Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. ed. 1032; *Randall v. Collins*, 58 Tex. 231; *Austin v. Talk*, 26 Tex. 127; *Rains v. Hood*, 23 Tex. 555.

38. See *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422.

39. *Spriggs v. Jamerson*, 115 Va. 250, 78 S. E. 571.

40. *Ga.*—*James v. Flannery Co.*, 6 Ga. App. 811, 66 S. E. 153. *Ill.*—*Silsbe v. Lucas*, 53 Ill. 479; *Osner v. Zadek*, 120 Ill. App. 444. *Ind.*—*Shirts v. Irons*, 47 Ind. 445, 450. *Ky.*—*Bardstown v. Nelson*, 121 Ky. 737, 90 S. W. 246. *Miss.*—*Wildy v. Bonney's Lessee*, 35 Miss. 77. *Tenn.*—*Knoxville Iron Co. v. Dobson*, 15 Lea 409; *Trott v. West*, 10 Yerg. 499; *Wilson v. Greer*, 7 Humph. 513. *Tex.*—*Collins v. Ballow*, 72 Tex. 330, 10 S. W. 248; *Rains v. Hood*, 23 Tex. 555.

[a] **The statute means** that where the facts of the case have been fairly left to the jury upon a proper charge of the court and they have twice found a verdict for the same party, each of which having been set aside by the court; if the same party obtain another verdict in like manner, it shall not be disturbed. But this act did not intend to prevent the court granting new trials for error in the charge of the court to the jury, for error in the admission of, or rejection of testimony, for misconduct of the jury and the like." *East Tennessee & G. R. Co. v. Hackney*, 1 Head (Tenn.) 169; *Turner v. Ross*, 1 Humph. (Tenn.) 16, quoted in *Louisville & N.*

R. Co. v. Woodson, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. ed. 1032.

[b] **Where there is error in instructions**, the statute does not apply. *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832.

[c] **For Reasons Not Specified in Statute.**—In *Shirts v. Irons*, 47 Ind. 445, the supreme court said: "We think the true rule is, that where two new trials have been granted in the same cause to the same party, either by the court below or by this court, exclusively for any of the reasons specified in section 352 (the statute), another new trial cannot be granted to the same party in such cause for any of the reasons specified in said section; but that this court may reverse a judgment for the erroneous rulings of the court below on the pleadings, or other matters which do not constitute reasons for a new trial, although such reversal may result in another trial in the court below upon the merits of the case." See also *Charles v. Malott*, 65 Ind. 184; *Headrick v. Wisheart*, 57 Ind. 129.

41. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. 881; *Watterson v. Moore*, 23 W. Va. 404.

42. *Bardstown v. Nelson*, 121 Ky. 737, 90 S. W. 246.

43. *Kreis v. Railroad*, 131 Mo. 533, 33 S. W. 64, 1150; *Van Loon v. St. Joseph Ry., etc. Co.*, 174 Mo. App. 372, 160 S. W. 63.

[a] **Under the Missouri statute** (1) excepting new trials for errors in law

is not intended to and does not prevent the court from granting new trials of its own motion for its own errors.⁴⁴ In determining the number of new trials prohibited, although not expressly so stating, the statute is construed to mean new trials to the same party.⁴⁵ A re-statement granted after a default set aside, is not counted as a new trial,⁴⁶ and, in some states, a new trial granted by the appellate court is not included.⁴⁷

3. Appellate Courts.—The courts are not agreed as to the application of the statutes to appellate courts. Some cases hold that the statutes restrict the appellate courts in granting new trials upon the merits of the evidence, although not where new trials are granted for errors of the trial court.⁴⁸ Other cases hold, however, that the statutes do not apply to the appellate courts, but only to the trial courts.⁴⁹

by the triers of the facts and for misbehavior of the jury, any number of new trials may be granted for errors in instructions or in admitting or excluding evidence, or if the jury misbehaves or errs in matters of law. See *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422. (2) A verdict may be so contrary to the evidence as to amount, in legal effect, to misbehavior on the part of the jury, or may be regarded as springing from improper motives, and should not be permitted to stand in any event. *Partello v. Missouri, etc. R. Co.*, 217 Mo. 645, 661, 117 S. W. 1138; *Chlanda v. St. Louis Transit Co.*, 213 Mo. 244, 264, 112 S. W. 249; *Baker v. Stonebraker's Admrs.*, 36 Mo. 338, 345; *Rigby v. St. Louis Transit Co.*, 153 Mo. App. 330, 335, 133 S. W. 110; *McGraw v. O'Neil*, 123 Mo. App. 691, 101 S. W. 132.

[b] **Remedy by Mandamus.**—If a second new trial is improperly granted upon a restricted ground, the order may be corrected by mandamus. *Leahy v. Dugdale*, 41 Mo. 517.

44. *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422.

45. *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422.

46. *Crossland v. Admire*, 118 Mo. 87, 24 S. W. 154.

47. See *infra*, V, B, 3.

48. *Ind.*—*Charles v. Malott*, 65 Ind. 184; *Headrick v. Wisheart*, 57 Ind. 129; *Shirts v. Irons*, 47 Ind. 445, 450. *Ky.* *Burton v. Brashear*, 3 A. K. Marsh. 276. *Tenn.*—*Knoxville Iron Co. v. Dobson*, 15 Lea 409, 416, 418.

49. *Ill.*—*Illinois Cent. R. Co. v. Patterson*, 93 Ill. 290; *Stanberry v. Moore*, 56 Ill. 472; *Silsbe v. Lucas*, 53 Ill. 479; *Atchison, etc. R. Co. v. Alsdurf*, 68 Ill. App. 149. *Kan.*—*Beekman v. Richardson*, 28 Kan. 648. *Ky.*—*Louisville, etc. R. Co. v. Daniel*, 131 Ky. 689, 115 S. W. 804, 1198, 119 S. W. 229. *Mich.*—*People ex rel. Dennison v. Genesee Circ. Judge*, 37 Mich. 281, 285. *Miss.*—*Wildy v. Bonney's Lessee*, 35 Miss. 77; *Garnett v. Kirkman*, 33 Miss. 389. *Mo.* *Harrison v. Cachelin*, 23 Mo. 117; *Boyce v. Smith's Admr.*, 16 Mo. 317. *Tex.*—*Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723. *Va.*—*Spriggs v. Jamerson*, 115 Va. 250, 78 S. E. 571.

NEXT FRIEND.—See *Guardian ad Litem.*

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NOLLE PROSEQUI

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For forms, see 9 STANDARD PROC. 876.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION.—A nolle prosequi in a criminal prosecution is an entry on the record to the effect that the prosecutor will proceed no further with the suit, either as a whole, or as to some count or part thereof, or as to one or more of several defendants.¹

1. **Haw.**—King v. Robertson, 6 Hawaii 718. **N. C.**—Wilkerson v. Wilkerson, 74 S. E. 740; State v. Thornton, 35 N. C. 256. **Pa.**—Com. v. Evans, 26 Pa. Co. Ct. 90. **Tenn.**—Scheibler v. Steinburg, 129 Tenn. 614, 167 S. W. 866, Ann. Cas. 1915D, 1162. **W. Va.**—Denham v. Robinson, 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D, 997, 45 L. R. A. (N. S.) 1123.

II. WHO AUTHORIZED TO MAKE ENTRY.—Authority to enter a nolle prosequi rests usually in the prosecuting attorney alone;² it cannot be entered by a court on its own motion,³ unless authorized⁴

[a] **Distinguished From Retraxisit.** See 7 STANDARD PROC. 653.

[b] **Striking the case from the docket** unconditionally (1) is equivalent to a nolle prosequi (*Kistler v. State*, 64 Ind. 371; *State v. Dix*, 18 Ind. App. 472, 48 N. E. 261); but (2) this is not true of an order made, without prejudice to the defendant, to meet the exigencies of the case, which contains the express provision that the case shall not be considered dismissed. *Southerland v. State*, 176 Ind. 493, 96 N. E. 583.

2. **U. S.**—*United States v. Watson*, 7 Blatchf. 60, 28 Fed. Cas. No. 16,652. **Ala.**—*Stevens v. State*, 156 Ala. 119, 47 So. 208; *Gibbs v. State*, 130 Ala. 101, 30 So. 393. **Cal.**—*People v. Smith*, 143 Cal. 597, 77 Pac. 449; *People v. Curtis*, 113 Cal. 68, 45 Pac. 180. **Colo.** *People v. Zobel*, 54 Colo. 284, 130 Pac. 837. **Conn.**—*State v. Main*, 31 Conn. 572. **D. C.**—*Bass v. United States*, 20 App. Cas. 232. **Ga.**—*Lascelles v. State*, 90 Ga. 347, 372, 16 S. E. 945, 35 Am. St. Rep. 216. **Haw.**—*King v. Robertson*, 6 Hawaii 718. **Ind.**—*State v. Morrison*, 165 Ind. 461, 75 N. E. 968. **Ia.** *State v. McComb*, 18 Iowa 43. **Kan.** *State v. Rust*, 31 Kan. 509, 3 Pac. 428. **Ky.**—*Com. v. Hughes*, 153 Ky. 34, 154 S. W. 399; *Dilger v. Com.*, 88 Ky. 550, 11 S. W. 651. **La.**—*State v. Moise*, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701. **Me.**—*State v. Smith*, 67 Me. 328. **Mass.**—*Lizotte v. Dloska*, 200 Mass. 327, 86 N. E. 774. **Miss.**—*Clark v. State*, 23 Miss. 261. **Mo.**—*State v. Beauleigh*, 92 Mo. 490, 4 S. W. 666. **N. H.**—*State v. Tufts*, 56 N. H. 137. **N. J.**—*State v. Hickling*, 45 N. J. L. 152. **N. Y.**—*Lindsay v. People*, 63 N. Y. 143. **N. C.**—*Wilkerson v. Wilkerson*, 74 S. E. 740. **Pa.**—*Agnew v. Cumberland County*, 12 Serg. & R. 94. **P. R.** *United States v. Merritt*, 1 Porto Rico Fed. 203; *United States v. Dunlap*, 1 Porto Rico Fed. 112. **S. C.**—*State v. Thomas*, 75 S. C. 477, 55 S. E. 893. **Tenn.** *Scheibler v. Steinburg*, 129 Tenn. 614, 167 S. W. 866, Ann. Cas. 1915D, 1162. **Tex.**—*Railey v. State*, 58 Tex. Crim. 1, 121 S. W. 1120, 125 S. W. 576. **Vt.** *State v. Roe*, 12 Vt. 93. **Va.**—*Wortham*

v. Com., 5 Rand. (26 Va.) 669. **W. Va.** *Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D, 997, 45 L. R. A. (N. S.) 1123. **Eng.**—*Reg. v. Dunn*, 1 C. & K. 730, 47 E. C. L. 730. **Can.**—*Reg. v. Marshall*, 31 N. Brunsw. 390.

3. **Colo.**—*People v. Zobel*, 54 Colo. 284, 130 Pac. 837. **Ind.**—*State v. Morrison*, 165 Ind. 461, 75 N. E. 968. **Ky.** *Com. v. Flynn*, 161 Ky. 289, 170 S. W. 617; *Com. v. Hughes*, 153 Ky. 34, 154 S. W. 399; *Com. v. Cundiff*, 149 Ky. 37, 147 S. W. 767. **La.**—*State v. Frazier*, 52 La. Ann. 1305, 27 So. 799. **Mo.**—*State v. Mathews*, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135. **N. J.** *State v. Hickling*, 45 N. J. L. 152. **N. Y.**—*People v. Bennett*, 49 N. Y. 137. **Tex.**—*State v. McLane*, 31 Tex. 260. **Eng.**—*Reg. v. Dunn*, 1 C. & K. 730, 47 E. C. L. 730.

[a] **Source of Authority.**—"The power to enter a nolle prosequi is held by the attorney general virtute officii. He exerts it upon his official responsibility. The court has no right to interfere with its exercise. They can only judge of the effect of the act when done, and of the legal consequences which may follow from it. They will take care that it shall not operate to the prejudice of the defendant's rights." *Com. v. Tuck*, 20 Pick. (Mass.) 356, 366.

4. *State v. McDonald*, 10 Okla. Crim. 413, 137 Pac. 362; *State v. Keep*, 85 Ore. 265, 166 Pac. 936.

[a] **Statutory Enactments.**—Under some statutes the discretionary power is given the court, upon payment of costs, to dismiss a case upon a showing by the injured party that he has received satisfaction for the injury; but the terms of such statute must be complied with, or the application for a dismissal will be denied. *Noble v. United States*, 190 Fed. 538, 111 C. C. A. 370.

[b] **In case of settlement between defendant and party injured**, in some minor criminal prosecutions, the statute gives the right to the court. *Cleveland v. Cromwell*, 110 App. Div. 82, 96 N. Y. Supp. 475.

by statute. Nor can a nolle prosequi be entered by others,⁵ even though they be connected with the case.⁶

III. MANNER OF PROCEEDING.—A. **LEAVE OF COURT.**—In the absence of a statute requiring leave of court to enter a nolle prosequi,⁷ it is not necessary;⁸ the usual practice, however, is to obtain such leave.⁹

Motion To Obtain Leave.—If leave of court is necessary or desired, it is obtainable on motion, either oral or written, setting forth briefly the reasons therefor.¹⁰

B. **DECLARATION OF PROSECUTOR.**—Where it is neither customary to obtain leave of court, nor required by statute, the prosecutor merely makes a written or oral declaration of the action he has taken.¹¹

IV. GROUNDS.—The prosecuting attorney is not restricted by any rule as to grounds upon which a nolle prosequi may be entered.¹² Generally, however, his motion is based upon the reason that the evi-

5. See *infra*, this note.

[a] **The military commander of a district cannot order the court to nolle prosequi a case.** *State v. McLane*, 31 Tex. 260.

[b] **The legislature has no authority to make such an entry.** *State v. Fleming*, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73.

[c] **The grand jury may suggest, but cannot order an indictment dismissed.** *Edwards v. State*, 121 Ga. 590, 49 S. E. 674.

6. *Virginia v. Dulany*, 1 Cranch C. C. 82, 28 Fed. Cas. No. 16,959, holding a private prosecutor could not exercise the authority.

[a] **Defendant's attorney cannot originate the motion.** *Cal.*—*People v. Bruzzo*, 24 Cal. 41. *La.*—*State v. Frazier*, 52 La. Ann. 1305, 27 So. 799. *N. J.*—*State v. Hickling*, 45 N. J. L. 152. *N. Y.*—*People v. Beckwith*, 2 N. Y. Crim. 29.

7. *Ga.*—*Lascelles v. State*, 90 Ga. 347, 372, 16 S. E. 945, 35 Am. St. Rep. 216. *N. Y.*—*People v. Bennett*, 49 N. Y. 137. *Ore.*—*State v. Keep*, 85 Ore. 265, 166 Pac. 936. *Pa.*—*Com. v. Stewart*, 44 Pa. Super. 620. *Tex.*—*Wilson v. State*, 69 Tex. Crim. 567, 154 S. W. 571; *Taylor v. State* (Tex. Crim.), 81 S. W. 299; *Kelly v. State*, 36 Tex. Crim. 480, 38 S. W. 39.

8. *Ga.*—*Statham v. State*, 41 Ga. 507. *Haw.*—*King v. Robertson*, 6 Hawaii 718. *La.*—*State v. Frazier*, 52 La. Ann. 1305, 27 So. 799. *Mass.*—*Lizotte v. Dloska*, 200 Mass. 327, 86 N. E. 774. *N. H.*—*State v. Smith*, 49 N. H. 155, 6 Am. Rep. 480. *N. J.*—*State v. Hickling*, 45 N. J. L. 152.

Pa.—*Com. v. Evans*, 26 Pa. Co. Ct. 90. *P. R.*—*United States v. Merritt*, 1 Porto Rico Fed. 203. *W. Va.*—*Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D, 997, 45 L. R. A. (N. S.) 1123. *Eng.*—*Reg. v. Allen*, 1 B. & S. 850, 31 L. J. M. C. 129, 8 Jur. N. S. 230, 9 Cox C. C. 120, 101 E. C. L. 849, 5 L. T. N. S. 636, 121 Eng. Reprint 929.

9. *Haw.*—*King v. Robertson*, 6 Hawaii 718. *N. J.*—*State v. Hickling*, 45 N. J. L. 152. *P. R.*—*United States v. Merritt*, 1 Porto Rico Fed. 203. *W. Va.*—*Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970, 1915D, 997, 45 L. R. A. (N. S.) 1123.

10. See the following cases: *U. S.*—*United States v. Watson*, 7 Blatchf. 60, 28 Fed. Cas. No. 16,652. *Ala.*—*Stevens v. State*, 156 Ala. 119, 47 So. 208. *Cal.*—*People v. Smith*, 143 Cal. 597, 77 Pac. 449. *Colo.*—*People v. Zobel*, 54 Colo. 284, 130 Pac. 837. *Conn.*—*State v. Main*, 31 Conn. 572. *Ind.*—*State v. Morrison*, 165 Ind. 461, 75 N. E. 968. *Miss.*—*Clarke v. State*, 23 Miss. 261. *S. C.*—*State v. McKee*, 1 Bailey 651, 21 Am. Dec. 499. *W. Va.*—*Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D, 997, 45 L. R. A. (N. S.) 1123.

11. See the following cases: *La.*—*State v. Frazier*, 52 La. Ann. 1305, 27 So. 799; *State v. Moise*, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701. *Mass.*—*Com. v. Tuck*, 20 Pick. 356. *N. H.*—*State v. Smith*, 49 N. H. 155, 6 Am. Rep. 480.

12. See *infra*, this section.

[a] It (1) may be used to avoid a disagreement (*Com. v. Stedman*, 12

dence is insufficient to convict,¹³ or that the indictment is defective;¹⁴ or that one of the defendants is a necessary witness for the people.¹⁵

V. SCOPE AND TIME OF ENTRY.—A. TO THE WHOLE INDICTMENT.—If to the whole indictment, a nolle prosequi may be entered at any time before the trial is entered upon;¹⁶ but not thereafter, unless with defendant's consent.¹⁷ There are cases, however, which would seem to permit such action up to the time of the verdict,¹³

Metc. [Mass.] 444), as (2) when a jury disagrees on one count to correct an erroneous verdict when possible to do so by eliminating one count (*State v. Bruce*, 24 Me. 71); to (3) put the case over, that the defendant may be tried on another charge (*Railey v. State*, 58 Tex. Crim. 1, 121 S. W. 1120, 125 S. W. 576); on (4) occasion of a theft, loss or destruction of the papers of the case (*State v. Pierre*, 38 La. Ann. 91); or (5) for the purpose of drawing another indictment of fuller counts. *Lascelles v. State*, 90 Ga. 347, 371, 16 S. E. 945, 35 Am. St. Rep. 216.

13. **U. S.**—*United States v. Brooks*, 44 Fed. 749. **Ga.**—*Williams v. State*, 97 Ga. 398, 23 S. E. 822. **Haw.**—*King v. Robertson*, 6 Hawaii 718. **S. C.** *State v. Norton*, 69 S. C. 454, 48 S. E. 464.

[a] After the issue has been tried (1) this is not a good ground (*Com. v. Wade*, 17 Pick. [Mass.] 395); except (2) as to one count. *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

14. **Ala.**—*Stevens v. State*, 156 Ala. 119, 47 So. 208; *Gibbs v. State*, 130 Ala. 101, 30 So. 393. **D. C.**—*Bass v. United States*, 20 App. Cas. 232. **Haw.** *King v. Robertson*, 6 Hawaii 718. **La.** *State v. Evans*, 40 La. Ann. 216, 3 So. 838. **Mass.**—*Com. v. Cain*, 102 Mass. 487. **Pa.**—*Com. v. Casey*, 7 Kulp 265, 14 Pa. Co. Ct. 389. **Tenn.**—*Walton v. State*, 3 Sneed 687. **Va.**—*Hughes v. Com.*, 17 Gratt. (58 Va.) 565, 94 Am. Dec. 498.

[a] **Misjoinder.**—*United States v. Nye*, 4 Fed. 883, 892. See also 12 STANDARD PROC. 498.

15. **Cal.**—*People v. Bruzzo*, 24 Cal. 41. **Colo.**—*People v. Zobel*, 54 Colo. 284, 130 Pac. 837. **Ind.**—*Baker v. State*, 57 Ind. 255. **Mass.**—*Com. v. Tuck*, 20 Pick. 356. **Mo.**—*State v. Mathews*, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135. **N. Y.**—*Lindsay v. People*, 63 N. Y. 143. **N. C.**—*State v. Phipps*, 76 N. C. 203. **Tex.**—*Johnson v. State*, 32 Tex. 570.

16. **U. S.**—*United States v. Shoemaker*, 2 McLean 114, 27 Fed. Cas. No. 16,279. **Ala.**—*Walker v. State*, 61 Ala. 30. **Cal.**—*People v. Curtis*, 113 Cal. 68, 45 Pac. 180. **Ga.**—*Reynolds v. State*, 3 Ga. 53. **Ia.**—*State v. McPherson*, 9 Iowa 53. **La.**—*State v. Pierre*, 38 La. Ann. 91. **Mass.**—*Com. v. McClusky*, 151 Mass. 488, 25 N. E. 72. **Miss.** *Clarke v. State*, 23 Miss. 261. **N. H.** *State v. Smith*, 49 N. H. 155, 6 Am. Rep. 480. **Pa.**—*Com. v. Evans*, 26 Pa. Co. Ct. 90. **P. I.**—*United States v. Luciano*, 2 Phil. Isl. 96. **Can.**—*Reg. v. Marshall*, 31 N. Bruns. 390.

[a] Before finding of bill by the grand jury. *Gallagher v. Franklin*, 5 Pa. Co. Ct. 431.

[b] After jury impaneled, but before case is submitted to it. *Walton v. State*, 3 Sneed (Tenn.) 687.

[c] At any time before the jury is charged, but not after. *State v. Thomas*, 75 S. C. 477, 55 S. E. 893; *State v. McKee*, 1 Bailey (S. C.) 651, 21 Am. Dec. 499.

17. **U. S.**—*United States v. Shoemaker*, 2 McLean 114, 27 Fed. Cas. No. 16,279. **Ga.**—*Newsom v. State*, 2 Ga. 60. **Ill.**—*People v. Brown*, 273 Ill. 169, 112 N. E. 462. **La.**—*State v. Sheriff*, 48 La. Ann. 140, 18 So. 942. **Mass.** *Com. v. Scott*, 121 Mass. 33. **N. H.** *State v. Smith*, 49 N. H. 155, 6 Am. Rep. 480. **N. C.**—*State v. Thompson*, 95 N. C. 596. **P. I.**—*United States v. Luciano*, 2 Phil. Isl. 96; *United States v. Valencia*, 1 Phil. Isl. 642. **Vt.**—*State v. Roe*, 12 Vt. 93.

[a] For a statement of the reason, see *Com. v. Tuck*, 20 Pick. (Mass.) 356, 365.

[b] **Objection Necessary.**—If a nolle prosequi be entered after the trial has begun and the defendant fails to object, he cannot afterwards take advantage of it. *Com. v. Kimball*, 7 Gray (Mass.) 328.

18. *United States v. Watson*, 7 Blatchf. 60, 28 Fed. Cas. No. 16,652;

and even after verdict.¹⁹

B. TO A PART OF THE INDICTMENT. — A nolle prosequi that falls short of a complete abandonment of the prosecution may be entered at any time either before or after verdict; and this is true though a demurrer or motion to quash is filed.²⁰ The rule obtains where a nolle prosequi is entered as to one or more counts,²¹ or as to part of a count,²² or as to one or more of the defendants,²³ or after an adverse,²⁴ or favorable ruling.²⁵

VI. EFFECT. — A nolle prosequi operates merely to terminate the prosecution within the terms of the order.²⁶ It does not amount to an

State *v.* Moise, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701.

19. **U. S.**—United States *v.* Brooks, 44 Fed. 749. **Ala.**—Lacey *v.* State, 58 Ala. 385. **Ga.**—Fortson *v.* State, 13 Ga. App. 681, 79 S. E. 746. **Mass.**—Com. *v.* Scott, 121 Mass. 33; Com. *v.* Cain, 102 Mass. 487. **N. C.**—State *v.* Taylor, 84 N. C. 773.

20. See the following: **Ala.**—Gibbs *v.* State, 130 Ala. 101, 30 So. 393; Lacey *v.* State, 58 Ala. 385. **Me.**—State *v.* Smith, 67 Me. 328. **Mass.**—Com. *v.* Andrews, 132 Mass. 263. **N. C.**—State *v.* Buchanan, 23 N. C. 59. **Pa.**—Com. *v.* Casey, 7 Kulp 265, 14 Pa. Co. Ct. 389.

21. **U. S.**—United States *v.* Nye, 4 Fed. 883. **Ala.**—Stevens *v.* State, 156 Ala. 119, 47 So. 208; Gibbs *v.* State, 130 Ala. 101, 30 So. 393; Williams *v.* State, 130 Ala. 31, 30 So. 336. **Ill.**—People *v.* Brown, 273 Ill. 169, 112 N. E. 462. **Ia.**—State *v.* Struble, 71 Iowa 11, 32 N. W. 1. **La.**—State *v.* Perry, 116 La. 231, 40 So. 686. **Me.**—State *v.* Smith, 67 Me. 328. **Mass.**—Com. *v.* Andrews, 132 Mass. 263. **Minn.**—State *v.* Eno, 8 Minn. 220. **N. C.**—State *v.* Taylor, 84 N. C. 773. **Ohio.**—Baker *v.* State, 12 Ohio St. 214. **S. C.**—State *v.* Norton, 69 S. C. 454, 48 S. E. 464. **Tex.**—Tune *v.* State, 49 Tex. Crim. 445, 94 S. W. 231. **Vt.**—State *v.* Roe, 12 Vt. 93. **Eng.**—Reg. *v.* Leatham, 8 Cox C. C. 498.

[a] After General Verdict of Guilty.—Com. *v.* Jenks, 1 Gray (Mass.) 490.

22. **La.**—State *v.* Evans, 40 La. Ann. 216, 3 So. 838. **Me.**—State *v.* Bean, 77 Me. 486; State *v.* Burke, 38 Me. 574. **Mass.**—Com. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047; Com. *v.* Wallace, 108 Mass. 12; Jennings *v.* Com., 105 Mass. 586. **N. C.**—State *v.* Upton, 170 N. C. 769, 87 S. E. 328. **Tenn.**—Ferrell *v.* State, 2 Lea 25. **Tex.**—Weaver *v.* State,

52 Tex. Crim. 11, 105 S. W. 189; Dunham *v.* State, 9 Tex. App. 330.

23. **U. S.**—United States *v.* Keen, 1 McLean 429, 26 Fed. Cas. No. 15,510. **Ala.**—Levison *v.* State, 54 Ala. 520. **Ind.**—State *v.* Woulfe, 58 Ind. 17. **Ia.**—State *v.* McComb, 18 Iowa 43. **Mo.**—State *v.* Clump, 16 Mo. 385. **N. Y.**—Lindsay *v.* People, 63 N. Y. 143. **N. C.**—State *v.* Phipps, 76 N. C. 203. **Pa.**—Com. *v.* Casey, 7 Kulp 265, 14 Pa. Co. Ct. 389. **P. I.**—United States *v.* De la Torre, 25 Phil. Isl. 36. **Tex.**—Johnson *v.* State, 33 Tex. 570; Harville *v.* State, 54 Tex. Crim. 426, 113 S. W. 283.

[a] Conspiracy.—Since this crime necessarily implies the co-operation of two or more individuals, it is erroneous to enter a nolle prosequi as to one of two defendants. State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476.

24. **D. C.**—Bass *v.* United States, 20 App. Cas. 232. **La.**—State *v.* Ayles, 120 La. 661, 45 So. 540. **Mass.**—Com. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047; Com. *v.* Cain, 102 Mass. 487.

25. Stevens *v.* State, 156 Ala. 119, 47 So. 208.

26. **Ala.**—Walker *v.* State, 61 Ala. 30. **Ky.**—Henry *v.* Com., 4 Bush 427. **Mass.**—Com. *v.* McClusky, 151 Mass. 488, 25 N. E. 72. **Tenn.**—Scheibler *v.* Steinburg, 129 Tenn. 614, 167 S. W. 866, Ann. Cas. 1915D, 1162. **W. Va.**—Denham *v.* Robinson, 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D, 997, 45 L. R. A. (N. S.) 1123. **Eng.**—Rex *v.* Pickering, 2 B. & Ad. 267, 9 L. J. (O. S.) M. C. 106, 22 E. C. L. 118, 109 Eng. Reprint 1142.

[a] Verdict on a nolle prossed count is void. Walker *v.* State, 61 Ala. 30.

[b] When granted upon a condition, such as the payment of costs by accused, the condition must be fulfilled before the nolle prosequi may go into effect. State *v.* Morgan, 33 Md. 44.

acquittal;²⁷ and the defendant may be further prosecuted, even on the same indictment.²⁸

Defendant's sureties are released by the entry of a nolle prosequi.²⁹

VII. VACATING THE ENTRY.—According to some decisions, the court has no power to vacate an entry of nolle prosequi;³⁰ but the court's authority to recall such entry has been recognized at least during the term in which it was made.³¹

27. *Ala.*—Walker *v.* State, 61 *Ala.* 50. *Cal.*—People *v.* Smith, 143 *Cal.* 597, 77 *Pac.* 449. *Conn.*—State *v.* Main, 31 *Conn.* 572. *Ga.*—Lascelles *v.* State, 90 *Ga.* 347, 372, 16 *S. E.* 945, 35 *Am. St. Rep.* 216. *Ia.*—State *v.* McPherson, 9 *Iowa* 53. *Ky.*—Dilger *v.* Com., 88 *Ky.* 550, 11 *S. W.* 651; Wilson *v.* Com., 3 *Bush* 105. *La.*—State *v.* Pierre, 38 *La. Ann.* 91. *Md.*—State *v.* Morgan, 33 *Md.* 44. *Mass.*—Com. *v.* Wheeler, 2 *Mass.* 172. *N. C.*—Wilkerson *v.* Wilkerson, 74 *S. E.* 740. *Pa.*—Agnew *v.* Cumberland County, 12 *Serg. & R.* 94. *S. C.*—State *v.* Jackson, 7 *S. C.* 283, 24 *Am. Rep.* 476. *Tenn.*—Walton *v.* State, 3 *Sneed* 687. *Eng.*—Rex *v.* Pickering, 2 *B. & Ad.* 267, 9 *L. J. (O. S.) M. C.* 106, 22 *E. C. L.* 118, 109 *Eng. Reprint* 1142.

See also 14 *STANDARD PROC.* 557.

[a] Simply a discharge of the particular indictment upon which it is entered. State *v.* Hornsby, 8 *Rob. (La.)* 583, 41 *Am. Dec.* 314.

28. Wilkerson *v.* Wilkerson (*N. C.*), 74 *S. E.* 740; State *v.* Thornton, 35 *N. C.* 256; State *v.* Thompson, 10 *N. C.* 613; Agnew *v.* Cumberland County, 12 *Serg. & R. (Pa.)* 94.

[a] Fact that it was not entered until after another bill was found, it having been ordered before, does not vitiate the second bill. Williams *v.* State, 57 *Ga.* 473.

[b] Effect on Evidence in Second Suit.—State *v.* Main, 31 *Conn.* 572.

29. State *v.* Bugg, 6 *Rob. (La.)* 63. But see State *v.* Haskett, 3 *Hill (S. C.)* 95.

30. Kistler *v.* State, 64 *Ind.* 371; State *v.* Dix, 18 *Ind. App.* 472, 48 *N. E.* 261; Henry *v.* Com., 4 *Bush (Ky.)* 427.

31. *Cal.*—People *v.* Curtis, 113 *Cal.* 68, 45 *Pac.* 180. *Ia.*—State *v.* Manley, 63 *Iowa* 344, 19 *N. W.* 211. *Tenn.*—State *v.* Phelan, 9 *Baxt.* 241. *Tex.*—Parry *v.* State, 21 *Tex.* 746.

NOMINAL PARTIES.—See **Parties.**

NOMINATIONS.—See **Elections.**

NON ASSUMPSIT.—See **Assumpsit.**

NON CEPIT.—See **Replevin.**

NON COMPOS MENTIS.—See **Insane Persons.**

NON DAMNIFICATUS.—See **Bonds; Indemnity.**

NON DETINET. — See **Detinue.**

NON EST FACTUM. — See **Covenant, Action of; Debt; Denials.**

NON JOINDER. — See **Parties; Successive Suits.**

NON-JUDICIAL DAY. — See **Sunday and Holidays.**

NON-MAILABLE MATTER. — See **Post Office.**

NON OBSTANTE VEREDICTO. — See **Judgments.**

NON RESIDENTS. — See **Jurisdiction; Removal of Causes; Security for Costs; Service of Process and Papers; Venue.**

NONSUIT. — See **Dismissal, Discontinuance and Nonsuit.**

NOTARIES. — See **Bonds; Depositions; Officers.**

NOTES OF ISSUE. — See **Trial.**

NOT GUILTY. — See **Arraignment and Plea; Denials; Ejectment; Pleas; Trespass.**

NOTICE

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CROSS-REFERENCES:

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For notice in particular proceedings, see the specific titles in this work.

For further references and cross-references, see the index to this work and the cross-references throughout the article.

I. NOTICE IN JUDICIAL PROCEEDINGS GENERALLY.¹

When notice is required in a judicial proceeding, a written notice is intended;² and, according to some authorities, one capable of service, proof, return and filing is intended.³

II. NECESSITY FOR AVERRING NOTICE.—A. AS AFFECTED BY PECULIAR KNOWLEDGE OF PLAINTIFF.—The general rule is that where the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, the plaintiff should allege that the defendant had notice thereof,⁴ or allege facts showing an excuse for failure to give such notice;⁵ but notice need not be so averred where the matter does not lie more properly in the knowledge of the plaintiff,⁶ as where the defendant has the same means of information as the plaintiff.⁷

1. Notice in mandamus proceedings, see the title "Mandamus."

2. **Ariz.**—Hunter v. Territory, 4 Ariz. 197, 36 Pac. 175, where statute requires that notice stating the appeal be filed, a written notice intended. **Mich.**—Mason v. Kellogg, 38 Mich. 132, all notices in legal proceedings must be in writing. **N. Y.**—Jenkins v. Wild, 14 Wend. 539, formal written notice intended.

[a] Should be signed by proper parties; the fact that notice is to be in writing implies a signing. Minard v. Douglas, 9 Ore. 206.

3. **Clemmons v. State**, 5 Okla. Crim. 119, 113 Pac. 238; **Ensley v. State**, 4 Okla. Crim. 49, 109 Pac. 250, under statute requiring notice of appeal, oral notice not sufficient. See also **Bailey v. Territory**, 9 Okla. 461, 60 Pac. 117; **Arispi v. Territory**, 2 Okla. Crim. 79, 99 Pac. 1099.

[a] Especially is this true where service of such notice and proof thereof are matters jurisdictional. **Ensley v. State**, 4 Okla. Crim. 49, 109 Pac. 250.

4. **U. S.**—**Slacum v. Pomery**, 6 Cranch 221, 3 L. ed. 204. **Ala.**—**Huff v. Campbell**, 1 Stew. 543; **Lawson v. Townes, Oliver & Co.**, 2 Ala. 373. **Conn.**—**Hammond v. Gilmore's Admr.**, 14 Conn. 479, 486. **Ill.**—**Chase v. Sycamore, etc. R. Co.**, 38 Ill. 215. **Ia.**—**Brace v. Reid**, 3 G. Gr. 422. **Ky.**—**Rountree v. Hendrick's Admr.**, 1 B. Mon. 189. **Mass.**—**Lent v. Padelford**, 10 Mass. 230, 6 Am. Dec. 119; **Sponer v. Baxter**, 16 Pick. 409. **N. H.**—**Hillsborough County v. Londonderry**, 43 N. H. 451; **Watson v. Walker**, 23 N. H. 471. **N. Y.**—**Cole v. Jessup**, 2 Barb. 309; **Harker v. Anderson**, 21 Wend. 372; **Clough v. Hoffman**, 5 Wend. 499. **Pa.**—**Weigley's Admrs.**

v. Weir, 7 Serg. & R. 309. **Tenn.**—**Tumley v. Clarksville & M. R. R.**, 2 Coldw. 327; **Harlan v. Dew**, 3 Head 505; **Knott v. Hicks**, 2 Humph. 162. **Tex.**—**Cooper v. Loughlin**, 75 Tex. 524, 13 S. W. 37. **Vt.**—**Lamphere v. Cowen**, 42 Vt. 175. **Va.**—**Austin v. Richardson**, 3 Call (7 Va.) 201, 2 Am. Dec. 543. **Wis.**—**Susenguth v. Rautoul**, 48 Wis. 334, 4 N. W. 328; **Catlin v. Jones**, 1 Pin. 130. **Eng.**—**Rex v. Holland**, 5 T. R. 607, 624, 101 Eng. Reprint 340; **Palgrave v. Windham**, 1 Stra. 212, 93 Eng. Reprint 478.

5. **Mass.**—**Blakely v. Grant**, 6 Mass. 586. **N. Y.**—**Shultz v. Depuy**, 3 Abb. Pr. 252. **Tenn.**—**Harlan v. Dew**, 3 Head 505.

6. **Ala.**—**Huff v. Campbell**, 1 Stew. 543. **Cal.**—**People v. Edwards**, 9 Cal. 286. **Conn.**—**Jones v. Hoyt**, 25 Conn. 374, 385; **Marey v. Crawford**, 16 Conn. 549, 41 Am. Dec. 158; **Hammond v. Gilmore's Admr.**, 14 Conn. 479, 486. **Ky.**—**Muldrow v. McClelland**, 1 Litt. 1; **Keys v. Powell & Co.**, 2 A. K. Marsh. 253; **Peck v. McMurtry**, 2 A. K. Marsh. 358. **Mass.**—**Lent v. Padelford**, 10 Mass. 230, 6 Am. Dec. 119; **Hobart v. Hilliard**, 11 Pick. 143. **N. H.**—**Hillsborough County v. Londonderry**, 43 N. H. 451; **Watson v. Walker**, 23 N. H. 471; **Dix v. Flanders**, 1 N. H. 246. **N. Y.**—**Clough v. Hoffman**, 5 Wend. 499; **Kemble v. Wallis**, 10 Wend. 374. **Ohio.**—**Bush v. Critchfield**, 4 Ohio 103. **Va.**—**Austin v. Richardson**, 3 Call (7 Va.) 201, 2 Am. Dec. 543. **Eng.**—**Rex v. Holland**, 5 T. R. 607, 101 Eng. Reprint 340.

7. **Ala.**—**Huff v. Campbell**, 1 Stew. 543. **Cal.**—**People v. Edwards**, 9 Cal. 286. **Conn.**—**Jones v. Hoyt**, 25 Conn. 374; **Hammond v. Gilmore's Admr.**, 14

B. WHEN NOTICE REQUIRED BY CONTRACT. — Where notice is necessary by the terms of the contract on which the suit is based, that notice must be alleged.⁸

III. SUFFICIENCY OF ALLEGATION, ETC. — When the pleader alleges facts which in law constitute notice, it is equivalent to an allegation that the parties affected had notice.⁹ Where notice is required, it should appear that it was given at the proper time,¹⁰ and to the proper person.¹¹ It is held that where notice is required by law a general averment is not sufficient, but the notice should be particularly set forth to enable the court to determine its sufficiency.¹²

Where notice by mail is relied upon, the plaintiff must allege facts showing a strict compliance with the statutory requirements as to such a notice.¹³

IV. AVERRING EXCUSE OR WAIVER OF NOTICE. — Where an excuse for failure to give notice,¹⁴ or a waiver of notice is relied

Conn. 479, 486. **Ky.**—*Muldrow v. McClelland*, 1 Litt. 1; *Keys v. Powell & Co.*, 2 A. K. Marsh. 253; *Peck v. McMurry*, 2 A. K. Marsh. 358. **Mass.** *Hobart v. Hilliard*, 11 Pick. 143; *Lent v. Padelford*, 10 Mass. 230, 6 Am. Dec. 119. **N. H.**—*Watson v. Walker*, 23 N. H. 471; *Dix v. Flanders*, 1 N. H. 246. **N. Y.**—*Clough v. Hoffman*, 5 Wend. 499. **Ohio.**—*Bush v. Critchfield*, 4 Ohio 103. **Vt.**—*Lamphere v. Cowen*, 42 Vt. 175. **Va.**—*Austin v. Richardson*, 3 Call (7 Va.) 201; 2 Am. Dec. 543. **Eng.**—*Hodsden v. Harridge*, 2 Saund. 61, note 4, 85 Eng. Reprint 672.

[a] In an action on an award it is (1) not necessary to allege that the defendant had knowledge of the award (*Hodsden v. Harridge*, 2 Saund. 61, 85 Eng. Reprint 672; *Rex v. Hollond*, 5 T. R. 607, 620, 101 Eng. Reprint 340), unless (2) the submission requires notice. *Hodsden v. Harridge*, 2 Saund. 61, note a, 85 Eng. Reprint 672.

8. *Watson v. Walker*, 23 N. H. 471 (such notice is gist of action and without which no complete right of action can appear); *Rex v. Hollond*, 5 T. R. 607, 621, 101 Eng. Reprint 340. See also 11 STANDARD PROC. 995, et seq.

When required under insurance policy, see 14 STANDARD PROC. 44.

9. *Pottkamp v. Buss*, 114 Cal. xvii, 46 Pac. 169.

10. *Lawson v. Townes, Oliver & Co.*, 2 Ala. 373; *Rogers v. Mutton*, 7 H. & N. (Eng.) 933; 1 Chit. Pl. 321; *Comyn's Dig.*, tit. Pleader, c. 74.

[a] Precise day that notice was given need not be alleged; sufficient to

prove notice at the proper time. *Norton v. Lewis*, 2 Conn. 478.

11. *Lawson v. Townes, Oliver & Co.*, 2 Ala. 373; *Comyn's Dig.*, tit. Pleader, c. 74.

12. *Rapelye v. Bailey*, 3 Conn. 438, 8 Am. Dec. 199 (allegation "whereof the defendant had due and legal notice," insufficient); *Wallis v. Scott*, 1 Stra. 88, 93 Eng. Reprint 402. See *Hill v. Planters' Bank*, 3 Humph. (Tenn.) 670, holding that general allegation that defendant had due notice sufficient in action against endorser of bill of exchange.

[a] A general allegation "of all which said defendants had due notice, whereby," etc., is insufficient where the liability of the defendants rests on notice of the facts referred to. *Lawson v. Townes, Oliver & Co.*, 2 Ala. 373.

13. *Clark v. Adams*, 33 Mich. 159, an allegation under such a statute that plaintiff, on a day named "caused to be mailed to each of said defendants a notice of the filing of said petition or statement, as required by the act aforesaid," does not show sufficient compliance where the statute requires the notice to be given, "by depositing the same in the postoffice, directed to the owner of the logs or timber, his agent or attorney, at his or their place of residence, and paying the full postage thereon."

14. **Ind.**—*Curtis v. State Bank*, 6 Blackf. 312, 38 Am. Dec. 143. **Mo.** *Pier v. Heinrichoffen*, 52 Mo. 333. **Tenn.** *Harlan v. Dew*, 3 Head 505. **Tex.** *Cole's Admr. v. Wintereost*, 12 Tex.

on,¹⁵ facts showing such excuse or waiver must be specifically alleged.

V. PLEA DENYING NOTICE.¹⁶ — A denial of notice, "directly or indirectly," includes a denial of notice by agent;¹⁷ and an allegation of lack of notice includes constructive as well as actual knowledge unless the context of the pleading evinces the contrary.¹⁸ An answer denying that notice was served on the defendants as required by law does not put in issue the fact of notice.¹⁹ Where defendants are jointly interested, a general allegation of no notice to them is all that is necessary, especially on general demurrer.²⁰

VI. ISSUES, PROOF, AND VARIANCE.²¹ — Generally an averment of due notice is not sustained by proof of facts showing an excuse for failure to give notice,²² or a waiver of notice,²³ though there are authorities to the contrary.²⁴ An allegation of constructive notice by reason of the recording of certain papers does not raise an issue as to actual notice.²⁵ Where no particular kind of notice is averred, the party may prove any proper notice which will impose upon the adverse party the duty averred, with respect to the subject matter involved.²⁶

VII. QUESTIONS FOR COURT AND JURY.²⁷ — The question whether or not a person had or received notice is generally one of fact for the jury;²⁸ but the question of constructive notice is usually a

118. **Eng.**—*Burgh v. Legg*, 5 M. & W. 418; *Harris v. Richardson*, 4 C. & P. 522, 19 E. C. L. 631.

15. *Lumbert & Co. v. Palmer*, 29 Iowa 104; *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665; *Shultz v. Depuy*, 3 Abb. Pr. (N. Y.) 252.

16. **In action on negotiable instrument**, see 2 STANDARD PROC. 281.

17. *Black v. Childs*, 14 S. C. 312.

18. *Indiana Union Traction Co. v. Abrams*, 180 Ind. 54, 101 N. E. 1; *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 456, 33 N. E. 355.

19. *Soeding v. Bartlett*, 35 Mo. 90.

20. *Watson v. Walker*, 23 N. H. 471, need not allege that notice was not given to defendants or either of them; inasmuch as the undertaking was a joint one a notice to one is notice to both. Rule might be different where the obligation is joint and several.

21. **As to variance generally**, see the title "Variance and Failure of Proof."

22. **Ind.**—*Curtis v. State Bank*, 6 Blackf. 312, 38 Am. Dec. 143. **Me.** *Hill v. Varrell*, 3 Greenl. 233. **Mo.** *Pier v. Heinrichoffen*, 52 Mo. 333, under code. **N. Y.**—*Shultz v. Depuy*, 3 Abb. Pr. 252; *Garvey v. Fowler*, 4 Sandf. 665. See, however, *Williams v. Mat-*

thews, 3 Cow. 252; *Stewart v. Eden*, 2 Caines 121. **Eng.**—*Allen v. Edmundson*, 2 Exch. 719; *Nurse v. Frampton*, 1 Salk. 214, 91 Eng. Reprint 191; *Burgh v. Legg*, 5 M. & W. 418.

23. *Nurse v. Frampton*, 1 Salk. 214, 91 Eng. Reprint 191; *Burgh v. Legg*, 5 M. & W. (Eng.) 418.

24. **Conn.**—*Windham Bank v. Norton, Converse & Co.*, 22 Conn. 213, 56 Am. Dec. 397; *Norton v. Lewis*, 2 Conn. 478. **Md.**—*Whitridge v. Rider*, 22 Md. 548. **Mass.**—*Harrison v. Bailey*, 99 Mass. 620, 97 Am. Dec. 63; *City Bank v. Cutter*, 3 Pick. 414; *North Bank v. Abbot*, 13 Pick. 465, 25 Am. Dec. 334; *Taunton Bank v. Richardson*, 5 Pick. 436, waiver of notice being equivalent to actual notice. **Mo.**—*Pier v. Heinrichoffen*, 52 Mo. 333, rule at common law, but changed by Code.

25. *King v. Howell*, 94 Iowa 208, 62 N. W. 738; *Barrett v. Fisch*, 76 Iowa 553, 41 N. W. 310, 14 Am. St. Rep. 238.

26. *City Water Co. v. Silverfarb*, 128 Ill. App. 215.

27. See generally the title "Province of Judge and Jury."

28. **U. S.**—*Empire State Surety Co. v. Pacific Nat. Lumb. Co.*, 200 Fed. 224, 118 C. C. A. 410. **Ala.**—*Saltmarsh v. Bower & Co.*, 22 Ala. 221. **Cal.**—*Renton v. Monnier*, 77 Cal. 449,

matter of law for the court.²⁹ especially if the facts are not disputed.³⁰ Whether a place is a public place within the meaning of a statute requiring notice to be posted therein is a mixed question of law and fact.³¹

VIII. AIDER BY VERDICT.³² — The omission to aver notice will generally be cured by verdict.³³

19 Pac. 820; *Biggerstaff v. Briggs*, 2 Cal. Unrep. 339, 4 Pac. 371. **Ga.**—*Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50; *Montgomery v. Hunt*, 99 Ga. 499, 27 S. E. 701; *Cook v. Hightower & Co.*, 13 Ga. App. 309, 79 S. E. 165. **Ind.**—*Judd v. Gray*, 156 Ind. 278, 59 N. E. 849. **Ia.**—*Cole v. Chicago, etc. R. R. Co.*, 38 Iowa 311, where proof of service of notice in writing, or facts constituting it, are conceded or without conflict in evidence, sufficiency of service is for court; but if fact of service, rather than its sufficiency is at issue, or the fact of the agency of the person upon whom service was made is controverted, question is properly left to the jury. **Me.**—*Bradbury v. Falmouth*, 18 Me. 64. **Mass.**—*Huntley v. Whittier*, 105 Mass. 391, 7 Am. Rep. 536. **Mo.**—*Muldrow v. Robison*, 58 Mo. 331; *Hill v. Tissier*, 15 Mo. App. 299; *Eyerman v. Second Nat. Bank*, 13 Mo. App. 289; *Masterson v. West End Narrow Gauge R. Co.*, 5 Mo. App. 64. **N. Y.**—*McCoy v. New York*, 46 Hun 268. **S. C.**—See *Wheeler v. Corley*, 106 S. C. 319, 91 S. E. 307, holding that notice is always largely a question of fact, dependent upon all the circumstances, and one case does not help much in the decision of another. **Tex.**—*Missouri, K. & T. Ry. Co. v. Wood* (Tex. Civ. App.), 152 S. W. 487; *College Park Electric Belt Line v. Ide & Son*, 15 Tex. Civ. App. 273, 277, 40 S. W. 64. **Wash.**—*Rattelmiller v. Stone*, 28 Wash. 104, 68 Pac. 168. **W. Va.**—*Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246, 46 S. E. 1024.

[a] Whether a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact," and whether "by prosecuting such inquiry, he might have learned such fact" are questions of fact to be determined by the jury or the trial court. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 163 Pac. 47.

29. *Gonzalus v. Hoover*, 6 Serg. & R. (Pa.) 118, though the court may leave it to the jury to decide whether party had received notice, actual or constructive, instructing them as to what constitutes constructive notice. See, however, *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27, holding that it is a question of fact whether constructive notice was given or not.

30. *Birdsall v. Russell*, 29 N. Y. 220, constructive notice is a legal inference from established facts; and when the facts are not controverted, or the alleged defect or infirmity appears on the face of an instrument, and is a matter of ocular inspection, the question is one for the court.

31. *Hoitt v. Burnham*, 61 N. H. 620, following *Tidd v. Smith*, 3 N. H. 178, "the nature and situation of the place, and the use to which it is applied, are matters of fact to be settled by a jury; when these are settled, whether the place is to be considered a public place within the intent of the statute is purely a question of law."

32. See generally the title "Pleading."

33. **Conn.**—*Spencer v. Overton*, 1 Day 183; also *Rapelye v. Bailey*, 3 Conn. 438, 8 Am. Dec. 199. **Ky.**—*Rountree v. Hendrick's Admr.*, 1 B. Mon. 189, that averment of due notice is sufficient after verdict. **Mass.**—*Crocker v. Gilbert*, 9 Cush. 131; *Colt v. Root*, 17 Mass. 229. **Pa.**—*Weigley's Admrs. v. Weir*, 7 Serg. & R. 309. **Va.**—*Pasteur v. Parker*, 3 Rand. (24 Va.) 458.

[a] **Not Cured by Judgment by Default.**—*Harlan v. Dew*, 3 Head (Tenn.) 505, based on *Knott v. Hicks*, 2 Humph. (Tenn.) 162, that want of notice is not cured by verdict. *Contra*, see *Slacum v. Pomery*, 6 Cranch (U. S.) 221, 3 L. ed. 204; *Knott v. Hicks*, 2 Humph. (Tenn.) 162.

NOTICE OF DEFENSE. — See **Denials.**

NOTICE OF TRIAL. — See **Trial.**

NOVATION. — See **Implied and Express Agreements.**

Vol. XX

NUISANCE

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Impeach Judgments and Decrees.*"

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CROSS-REFERENCES:

Disorderly House; Highways, Streets and Bridges;
Health; Intoxicating Liquors.

For matters of evidence, see 9 ENCY. OF EV 11, et seq.

For forms, see 9 STANDARD PROC. 879, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. GENERAL STATEMENT OF REMEDIES. — There are, in all, four remedies which an injured party may use against a wrongdoer who erects, fosters or maintains a nuisance.¹ First, he may sum-

1. See *infra*, this article.
[a] These remedies have superseded the ancient remedies of the common law which were: (1) A writ of quod permittat prosternere, which was in the nature of a writ of right commanding the defendant to allow the plaintiff to abate the nuisance or show cause why he should not do so (see 3 Black. Com. 221; *Brown v. Woodworth*, 5 Barb. [N. Y.] 550; *Waggoner v. Jer-*

maine, 3 Denio [N. Y.] 306, 45 Am. Dec. 474); and (2) an assize of nuisance, which was a common law writ issued at the instance of a tenant of a freehold and commanding the sheriff to summon a jury to view the premises, and if they found for the plaintiff he was entitled to a judgment abating the nuisance and awarding damages. See Jenks, *Short Hist. of English Law* 144; 3 Black. Com. 221. (3) These an-

marily abate the nuisance himself.² Second, he may maintain a civil action and recover damages.³ Third, he may invoke the aid of equity, and enjoin the nuisance.⁴ Fourth, he may punish the offender by instituting a criminal action against him.⁵

II. SUMMARY ABATEMENT.—It is generally recognized that an individual, without the assistance of legal process may under certain circumstances summarily abate a nuisance both public,⁶ and private.⁷ So also, the public authorities may under some circumstances summarily abate a public nuisance.⁸

cient remedies are practically obsolete both in the United States (**Ky.**—*Tate v. Parrish*, 7 Mon. 325. **N. Y.**—*Waggoner v. Jermaine*, 3 Denio 306, 45 Am. Dec. 474. **Pa.**—*Barnet v. Ihrie*, 17 Serg. & R. 174; *Witherow v. Keller*, 11 Serg. & R. 271. **W. Va.**—*Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53), (4) and in England. St. 3 & 4 Wm. IV., ch. 27, §36.

[b] The common law doctrine of nuisance is as old as the common law itself. Our oldest law writers treat of the subject. See citations from Glandvill and Bracton in Bigelow's *Lead. Cas. on Torts*, 462.

2. See *infra*, II.

3. See *infra*, III.

4. See *infra*, IV.

5. See *infra*, V.

6. See the following. **Ark.**—*Harvey v. Dewoody*, 18 Ark. 252. **Cal.**—*Gunter v. Geary*, 1 Cal 462. **Colo.**—*Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693. **Me.**—*Marion v. Tuell*, 111 Me. 566, 90 Atl. 484, 51 L. R. A. (N. S.) 1172. **Mass.**—*Brown v. Perkins*, 12 Gray 89. **Mich.**—*People v. Severance*, 125 Mich. 556, 84 N. W. 1089. **Mo.**—*Sullivan Realty & Imp. Co. v. Crockett*, 158 Mo. App. 573, 138 S. W. 924. **N. J.**—*Brown v. DeGroot*, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. Rep. 794. **N. Y.**—*Wetmore v. Tracy*, 14 Wend. 250, 28 Am. Dec. 525. **Pa.**—*Crosland v. Pottsville*, 126 Pa. 511, 18 Atl. 15, 12 Am. St. Rep. 891; *Lancaster Tpk. Co. v. Rogers*, 2 Pa. 114, 44 Am. Dec. 179. **Wis.**—*Larson v. Furlong*, 63 Wis. 223, 23 N. W. 584. **Eng.**—*Dimes v. Petley*, 15 Q. B. 276, 69 E. C. L. 276, 19 L. J. Q. B. 449, 14 Jur. 1132, 117 Eng. Reprint 462.

But see: **D. C.**—*Nation v. District of Columbia*, 34 App. Cas. 453, 26 L. R. A. (N. S.) 996. **Ky.**—*Gray v. Ayres*, 7 Dana 375, 32 Am. Dec. 107. **W. Va.**

Watts v. Norfolk, etc. R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

7. See the following: **Ala.**—*Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731. **Cal.**—*Stiles v. Laird*, 5 Cal. 120, 63 Am. Dec. 110. **Conn.**—*Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175. **Ill.**—*Buck v. McIntosh*, 140 Ill. App. 9. **Ia.**—*Morrison v. Marquardt*, 24 Iowa 35, 92 Am. Dec. 444. **Ky.**—*Gates v. Blincoe*, 2 Dana 158, 26 Am. Dec. 440. **Md.**—*Maryland Tel. & Tel. Co. v. Ruth*, 106 Md. 644, 68 Atl. 358, 124 Am. St. Rep. 506, 14 L. R. A. (N. S.) 427. **Minn.**—*Felt v. Elmquist*, 104 Minn. 33, 115 N. W. 746, 116 N. W. 592, 124 Am. St. Rep. 588. **Mo.**—*Chillicothe v. Bryan*, 103 Mo. App. 409, 77 S. W. 465. **N. H.**—*Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53. **N. J.**—*Lawrence v. Hough*, 35 N. J. Eq. 371. **N. Y.**—*Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134. **Okla.**—*Colbert v. State*, 7 Okla. Crim. 401, 124 Pac. 78. **Ore.**—*Turner v. Loey*, 37 Ore. 158, 61 Pac. 342. **R. I.**—*Bowden v. Lewis*, 13 R. I. 189, 43 Am. Rep. 21. **Wis.**—*Harrington v. Edwards*, 17 Wis. 586, 84 Am. Dec. 768. **Eng.**—*Roberts v. Rose*, L. R. 1 Exch. 82, 4 H. & C. 103, 35 L. J. Ex. 62, 12 Jur. (N. S.) 78, 13 L. T. N. S. 471, 14 Wkly. Rep. 225.

8. See the following: **Colo.**—*Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693, nuisance per se. **Fla.**—*Orlando v. Pragg*, 31 Fla. 111, 12 So. 363, 34 Am. St. Rep. 17, 19 L. R. A. 196. **Idaho.**—*Mullen & Co. v. Moseley*, 13 Idaho 457, 90 Pac. 986, 121 Am. St. Rep. 277, 12 L. R. A. (N. S.) 394. **Ia.**—*State v. Meek*, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414. **N. J.**—*Coast Co. v. Spring Lake*, 56 N. J. Eq. 615, 36 Atl. 21 (*affirmed*, 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657); *Manhattan Mfg. & F. Co. v. Van*

III. ACTIONS AT LAW.—A. GENERALLY.—It is well settled that one damaged by a nuisance may maintain an action at law therefor.⁹ He may in the same action obtain a judgment abating the nuisance and awarding the damages caused thereby.¹⁰

Successive Suits.¹¹—When the nuisance complained of is not of a permanent character, but is temporary and abatable, the continuance thereof gives rise to successive rights of action, which may be enforced from time to time;¹² but it is otherwise if the nuisance is of

Keuren, 23 N. J. Eq. 251. **N. Y.**—Eckhardt v. Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204 (*affirmed*, 156 N. Y. 658, 50 N. E. 1116); United States Illuminating Co. v. Grant, 55 Hun 222, 7 N. Y. Supp. 788, 27 N. Y. St. 767. **Wash.**—Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178. **Wis.**—Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 102 Am. St. Rep. 983, 66 L. R. A. 907, 1 Ann. Cas. 341.

And see generally the specific titles, such as "Health," "Highways, Streets and Bridges;" "Intoxicating Liquors," etc.

9. See the following: **U. S.**—Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739. **Cal.**—Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70, 125 Am. St. Rep. 47. **Ga.**—Darnell v. Columbus Showcase Co., 129 Ga. 62, 58 S. E. 631, 121 Am. St. Rep. 206, 13 L. R. A. (N. S.) 333. **Ill.**—Schlitz Brew. Co. v. Compton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390. **Ind.**—Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577. **Ky.**—Cumberland Grocery Co. v. Baugh's Admr., 151 Ky. 641, 152 S. W. 565, Ann. Cas. 1915A, 130, 43 L. R. A. (N. S.) 1037. **N. H.**—Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 101 Am. St. Rep. 670, 62 L. R. A. 602. **N. J.**—Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co., 51 N. J. L. 56, 16 Atl. 12, properly styled "in tort." **Ohio.**—Columbus & H. Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 26 N. E. 630, 29 Am. St. Rep. 528, 12 L. R. A. 577. **Ore.**—Hawley v. Sumpter R. Co., 49 Ore. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526. **Pa.**—Robb v. Carnegie Bros. & Co., 145 Pa. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329. **S. C.**—Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730. **S. D.**—Hannicker v.

Lepper, 20 S. D. 371, 107 N. W. 202, 6 L. R. A. (N. S.) 243. **Tenn.**—Wilcox v. Hines, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770, 41 L. R. A. 278. **Tex.**—Ft. Worth & R. G. R. Co. v. Glenn, 97 Tex. 586, 80 S. W. 992, 104 Am. St. Rep. 894, 65 L. R. A. 818.

See also *infra*, III, D, 1.

10. See the following: **Cal.**—Astill v. South Yuba Water Co., 146 Cal. 55, 79 Pac. 594. **Ia.**—Gribben v. Hansen, 69 Iowa 255, 28 N. W. 584. **Kan.**—Drinkwater v. Sauble, 46 Kan. 170, 26 Pac. 433. **Mo.**—Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

See generally the title "Joinder of Actions;" also *infra*, III, F, 4.

[a] **Equitable Remedy Not Ousted.** Gribben v. Hansen, 69 Iowa 255, 28 N. W. 584.

11. See generally the title "Successive Suits."

12. See the following: **Ill.**—Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390; Fincher v. Baltimore & Ohio S. W. R. Co., 179 Ill. App. 622. **Ind.**—Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522. **Ky.**—Turner v. Brooks, 151 Ky. 210, 151 S. W. 948, L. R. A. 1916E, 958. **Minn.**—Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668. **Mo.**—Hayes v. St. Louis & S. F. R. Co., 177 Mo. App. 201, 162 S. W. 266. **N. J.**—Ballantine v. Public Service Corp., 86 N. J. L. 231, 91 Atl. 95, L. R. A. 1915A, 369. **N. Y.**—Pond v. Metropolitan El. R. Co., 112 N. Y. 186, 19 N. E. 487, 8 Am. St. Rep. 734. **N. C.**—Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. **Fa.**—Ellis v. American Academy of Music, 120 Pa. 608, 15 Atl. 494, 6 Am. St. Rep. 739. **Tenn.**—Iron Mt. R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622. **Tex.**—Austin & N. W. R. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St.

such character that its continuance is necessarily an injury of a permanent character.¹³

B. JURISDICTION of an action for damages in nuisance cases is largely a matter of constitutional and statutory control in the several states.¹⁴

Amount Involved as It Affects Jurisdiction.—In an action for the abatement of a nuisance, the value of the object to be attained controls.¹⁵

C. VENUE.¹⁶—If the action is brought to abate the nuisance as well as to obtain damages arising therefrom, the venue should be laid in the county where the nuisance is located.¹⁷ But the definition of nuisance by statute in some states has given the action a transitory character, even where abatement is the gist of the action.¹⁸

Where damages only are the gist of the action, there is strong authority, as well as reason, for the view that the action may be brought in the county where the injury is sustained.¹⁹

D. PARTIES.²⁰—**1. Plaintiff.**—Any person who is injured by the

Rep. 350. **Va.**—American Locomotive Co. v. Hoffman, 108 Va. 363, 61 S. E. 759, 128 Am. St. Rep. 953. **W. Va.** Guinn v. Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; Hargreaves v. Kimberly, 26 W. Va. 787, 53 Am. Rep. 121.

13. See the following. **U. S.**—Richardson v. Boston, 19 How. 263, 15 L. ed. 639. **Colo.**—Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234. **Ga.** Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133. **Ill.** Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390. **Ia.**—Irvine v. Oelwein, 170 Iowa 653, 150 N. W. 674, L. R. A. 1916E, 990. **Mo.**—Hayes v. St. Louis & S. F. R. Co., 177 Mo. App. 201, 162 S. W. 266. **Va.**—Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179. **W. Va.**—Quinn v. Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806 (right of action exists in such case for recovery of entire damages, past and future, and one recovery is a grant or license to continue nuisance, forbidding second recovery for its continuance); Hargreaves v. Kimberly, 26 W. Va. 787, 53 Am. Rep. 121.

14. See the statutes, and Learned v. Castle, 67 Cal. 41, 7 Pac. 34; Parsons v. Tuolumne County Water Co., 5 Cal. 43, 63 Am. Dec. 76; Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047, 65 Am. St. Rep. 256, 25 L. R. A. 538; also generally the title "Jurisdiction."

15. American Smelting & Ref. Co. v. Godfrey, 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8. See generally the title "Jurisdiction."

16. See generally the title "Venue."

17. **U. S.**—Mississippi & M. R. Co. v. Ward, 2 Black 485, 17 L. ed. 311. **Ala.**—Howard v. Ingersoll, 17 Ala. 780. **Mass.**—Vermont, etc. R. Co. v. Orcutt, 16 Gray 116. **N. J.**—Deacon v. Shreve, 23 N. J. L. 264. **N. Y.**—Watts v. Kinney, 23 Wend. 484; Horne v. Buffalo, 49 Hun 76, 1 N. Y. Supp. 801, 15 Civ. Proc. 81, 17 N. Y. St. 212. **Eng.**—Jef-feries v. Duncombe, 11 East 226, 103 Eng. Reprint 991.

18. People v. Selby Smelting & Lead Co., 163 Cal. 84, 124 Pac. 692, 124 Pac. 1135, Ann. Cas. 1913E, 1267; American Strawboard Co. v. State, 70 Ohio St. 140, 71 N. E. 284.

19. **Ill.**—Ohio & M. R. Co. v. Combs, 43 Ill. App. 119. **Mass.**—Barden v. Crocker, 10 Pick. 383; Thompson v. Crocker, 9 Pick. 59. **Wis.**—Lohmiller v. Indian-Ford Water Power Co., 51 Wis. 683, 8 N. W. 601.

But see Oliphant v. Smith, 3 Pen. & W. (Pa.) 180.

[a] If the agency causing the nuisance is located in one county and the damage inflicted is in another county, the venue may be laid in either county. Barden v. Crocker, 10 Pick. (Mass.) 383; Deacon v. Shreve, 22 N. J. L. 176.

[b] Where Agency Causing Nuisance in Another State.—See Ruckman v. Green, 9 Hun (N. Y.) 225.

20. See generally the title "Parties."

nuisance may be a plaintiff in an action to recover damages resulting therefrom.²¹

Several property owners injured by a nuisance cannot join as plaintiffs in an action to recover damages.²² But joint proprietors are properly joined as plaintiffs in an action for damages caused by a nuisance affecting their common property.²³

2. Defendant.—All parties jointly interested in causing the nuisance may be made defendants.²⁴

21. U. S.—*Exley v. Southern Cotton Oil Co.*, 151 Fed. 101. **Ala.**—*Shelby Iron Co. v. Greenlea*, 184 Ala. 496, 63 So. 470. **Cal.**—*Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82; *Meek v. De La-tour*, 2 Cal. App. 261, 83 Pac. 300. **N. C.**—*McManus v. Southern R. Co.*, 150 N. C. 655, 64 S. E. 766.

[a] Lawful Possession Is Enough To Support Plaintiff's Claim.—**Ala.** *Shelby Iron Co. v. Greenlea*, 184 Ala. 496, 63 So. 470. **Ga.**—*Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844. **Ky.**—*Brink v. Moeschl*, etc. *Corrugating Co.*, 142 Ky. 88, 133 S. W. 1147, 34 L. R. A. (N. S.) 560. **Md.** *Lurssen v. Lloyd*, 76 Md. 360, 25 Atl. 294. **Mo.**—*Ellis v. Kansas City*, etc. *R. Co.*, 63 Mo. 131, 21 Am. Rep. 436. **N. J.**—*Ackerman v. Ellis*, 81 N. J. L. 1, 79 Atl. 883.

[b] A tenant is the proper party plaintiff and not the landlord where the damage done by the nuisance affects the possession and not the reversion. *Jones v. Chappell*, L. R. 20 Eq. 539, 44 L. J. Ch. 658.

[c] Mere occupancy (1) not enough (*Kavanagh v. Barber*, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689), **(2) but the contrary has been held.** **Ala.** *Hosmer v. Republic Iron & Steel Co.*, 179 Ala. 415, 60 So. 801, 43 L. R. A. (N. S.) 871. **Ga.**—*Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844, under code. **Tex.**—*Ft. Worth & R. G. R. Co. v. Glenn*, 97 Tex. 586, 80 S. W. 992, 104 Am. St. Rep. 894, 65 L. R. A. 818, 1 Ann. Cas. 270, the conflict of opinion has apparently arisen "from confusing the damage which results to property from a nuisance with that special damage, such as sickness which may result to an individual from a nuisance either public or private."

22. Kan.—*Palmer v. Waddell*, 22 Kan. 352. **Ky.**—*Paducah v. Allen*, 20 Ky. L. Rep. 1342, 49 S. W. 343. **Minn.** *Grant v. Schmidt*, 22 Minn. 1.

[a] Father and Minor Children Cannot Join.—*Lockett v. Ft. Worth & R. G. Ry. Co.*, 78 Tex. 211, 14 S. W. 564.

[b] But under statutes providing that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, it has been held that several property owners may unite as plaintiffs in an action to obtain damages for a nuisance. *Schiffer v. Eau Claire*, 51 Wis. 385, 8 N. W. 253, under §2602, Rev. St. 1878.

23. Hall v. Galloway, 76 Wash. 42, 135 Pac. 478.

24. Colo.—*Canon City & C. C. R. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. 1127, owner and lessee of a railroad. **N. Y.**—*Taylor v. Metropolitan Elev. R. Co.*, 18 Jones & S. 311, 340, builder and lessee of an elevated railroad. **Ohio.**—*Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496, railroad company and its lessee, raising its tracks in front of plaintiff's premises. **Vt.**—*Rogers v. Steward*, 5 Vt. 215, 26 Am. Dec. 296, lessor and his assignee, and the lessee and his subtenants, erecting and maintaining a fence across plaintiff's right of way. **Can.**—*McCallum v. Hutchison*, 7 C. P. 508, owner and lessee maintaining a privy.

[a] Damages Severed and Separately Assessed.—*Taylor v. Metropolitan Elev. R. Co.*, 18 Jones & S. (N. Y.) 311, 340.

[b] Joint Liability Cannot Be Based Upon Successive Ownership. *Partridge v. Twin Falls L. & W. Co.*, 24 Idaho 275, 133 Pac. 677; *Brose v. Twin Falls Land L. & W. Co.*, 24 Idaho 266, 133 Pac. 673, 46 L. R. A. (N. S.) 1187. But see *Hyde Park T. H. Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206; *Cobb v. Smith*, 38 Wis. 21.

[c] Landlord and Tenant.—Where personal injury has resulted to plaintiff from the creation and continuance of a nuisance, an action may be maintained against landlord and tenant

Several Liability. — Parties who have separately and individually contributed to produce the nuisance cannot be sued jointly.²⁵

Effect of Sale of Premises by Creator of Nuisance. — The creator of the nuisance is still amenable to an action after sale of the premises.²⁶

E. PLEADING. — 1. **Declaration or Complaint.** — a. *In General.* The declaration or complaint must clearly and without ambiguity state facts showing the existence of a nuisance.²⁷ It need not allege that the nuisance set forth was maintained “wilfully” and “unnecessarily;”²⁸ or that the acts were “unlawfully”²⁹ or “negligently”³⁰ done. Nor need it negative contributory negligence on the part of the plaintiff.³¹

If the action is brought for erecting a nuisance and not merely for its continuance, an allegation as to the time when the nuisance was

jointly. **Mo.**—*Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503, an unguarded area near a sidewalk. **N. Y.**—*Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, coal hole in the pavement. **R. I.**—*Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855 (falling trough); *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620, faulty condition of wharf.

25. **Minn.**—*Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656. **Mo.**—*Martinowsky v. Hannibal*, 35 Mo. App. 70. **Tenn.**—*Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93. **Tex.**—*Sun Co. v. Wyatt*, 48 Tex. Civ. App. 349, 107 S. W. 934.

[a] **Joinder of defendants operating** separately is erroneous where no concert of action or common design or community of interest is shown. *Key v. Armour Fertilizer Wks.*, 18 Ga. App. 472, 89 S. E. 593.

26. **Mass.**—*Staple v. Spring*, 10 Mass. 72. **Minn.**—*Dorman v. Ames*, 12 Minn. 451. **N. H.**—*Eastman v. Amoskeag Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333. **N. J.**—*Beavers v. Trimmer*, 25 N. J. L. 97.

27. **U. S.**—*Exley v. Southern Cotton Oil Co.*, 151 Fed. 101. **Ill.**—*Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262. **Mich.**—*Kern v. Myll*, 80 Mich. 525, 45 N. W. 578, 8 L. R. A. 682. **Minn.**—*O'Brien v. St. Paul*, 18 Minn. 176. **N. Y.**—*Campbell v. United States Foundry Co.*, 73 Hun 576, 26 N. Y. Supp. 165. **R. I.**—*Sullivan v. Waterman*, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773.

[a] **Exact cause of nuisance should**

be alleged. *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

[b] **But an averment that the acts complained of constitute a nuisance is unnecessary and in fact improper.** **U. S.** *Exley v. Southern Cotton Oil Co.*, 151 Fed. 101. **Ill.**—*Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262. **R. I.**—*Sullivan v. Waterman*, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773. See also 5 STANDARD PROC. 204 et seq.

[c] **Literal Allegation of Unreasonable Use Unnecessary.**—Whether a use is reasonable or not is a conclusion of law and the unreasonableness of such use need not be literally alleged where all the facts in the petition, taken in connection with what may be naturally and proximately deduced therefrom, justify that conclusion. *Exley v. Southern Cotton Oil Co.*, 151 Fed. 101.

28. *Chesapeake & O. R. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59, such words held surplusage.

29. *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S. W. 646, it was only required to allege in substance facts which the law would say were unlawful or wrongful. The cause of action is the wrong that has been suffered and the facts that show the wrong show the cause of action. They are the facts to be found and upon principle they are the facts to be stated by the pleader.

30. *Hinmon v. Somers Brick Co.*, 75 N. J. L. 869, 70 Atl. 166.

31. *Niagara Oil Co. v. Ogle*, 177 Ind. 292, 98 N. E. 60, Ann. Cas. 1914D, 67, 42 L. R. A. (N. S.) 714.

erected must appear in the declaration or complaint.³²

Nature of the Plaintiff's Interest.—At the old common law, in a suit brought for the abatement of a nuisance by the writ of nuisance, the declaration was required to allege a freehold or a possessory interest in the realty since the action was a real action.³³ This rule has been followed in some of the modern cases on the theory that a nuisance is an injury to land.³⁴ But statutes of many states have declared that a nuisance may affect the person as well as property and hence it is not necessary in those states at least, to allege that the plaintiff has even a possessory interest in the realty, if the nuisance affects his personal well being.³⁵

Defendant's Act and Liability Therefor.—The declaration or complaint should set forth the defendant's act and his liability therefor.³⁶

b. **Notice To Remove.**—If the action is brought against defendant for a nuisance which he did not create, but continued, it is necessary to allege that he was notified to abate or remove the nuisance.³⁷

32. **Cal.**—Donahue *v.* Stockton Gas & Electric Co., 6 Cal. App. 276, 92 Pac. 196, exact certainty not essential. **Mass.**—Hodges *v.* Hodges, 5 Mete. 205. **Eng.**—Westbourne *v.* Mordant, Cro. Eliz. 191, 78 Eng. Reprint 447.

33. 3 Bl. Com. 221; 2 Pollock & M. Hist. Eng. Law. 93; Jenks Short Hist. Eng. Law. 53.

34. **Mo.**—Ellis *v.* Kansas City, etc. R. Co., 63 Mo. 131, 21 Am. Rep. 436. **N. Y.**—Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. **Eng.**—Molone *v.* Laskey (1907), 2 K. B. 141.

35. See the statutes, and Hosmer *v.* Republic Iron & Steel Co., 179 Ala. 415, 60 So. 801, 43 L. R. A. (N. S.) 871; Towaliga Falls Power Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844.

36. **Ala.**—Vernon *v.* Wedgworth, 148 Ala. 490, 42 So. 749. **Ill.**—N. K. Fairbank Co. *v.* Bahre, 213 Ill. 636, 73 N. E. 322; Wabash R. Co. *v.* Sanders, 47 Ill. App. 436. **Kan.**—Missouri Pac. Ry. Co. *v.* Webster, 3 Kan. App. 106, 42 Pac. 845. **N. J.**—Beavers *v.* Trimmer, 25 N. J. L. 97. **Tex.**—Ft. Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840.

[a] That the wrongs of defendant were natural and proximate cause of plaintiff's injury, need not be alleged. Carland *v.* Aurin, 103 Tenn. 555, 53 S. W. 940, 76 Am. St. Rep. 699, 48 L. R. A. 862.

[b] Categorical averment that nuisance maintained by defendant is not

necessary where nuisance described so as to inform defendants, jury and court of facts. Adler & Co. *v.* Pruitt, 169 Ala. 213, 53 So. 315, 32 L. R. A. (N. S.) 889.

37. **U. S.**—Philadelphia & R. R. Co. *v.* Smith, 64 Fed. 679, 13 C. C. A. 384, 27 L. R. A. 131. **Ala.**—Lamb *v.* Roberts, 196 Ala. 679, 72 So. 309, L. R. A. 1916F, 1018; Crommelin *v.* Cox & Co., 30 Ala. 318, 68 Am. Dec. 120. **Cal.**—Castle *v.* Smith, 102 Cal. xvii, 36 Pac. 859; Grigsby *v.* Clear Lake Water Co., 40 Cal. 396. **Conn.**—Johnson *v.* Lewis, 13 Conn. 303, 33 Am. Dec. 405. **Ill.**—Groff *v.* Ankenbrandt, 124 Ill. 51, 54, 15 N. E. 40, 7 Am. St. Rep. 342; Buck *v.* McIntosh, 140 Ill. App. 9. **Ind.**—Graham *v.* Chicago, etc. R. Co. (Ind. App.), 74 N. E. 541. **Ky.**—Glenn *v.* Crescent Coal Co., 145 Ky. 137, 140 S. W. 43, 37 L. R. A. (N. S.) 197; Ireland *v.* Bowman, 114 S. W. 338. **Me.**—Staples *v.* Dickson, 88 Me. 362, 34 Atl. 168. **Mass.**—McDonough *v.* Gilman, 3 Allen 264, 80 Am. Dec. 72. **Minn.**—Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656. **Mo.**—Ryehlicki *v.* St. Louis, 115 Mo. 662, 22 S. W. 908; Nicket *v.* St. Louis, etc. R. Co., 135 Mo. App. 661, 116 S. W. 477. **N. H.**—Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201. **N. J.**—Morris Canal & Bkg. Co. *v.* Ryerson, 27 N. J. L. 457. **N. Y.**—Conhocton Stone Road *v.* Buffalo, etc. R. Co., 51 N. Y. 573, 10 Am. Rep. 646; Neuman *v.* Steuer, 119 N. Y. Supp. 168. **Okla.**—Daniels *v.* St. Louis, etc. R. Co., 36

But, by statute an allegation of notice to remove a nuisance is sometimes unnecessary.³⁸

c. *Averments as to Damages.*—An allegation of general damages will usually suffice when the nuisance alleged is private;³⁹ yet if there are certain specific elements of injury that do not necessarily arise and are not implied by law these specific damages must be alleged, even in the case of a private nuisance to warrant a recovery for more than the ordinary damages.⁴⁰ If the cause of action is based upon a public nuisance an allegation of special damages is mandatory.⁴¹

Okla. 421, 128 Pac. 1089, 50 L. R. A. (N. S.) 929. **S. C.**—Townes v. Augusta, 52 S. C. 396, 29 S. E. 851. **Vt.** Bishop v. Readsboro, etc. Mfg. Co., 85 Vt. 141, 81 Atl. 454, Ann. Cas. 1914B, 1163, 36 L. R. A. (N. S.) 1171; Dodge v. Stacy, 39 Vt. 558. **Wis.** Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476. **Eng.**—Brent v. Haddon, Cro. Jac. 555, 79 Eng. Reprint 476.

[a] **The reason** is that, in the absence of any notice to the contrary, the grantee or continuer of the nuisance, has a right to assume that the structures upon the land are rightfully there, and that, even where they may seem to interfere with the usual rights appurtenant to other estates, he may properly assume that the right thus to interfere has been lawfully obtained, and it is inequitable to subject him to damages until he had notice that in maintaining the structure or work complained of he is infringing upon the rights of others. Leahan v. Cochran, 178 Mass. 566, 60 N. E. 382, 86 Am. St. Rep. 506, 53 L. R. A. 891.

[b] **Where defendant had actual knowledge** of its existence, the rule is otherwise. **Ala.**—Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33. **Ia.** Willits v. Chicago, B. & K. C. R. R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608. **Kan.**—Martin v. Chicago, R. I. & P. R. Co., 81 Kan. 344, 105 Pac. 451, 27 L. R. A. (N. S.) 164; Union Trust Co. v. Cuppy, 26 Kan. 754. **Mo.**—Dickson v. Chicago, R. I., etc. R. Co., 71 Mo. 575; Nicket v. St. Louis, M. & S. R. Co., 135 Mo. App. 661, 116 S. W. 477. **N. Y.**—Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193, 12 Am. St. Rep. 778, 5 L. R. A. 449.

38. Watson v. Colusa-Parrot Min., etc. Co., 31 Mont. 513, 79 Pac. 14, citing Civ. Code, §4554.

39. **U. S.**—Exley v. Southern Cotton Oil Co., 151 Fed. 101. **Conn.**—Parker

v. Griswold, 17 Conn. 288, 42 Am. Dec. 739. **Mass.**—Codman v. Evans, 7 Allen 431. **Mo.**—Smiths v. McConathy, 11 Mo. 517. **Pa.**—Hart v. Evans, 8 Pa. 13. **R. I.**—Sullivan v. Waterman, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773. **Wash.**—Hall v. Galloway, 76 Wash. 42, 135 Pac. 478, complaint is not demurrable because of its failure to allege the specific items of damage as would have been the case had the action been by a private person for special damages sustained by reason of the perpetration of a public nuisance.

40. **Cal.**—Lewiston Tpk. Co. v. Shasta & W. Wagon Road Co., 41 Cal. 562. **N. Y.**—Squier v. Gould, 14 Wend. 159. **Tex.**—Russell v. Baneroff, 79 Tex. 377, 15 S. W. 245.

41. See the following: **U. S.**—Roessler-Hasslachner Chem. Co. v. Doyle, 142 Fed. 118, 73 C. C. A. 174. **Cal.**—Donahue v. Stockton Gas, etc. Co., 6 Cal. App. 276, 32 Pac. 196. **Colo.**—Walley v. Platte, etc. Ditch Co., 15 Colo. 579, 26 Pac. 129; Platte & D. D. Co. v. Anderson, 8 Colo. 131, 6 Pac. 515, failure not cured by verdict. **Ind.**—Waltman v. Rund, 94 Ind. 225. **Ky.**—Winter Bros. v. Mays, 170 Ky. 554, 186 S. W. 127. **Mass.**—Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421. **Minn.**—Thelen v. Farmer, 36 Minn. 225, 30 N. W. 670. **Mo.**—Scheurich v. Empire, etc. Electric Co., 188 S. W. 114; Smiths v. McConathy, 11 Mo. 517. **Ore.**—Roseburg v. Abraham, 8 Ore. 509. **S. C.**—Woods v. Rock Hill Fertilizer Co., 102 S. C. 442, 86 S. E. 817, Ann. Cas. 1917D, 1149; Baltzger v. Carolina Midland Ry. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789. **Wis.**—Hall v. Kitson, 3 Pin. 296, 4 Chand. 20, but failure cured by verdict.

[a] **It is not enough to allege a depreciation in value of plaintiff's property, in consequence of the public**

2. Plea or Answer.⁴² — In those states where common law pleading prevails, the usual plea is "not guilty," and any substantive defense may be shown thereunder.⁴³

F. TRIAL.⁴⁴ — **1. Variance.** — The general rule that the pleadings and the proof must substantially correspond obtains.⁴⁵

2. Questions of Law and Fact.⁴⁶ — The question as to what is a nuisance is a question of law for the court.⁴⁷ So whether the nuisance is permanent or not has been held to be a question for the court.⁴⁸ But it is for the jury to say whether acts complained of, not amounting to a nuisance per se, constitute a nuisance or not.⁴⁹ It is also a question of fact for the jury whether the nuisance is the cause⁵⁰ of the

nuisance, for that alone will not entitle them to maintain an action. *Thelen v. Farmer*, 36 Minn. 225, 30 N. W. 670, excellent case collecting authorities.

42. See generally the titles "**Answers**;" "**Pleas**."

43. *Jessup v. Loucks*, 55 Pa. 350.

[a] **Matters of inducement** are not put in issue by a plea of "not guilty." *Jessup v. Loucks*, 55 Pa. 350.

[b] **But defense of prescriptive right to maintain nuisance** must be specially pleaded; it cannot be shown under general denial. *Atlantic Coast Line Ry. Co. v. Harwell*, 10 Ala. App. 587, 65 So. 711.

44. See generally the title "**Trial**."

45. See generally the title "**Variance and Failure of Proof**," and *Ga. Southern Ry. Co. v. Cook*, 106 Ga. 450, 32 S. E. 585, petition alleged nuisance erected by defendant; proof showed erection by predecessor in title; verdict for plaintiff held contrary to law. **Ill.**—*Cooper v. Randall*, 53 Ill. 24. **Kan.** *Miller v. Blue*, 43 Kan. 441, 23 Pac. 588. **Minn.**—*O'Brien v. St. Paul*, 18 Minn. 176, under complaint stating nuisance of one kind, it is not permissible to prove nuisance of a character essentially different. **Mo.**—*Rychlicki v. St. Louis*, 115 Mo. 662, 22 S. W. 908, allegation of originating nuisance will not support allegation of continuing same.

[a] **Immaterial variance not fatal.** See *Hinmon v. Somers Brick Co.*, 75 N. J. L. 869, 70 Atl. 166.

46. See generally the title "**Providence of Judge and Jury**."

47. *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; *Smiths v. McConathy*, 11 Mo. 517.

48. *McAlister v. St. Louis, etc. R.*

Co., 107 Ark. 65, 154 S. W. 186. But see *Madisonville, H. & E. R. Co. v. Graham*, 147 Ky. 604, 144 S. W. 737 (holding it one for jury); *Fidelity Trust Co. v. Shelbyville Water & L. Co.*, 33 Ky. L. Rep. 202, 110 S. W. 239.

49. U. S.—*United States Smelting Co. v. Sisam*, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. (N. S.) 976. **Ala.** *Harris v. Randolph Lumber Co.*, 175 Ala. 148, 57 So. 453. **Ark.**—*Czarnecki v. Bolen-Darnell Coal Co.*, 91 Ark. 58, 120 S. W. 376. **Ind.**—*Merchants' Mut. Tel. Co. v. Hirschman*, 43 Ind. App. 283, 87 N. E. 238. **Minn.**—*Matthias v. Minneapolis, St. Paul & S. M. R. Co.*, 125 Minn. 224, 146 N. W. 353, 51 L. R. A. (N. S.) 1017; *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221. **Miss.** *King v. Vicksburg R. & L. Co.*, 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. (N. S.) 1036. **Mo.** *Bradbury Marble Co. v. Laeclde Gaslight Co.*, 128 Mo. App. 96, 106 S. W. 594. **N. Y.**—*Melker v. New York*, 190 N. Y. 481, 83 N. E. 565, 16 L. R. A. (N. S.) 621; *Cuilo v. New York Edison Co.*, 85 Misc. 6, 147 N. Y. Supp. 14. **Pa.** *Stokes v. Pennsylvania R. Co.*, 214 Pa. 415, 63 Atl. 1028; *Gavigan v. Atlantic Refining Co.*, 186 Pa. 604, 4 Atl. 834; *Amsterdam v. Dupont, etc. Powder Co.*, 62 Pa. Super. 314. **Utah.**—*Church of Latter-Day Saints v. Oregon Short Line R. Co.*, 36 Utah 238, 103 Pac. 243, 140 Am. St. Rep. 819, 23 L. R. A. (N. S.) 860.

50. Ga.—*Savannah, etc. R. Co. v. Parish*, 117 Ga. 893, 45 S. E. 280. **Minn.** *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221. **Miss.**—*King v. Vicksburg R. & L. Co.*, 88 Miss. 456, 42 So. 204, 117 Am. St. Rep. 749, 6 L. R. A. (N. S.) 1036.

[a] **What proportion of damage** caused by defendant. *United States*

injury complained of. And there are other questions of fact properly referable to the jury.⁵¹

3. **Instructions** in such actions are governed by the general rules governing instructions.⁵²

4. **Judgments.**—The general rules governing judgments obtain in such actions.⁵³

Abatement Order.—By express provision of statute in some states, an order abating the nuisance may issue with the judgment awarding damages.⁵⁴

G. **APPEAL.**—The general rules governing appeals obtain in such actions.⁵⁵

IV. RELIEF IN EQUITY.—A. **IN GENERAL.**—It is a well established rule that equity will give a remedy by injunction,⁵⁶ for nuis-

Smelting Co. v. Sisam, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. (N. S.) 976.

51. See the following: **N. Y.**—*Gibbons v. New York C. & H. R. R. Co.*, 161 App. Div. 201, 146 N. Y. Supp. 288, amount of damages. **Pa.**—*Kemmerer v. Edelman*, 23 Pa. 143, whether notice to remove nuisance reasonable. **Tex.**—*Hockaday v. Wortham*, 22 Tex. Civ. App. 419, 54 S. W. 1094, amount of damages. **Va.**—*Southern Ry. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980.

52. See generally the title "Instructions," and **Ala.**—*Murkeson v. Adler*, 178 Ala. 622, 59 So. 505, instruction invading province of jury properly refused. **D. C.**—*Academy of Sacred Heart of Mary v. Philadelphia*, B. & W. R. Co., 36 App. Cas. 372. **Ill.**—*N. K. Fairbank Co. v. Nicolai*, 167 Ill. 242, 47 N. E. 360, reversing 66 Ill. App. 637, should not be argumentative. **Ind.**—*Merchants' Mut. Tel. Co. v. Hirschman*, 43 Ind. App. 283, 87 N. E. 238. **Ia.**—*Correll v. Cedar Rapids*, 110 Iowa 333, 81 N. W. 724; *Shirley v. Cedar Rapids*, etc. Co., 74 Iowa 169, 37 N. W. 133, 7 Am. St. Rep. 471. **Md.**—*Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533. **N. Y.**—*Gerow v. Liberty*, 106 App. Div. 357, 94 N. Y. Supp. 949. **S. C.**—*Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 736, 26 L. R. A. 693. **Tex.**—*Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556; *Hamm v. Briant*, 57 Tex. Civ. App. 614, 124 S. W. 112, instruction starting incorrect proposition of law properly refused.

53. See the title "Judgments."

[a] **Cannot Be Collaterally Attacked.**—*Paddock v. Somes*, 102 Mo.

226, 14 S. W. 746, 10 L. R. A. 254.

54. See the statutes, and **Ind.**—*Cromwell v. Lowe*, 14 Ind. 234. **Mass.**—*Codman v. Evans*, 7 Allen 431. **Minn.**—*Colstrum v. Minneapolis*, etc. R. Co. 33 Minn. 516, 24 N. W. 255. **Ore.**—*Kothenberthal v. Salem Co.*, 13 Ore. 604, 11 Pac. 287; *Porges v. Jacobs*, 75 Ore. 458, 147 Pac. 396; **Tex.**—*Kennedy v. Garrard* (Tex. Civ. App.), 156 S. W. 570.

[a] **Prayer for Abatement Immaterial.**—*Porges v. Jacobs*, 75 Ore. 488, 147 Pac. 396.

[b] **Discretionary With Court.** *Bemis v. Clark*, 11 Pick. (Mass.) 452; *Kothenberthal v. Salem Co.*, 13 Ore. 604, 11 Pac. 287.

55. See generally the title "Appeals," and *infra*, this note.

[a] **Only those objections raised at the trial.** are available on appeal. *Murkerson v. Adler*, 178 Ala. 622, 59 So. 505; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679.

[b] **Harmless error** will not reverse. *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679.

56. See the following: **U. S.**—*In re Debs*, 153 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092. **Ala.**—*Nixon v. Bolling*, 145 Ala. 277, 40 So. 210. **Ark.**—*Durfey v. Thalheimer* 85 Ark. 544, 109 S. W. 519. **Cal.**—*People v. Beaudry*, 91 Cal. 213, 27 Pac. 610. **Colo.**—*Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693. **Fla.**—*Thebaut v. Canova*, 11 Fla. 143. **Ga.**—*Ruff v. Phillips*, 50 Ga. 130. **Ill.**—*Pana v. Central Washed Coal Co.*, 260 Ill. 111, 102 N. E. 992, 48 L. R. A. (N. S.) 244. **Ia.**—*Waterloo v. Waterloo*, C. F. & N. R. Co.,

ances both public and private. The nuisance may be threatened or in progress,⁵⁷ as well as existing.⁵⁸

B. CONSIDERATIONS AFFECTING RIGHT TO RELIEF. — 1. In General. If the facts show a clear and convincing case of irreparable injury, equity will lend its aid without requiring any action at law to first establish the nuisance as a fact.⁵⁹ But the assistance of equity will

149 Iowa 129, 125 N. W. 819; Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19. **Kan.**—State v. Rabino-witz, 85 Kan. 841, 118 Pac. 1040, 39 L. R. A. (N. S.) 187. **Ky.**—Dumesnil v. Dupont, 18 B. Mon. 804, 68 Am. Dec. 750. **Md.**—Powell v. Wilson, 85 Md. 347, 37 Atl. 216. **Mass.**—Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55, 14 Am. St. Rep. 446, 5 L. R. A. 193. **Mich.**—Wilmarth v. Woodcock, 66 Mich. 331, 33 N. W. 400. **Minn.**—State ex rel. Robertson v. Lane, 126 Minn. 78, 147 N. W. 951, Ann. Cas. 1915D, 549, 52 L. R. A. (N. S.) 932. **Mo.**—McDonough v. Robbins, 60 Mo. App. 156. **Neb.**—State v. Temple, 99 Neb. 505, 156 N. W. 1063. **N. H.**—Burnham v. Kempton, 44 N. H. 78. **N. J.**—Attorney-General v. Brown, 24 N. J. Eq. 89. **N. Y.**—McCarty v. National Carbonic Gas Co., 189 N. Y. 40, 81 N. E. 549, 13 L. R. A. (N. S.) 465. **N. C.**—Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930. **S. D.**—Hyde v. Minnesota, D. & P. R. Co., 24 S. D. 386, 123 N. W. 849; Searle v. Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345. **Vt.**—Montpelier v. McMahon, 85 Vt. 275, 81 Atl. 977. **W. Va.**—State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691. **Eng.**—Fenwick v. East London R. R. Co., L. R. 20 Eq. 544, 23 Wkly. Rep. 901.

57. **Ala.**—State v. Mobile, 5 Port. 279, 30 Am. Dec. 564. **Colo.**—Seigle v. Bromley, 22 Colo. App. 189, 124 Pac. 191. **Ga.**—Augusta v. Reynolds, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 69 L. R. A. 564. **Idaho**—Sand Point v. Doyle, 11 Idaho 642, 83 Pac. 598, 4 L. R. A. (N. S.) 810. **Ill.**—St. John v. North Utica, 157 Ill. App. 504. **Ind.**—Bowen v. Mauzy, 117 Ind. 258, 19 N. E. 526. **Ia.**—Perry v. Howe Co-Op. Creamery Co., 125 Iowa 415, 101 N. W. 150. **Me.**—Houlton v. Titcomb, 102 Me. 272, 66 Atl. 733, 120 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580. **Mo.**—Caskey v. Edwards, 128 Mo. App. 237, 107 S. W. 37. **Neb.**—Lowe v. Prospect Hill Cem. Assn., 58 Neb. 94,

78 N. W. 488, 46 L. R. A. 237. **N. J.**—Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201. **N. Y.**—Altschul v. Ludwig, 216 N. Y. 459, 111 N. E. 216. **Ore.**—Blagen v. Smith, 34 Ore. 394, 56 Pac. 292, 44 L. R. A. 522. **Pa.**—Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221. **S. C.**—State ex rel. Lyon v. Columbia Water Power Co., 82 S. C. 181, 63 S. E. 884, 129 Am. St. Rep. 876, 22 L. R. A. (N. S.) 435. **Wash.**—Lavner v. Independent Light, etc. Co., 74 Wash. 373, 133 Pac. 592.

[a] **Object Preventive.**—Miley v. A'Hearn, 13 Ky. L. Rep. 834, 18 S. W. 529.

58. **Ala.**—Barnett v. Tedescki, 154 Ala. 474, 45 So. 904. **Cal.**—Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300. **Colo.**—Seigle v. Bromley 22 Colo. App. 189, 124 Pac. 191. **Ill.**—Oehler v. Levy, 139 Ill. App. 294. **Md.**—Lamborn v. Covington Co., 2 Md. Ch. 409. **Mo.**—Blackford v. Heman Constr. Co., 132 Mo. App. 157, 112 S. W. 287. **N. J.**—Reilly v. Curley, 75 N. J. Eq. 57, 71 Atl. 700, 138 Am. St. Rep. 510. **N. Y.**—Barnes v. Midland R. Terminal Co., 126 App. Div. 435, 110 N. Y. Supp. 545. **Ore.**—Templeton v. Williams, 59 Ore. 160, 116 Pac. 1062, 35 L. R. A. (N. S.) 468. **Tex.**—Hamm v. Gunn, 54 Tex. Civ. App. 424, 113 S. W. 304. **Can.**—Alley v. Duchemin, 2 Pr. Edw. Isl. 266, 340.

59. **Ala.**—Ogletree v. McQuaggs, 67 Ala. 580, 42 Am. Rep. 112. **Ill.**—Sutton v. Findlay Cemetery Assn., 270 Ill. 11, 110 N. E. 315, Ann. Cas. 1917B, 559, L. R. A. 1916B, 1135; Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N. E. 992, 48 L. R. A. (N. S.) 244, action at law when first necessary. **Ky.**—Barrett v. Vreeland, 168 Ky. 471, 182 S. W. 605. **Me.**—Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108. **N. J.**—Stanford v. Lyon, 37 N. J. Eq. 94. **Ore.**—Bourne v. Wilson-Case Lumb. Co., 58 Ore. 48, 113 Pac. 52, Ann. Cas. 1913A, 245. **Pa.**—In re Hacke's Appeal, 101 Pa. 245.

[a] **Irreparable Injury Defined.** Newell v. Sass, 142 Ill. 104, 31 N. E.

be denied if the injury is trifling, transient or temporary;⁶⁰ or if the right infringed is technical, or nominal merely.⁶¹ It is clear that equity will not interfere in any case if the nuisance complained of can be redressed by an action at law.⁶² So also equity will not grant such relief if there is a statutory remedy that is adequate.⁶³

Multiplicity of Suits.—When it is clear that the nature of the wrong complained of will lead to vexations, litigation and a multiplicity of suits, the plenary power of equity will give ample protection by injunction.⁶⁴

2. Laches and Acquiescence.—Equity protects the vigilant and not those who slumber, hence tacit acquiescence in the alleged nuisance for a long time will result in a denial of equitable relief.⁶⁵

176, 180; *Lead v. Inch*, 116 Minn. 467, 134 N. W. 218, Ann Cas. 1913B, 891, 39 L. R. A. (N. S.) 234.

[b] **Statutory declaration that the thing is a nuisance per se makes a judicial inquiry unnecessary.** *Western & A. R. R. Co. v. Atlanta*, 113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294; *Eccles v. Ditto* (N. M.), 167 Pac. 726.

60. *Swaine v. Great Northern R. Co.*, 4 De Gex, J. & S. 211, 216, 46 Eng. Reprint 899, injury must be clear and convincing.

Balance of injury as affecting right, see *infra*, IV, B, 3.

61. *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499, 28 N. E. 498.

62. **Ala.**—*Dennis v. Mobile, etc. R. Co.*, 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69. **Ark.**—*Swain v. Morris*, 93 Ark. 362, 125 S. W. 432. **Cal.**—*Randall v. Freed*, 154 Cal. 299, 97 Pac. 669. **Conn.**—*Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 274. **Ill.**—*Nelson v. Milligan*, 151 Ill. 462, 38 N. E. 239; *Lake View v. Letz*, 44 Ill. 81. **Ind.**—*New Albany & S. R. Co. v. Higman*, 18 Ind. 77. **Ia.**—*Perry v. Howe Co-op. Creamery Co.*, 125 Iowa 415, 101 N. W. 150. **Ky.**—*Com. v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280. **Md.**—*Bonaparte v. Denmead*, 108 Md. 174, 69 Atl. 697; *Bartlett v. Moyers*, 88 Md. 715, 42 Atl. 204. **Mass.**—*Ingraham v. Dunnell*, 5 Mete. 118; *Dana v. Valentine*, 5 Mete. 8. **Neb.**—*George v. Peckham*, 73 Neb. 794, 103 N. W. 664. **N. J.**—*Attorney-General v. Brown*, 24 N. J. Eq. 89; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530. **Ohio**—*Goodall v. Crofton*, 23 Ohio St. 271, 31 Am. Rep. 535; *Downs v. Greer Beatty-Clay Co.*, 9 Ohio Cir. Ct. (N. S.) 345.

See generally the title "Legal Remedy."

63. **Ark.**—*Swain v. Morris*, 93 Ark. 362, 125 S. W. 432. **Ga.**—*Broomhead v. Grant*, 83 Ga. 451, 10 S. E. 116; *Powell v. Foster*, 59 Ga. 790. **Kan.**—*State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182. **Me.**—*Rockland v. Rockland Water Co.*, 86 Me. 55, 29 Atl. 935.

[a] **But such statutory remedy will not exclude redress in equity, if the facts warrant equity's interference.** **U. S.**—*Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. 970. **Ia.**—*Bushnell v. Robeson*, 62 Iowa 540, 17 N. W. 888. **Mass.**—*Fall River Iron Works Co. v. Old Colony, etc. R. Co.* 5 Allen 221. **Mich.**—*Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475. **Ore.**—*Fleischner v. Citizens' etc. Inv. Co.*, 25 Ore. 119, 35 Pac. 174.

64. **U. S.**—*Parker v. Winnipiseogee Lake C. & W. Mfg. Co.*, 2 Black 545, 17 L. ed. 333. **Ala.**—*Demopolis v. Webb*, 87 Ala. 659, 6 So. 408. **Ill.**—*Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839. **Me.**—*Sterling v. Littlefield*, 97 Me. 479, 54 Atl. 1108. **Md.**—*Reese v. Wright*, 98 Md. 272, 56 Atl. 976. **Mass.**—*Stevens v. Stevens*, 11 Mete. 251, 45 Am. Dec. 203. **Mich.**—*Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243. **Mo.**—*Desberger v. University Heights Realty, etc. Co.*, 126 Mo. App. 206, 102 S. W. 1060. **N. H.**—*Burnham v. Kempton*, 44 N. H. 78. **N. Y.**—*Davis v. Lambertson*, 56 Barb. 480. **Ore.**—*Parrish v. Stephens*, 1 Ore. 73. **W. Va.**—*Weston v. Ralston*, 48 W. Va. 170, 195, 36 S. E. 446.

See generally the title "Multiplicity of Suits."

65. **Ala.**—*Clifton Iron Co., v. Dye*,

3. Balance of Injury.—In some jurisdictions, if the court finds in the adjustment of the equities involved that the injury to the complainant is slight in comparison to the injury caused the public by enjoining the nuisance, relief will be refused;⁶⁶ on the other hand, if the injury to the public is slight or disproportionate to the injury suffered by the complainant the injunction will issue.⁶⁷ There are many authorities, however, which refuse to concede that the balance of injury should have any weight in the granting or denying of a restraining decree, if private persons are involved.⁶⁸

87 Ala. 468, 6 So. 192. **Alaska.**—Snyder v. Kelter, 4 Alaska 447, 451. **Ill.** Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N. E. 992, 48 L. R. A. (N. S.) 244. **Me.**—Bliss v. Junkins, 107 Me. 425, 78 Atl. 478; Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108. **Mich.** Washington Lodge No. 54 I. O. O. F. v. Frelinghuysen, 138 Mich. 350, 101 N. W. 569. **N. J.**—Stanford v. Lyon, 37 N. J. Eq. 94; Wolcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790. **Pa.**—Alexander v. Wilkes-Barre A. Coal Co. 245 Pa. 28, 91 Atl. 213; *In re Hacke's Appeal*, 101 Pa. 245. **Tex.** Galveston, H. & S. A. R. Co. v. De Groff, 102 Tex. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749; Fekles v. Nowlin (Tex. Civ. App.), 158 S. W. 794. **W. Va.**—Brokaw v. Carson, 74 W. Va. 340, 81 S. E. 1133.

[a] Mere knowledge that a structure when completed will be a nuisance will not amount to laches or acquiescence, even though no objection is made to the erection of it. **Ia.** Smith v. Jefferson, 161 Iowa 245, 142 N. W. 220, Ann Cas. 1916A, 97, 45 L. R. A. (N. S.) 792; Harley v. Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000. **Ky.**—Corley v. Lancaster, 81 Ky. 171. **Md.**—Carroll Springs Distilling Co. v. Schnepfe, 111 Md. 420, 74 Atl. 828. **Minn.**—Matthews v. Stillwater Gas & E. L. Co., 63 Minn. 493, 65 N. W. 947.

[b] If the nuisance is public, equity will not refuse preventive relief on account of laches or acquiescence. Wolcott *ex rel* Maloney v. Doremus (Del. Ch.), 95 Ala. 904; State *ex rel* Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254, 169 S. W. 267, L. R. A. 1915A, 615.

66. U. S.—Bliss v. Washoe Copper Co., 186 Fed. 789, 109 C. C. A. 133; Bliss v. Anaconda, etc. Min. Co., 167 Fed. 342. **Ala.**—Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192. **Ill.**—Thornton v. Roll, 118 Ill. 350, 8 N. E. 145. **Ia.**

Daniels v. Keokuk Water Works, 61 Iowa 549, 16 N. W. 705. **Mass.** Downing v. Elliott, 182 Mass. 28, 64 N. E. 201. **Mo.**—State *ex rel* Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254, 169 S. W. 267, L. R. A. 1915A, 615. **Neb.**—Kenesaw v. Chicago, B. & Q. R. Co., 91 Neb. 619, 136 N. W. 990. **N. Y.**—Riedeman v. Mt. Morris Electric Light Co., 56 App. Div. 23, 67 N. Y. Supp. 391; People v. Delaware, etc., Co., 75 Misc. 322, 135 N. Y. Supp. 339. **N. C.**—Daughtry v. Warren, 85 N. C. 136; Brown v. Carolina Cent. Ry. Co., 83 N. C. 128. **Pa.** Alexander v. Wilkes-Barre, etc., Coal Co., 245 Pa. 28, 91 Atl. 213. **Tenn.** Madison v. Ducktown Sulphur, C. & I. Co., 113 Tenn. 331, 83 S. W. 658. **W. Va.**—Wees v. Coal & Iron R. Co., 54 W. Va. 421, 46 S. E. 166.

67. Bradsher v. Lea's Heirs, 38 N. C. 301; Morton v. Chester, 2 Del. Co., (Pa.) 459.

68. U. S.—Am. Smelting & Ref. Co. v. Godfrey, 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8, excellent case collecting authorities. **Cal.**—Hobbs v. Amador & Sacramento C. Co., 66 Cal. 161, 4 Pac. 1147; Weaver v. Eureka Lake Co., 15 Cal. 271. **Colo.**—Suffolk G. Min. & Mill. Co. v. San Miguel, etc., Co., 9 Colo. App. 407, 48 Pac. 828. **Ga.** Chestatee Pyrites Co. v. Cavenders, etc. Min. Co., 118 Ga. 255, 45 S. E. 267. **Ill.**—Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367. **Ind.** Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. 719, 56 L. R. A. 899. **Ky.** Banks v. Frazier, 111 Ky. 909, 64 S. W. 983. **Mich.**—Stock v. Jefferson Twp., 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355. **N. J.**—Harper, Hollingsworth & Darby Co. v. Mountain Water Co., 65 N. J. Eq. 479, 56 Atl. 297; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374; Higgins v. Flemington Water Co., 36 N. J. Eq. 538. **N. Y.**—Corning v. Troy, etc., Factory, 40 N. Y. 191.

4. Criminal Character of the Nuisance.—Though it is a rule that equity will not interfere to prevent the commission of crime, its jurisdiction to abate a nuisance is undoubted even when the act constituting it is a crime.⁶⁹

5. Previous Trial at Law.—If the allegations and the proof offered are not clear and convincing, but doubtful and uncertain as to the fact of the nuisance, equity will not grant relief until and unless a previous trial at law has established the complainant's right to proceed in equity.⁷⁰ It is otherwise, however, where the legal right of

Pa.—*Evans v. Reading, etc., Fertilizer Co.* 160 Pa. 209, 28 Atl. 702. **R. I.** *Beckwith v. Howard*, 6 R. I. 1. **Eng.** *Young & Co. v. Bankier Distillery Co.*, (1893), App. Cas. 691; *Clowes v. Staffordshire, etc., Co.*, L. R. 8 Ch. App. 125.

69. U. S.—*In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092. **Cal.** *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581. **Kan.**—*State v. Lindsay*, 85 Kan. 79, 116 Pac. 207, 35 L. R. A. (N. S.) 810. **Ill.**—*Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680. **Ind.** *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 52 Am. St. Rep. 407, 28 L. R. A. 727, excellent case collecting authorities. **Ky.**—*Respass v. Com. ex rel. Attorney-General*, 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. (N. S.) 836; *Com. v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280. **La.**—*State v. Olympic Club*, 47 La. Ann. 1095, 17 So. 599. **Mass.**—*Attorney-General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361. **Mich.**—*Detroit Realty Co. v. Barnett*, 156 Mich. 385, 120 N. W. 804, 21 L. R. A. (N. S.) 585. **Mo.**—*State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S. W. 1078, 123 Am. St. Rep. 393, 15 L. R. A. (N. S.) 747, 13 Ann. Cas. 787; excellent case collecting authorities. **Ohio.**—*State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246. **Pa.**—*Com. v. Kennedy*, 240 Pa. 214, 87 Atl. 605, 47 L. R. A. (N. S.) 673; *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 55 Am. St. Rep. 717, 34 L. R. A. 94. **S. C.**—*State v. City Club*, 83 S. C. 509, 65 S. E. 730. **Tex.**—*Clopton v. State*, 105 S. W. 994; *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119. **Can.**—*Attorney-General v. Ewen*, 3 Brit. Col. 468.

Contra, *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691.

[a] **Reason.**—"This court has never regarded a criminal prosecution, which can only dispose of an existing nuisance and cannot prevent a renewal of the nuisance, for which a new prosecution must be brought, as a complete and adequate remedy for a wrong inflicted upon the public. The public authorities have a right to institute the suit where the general public welfare demands it and damages to the public are not susceptible of computation. The maintenance of the public health, morals, safety and welfare is on a plane above mere pecuniary damage although not susceptible of measurement in money and to say that a court of equity may not enjoin a public nuisance because property rights are not involved, would be to say that the state is unable to enforce the law or protect its citizens from public wrongs." *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680.

70. Ala.—*St. James Church v. Arlington*, 36 Ala. 546, 76 Am. Dec. 332. **Fla.**—*Shivery v. Streeper*, 24 Fla. 103, 3 So. 865. **Ill.**—*Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215. **Me.**—*Bliss v. Junkins*, 107 Me. 425, 78 Atl. 478; *Sterling v. Littlefield*, 97 Me. 479, 54 Atl. 1108; *Tracy v. Le Blanc*, 89 Me. 304, 36 Atl. 399. **Mass.**—*Ingraham v. Dunnell*, 5 Mete. 118. **Miss.**—*Gwin v. Melmott*, *Freem. Ch.* 505. **N. H.** *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Burnham v. Kempton*, 44 N. H. 78. **N. J.**—*Attorney-General v. Steward*, 20 N. J. Eq. 415; *Wolcott v. Melick*, 11 N. J. Eq. 294, 66 Am. Dec. 790. **N. Y.**—*Mohawk Bridge Co. v. Utica & S. R. R. Co.*, 6 Paige 554. **N. C.** *Redd v. Edna Cotton Mills*, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983. **Ohio.** *Goodall v. Crofton*, 33 Ohio St. 271, 31 Am. Rep. 535. **Ore.**—*Van Buskirk v. Bond*, 52 Ore. 234, 96 Pac. 1103. **Pa.**

a complainant is clearly shown and the unlawful use of defendant's property which injured complainant in person or property is clearly settled.⁷¹ A previous decision at law that a nuisance exists is insufficient in any event if an appeal or writ of review is pending,⁷² and if defendant in his answer admits plaintiff's right or the fact that the nuisance exists, a trial at law would serve no useful purpose.⁷³ If the object to be attained is a temporary injunction merely, a previous trial at law is unnecessary.⁷⁴

After a previous trial at law, a restraining order will issue as of course, provided the nuisance is of a constantly recurring character.⁷⁵

C. JURISDICTION.⁷⁶—In determining the court in which suit is to be brought for injunction purposes local statutes control.⁷⁷

In considering the amount involved as a jurisdictional fact in certain courts, the value of the subject matter constituting the alleged nuisance

Wood *v.* McGrath, 150 Pa. 451, 24 Atl. 682, 16 L. R. A. 715. S. C.—Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607. Eng.—Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 61 Eng. Reprint 291.

71. Ala.—Ogletree *v.* McQuaggs, 67 Ala. 580, 42 Am. Rep. 112; State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564. Ill.—Deaconess Home & Hospital *v.* Bontjes, 207 Ill. 553, 69 N. E. 748, 61 L. R. A. 215; Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; Dierks *v.* Highway Comrs., 142 Ill. 197, 31 N. E. 496. Me.—Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108. Mich.—White *v.* Forbes, Walk. Ch. 112. N. J. Stanford *v.* Lyon, 37 N. J. Eq. 94; Wolcott *v.* Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790. Pa.—*In re Hacke's Appeal*, 101 Pa. 245.

[a] Right Must Be Clear and Facts Uncontested.—Mowday *v.* Moore, 133 Pa. 598, 19 Atl. 626.

[b] Where nuisance clearly irreparable at law, it would be a reproach upon the powers of a court of equity to hold the complainant was bound to endure wrongs of the defendant until the jury should pass upon the facts in an action at law. Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63.

[c] Where action at law inadequate, no necessity for trial of issue before allowance of an injunction. Holsman *v.* Boiling Springs Bleaching Co., 14 N. J. Eq. 335.

72. Pana *v.* Central Washed Coal Co., 260 Ill. 111, 102 N. E. 992, 48 L. R. A. (N. S.) 244; Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71.

73. Tuolumne *v.* Chapman, 8 Cal. 392, 397; Duncan *v.* Hayes, 22 N. J.

Eq. 25; Ross *v.* Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

74. U. S.—Irwin *v.* Dixon, 9 How. 10, 28, 29, 13 L. ed. 25. N. H.—Burnham *v.* Kempton, 44 N. H. 78. N. J. Cronin *v.* Bloemeeke, 58 N. J. Eq. 313, 43 Atl. 605. N. Y.—Rochester *v.* Erickson, 46 Barb. 92. S. C.—Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607. Eng.—Sutton *v.* Lord Montfort, 4 Sim. 559, 565, 58 Eng. Reprint 209.

75. Paddock *v.* Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; People *v.* Third Ave. R. Co., 45 Barb. (N. Y.) 63, 30 How. Pr. 121.

76. See generally the title "Jurisdiction."

77. See the statutes, and Cal. People *v.* Selby Smelt & L. Co., 163 Cal. 84, 124 Pac. 692, 124 Pac. 1135, Ann Cas. 1913E, 1267 (superior court); McCarthy *v.* Gaston Ridge Mill & M. Co., 144 Cal. 542, 78 Pac. 7, superior court. Ga.—Central Georgia Power Co. *v.* Ham, 139 Ga. 569, 77 S. E. 396, (limitations of ordinary), Meador *v.* Central, etc., Power Co., 137 Ga. 196, 73 S. E. 3 (limitations of ordinary), Savannah, F. & W. R. Co. *v.* Gill, 118 Ga. 737, 45 S. E. 623, justices of peace, two. Mass.—Cadigan *v.* Brown, 120 Mass. 493; Fall River Irons Works *v.* Old Colony, etc., R. Co., 5 Allen 221, supreme court. Mo.—State *ex rel.* Crow *v.* Canty, 207 Mo. 439, 105 S. W. 1078, 123 Am. St. Rep. 393, 15 L. R. A. (N. S.) 747, 13 Ann. Cas. 787, circuit court. N. H.—Dover *v.* Portsmouth Bridge, 17 N. H. 200, superior court.

See also 12 STANDARD PROC. 1009, et seq.

and not the damage to plaintiff from the maintenance thereof, controls.⁷⁸

D. VENUE.⁷⁹—A suit to enjoin a nuisance must be instituted in the county where the nuisance exists.⁸⁰ If the nuisance has its genesis in one county or district but its effects extend into another county or district, the venue may be laid in the county or district affected.⁸¹ If the suit to enjoin is a federal one, then the venue must be laid in the federal district to which the state is attached, wherein the nuisance has its source.⁸²

E. PARTIES.⁸³—1. **Plaintiff.**—Proceedings to abate a private nuisance are properly maintainable in the name of the person injured thereby,⁸⁴ whether he be the owner,⁸⁵ a life tenant,⁸⁶ lessee,⁸⁷ or other

78. *Mississippi & M. R. Co. v. Ward*, 2 Black (U. S.) 485, 17 L. ed. 311; *American Smelting & Ref. Co. v. Godfrey*, 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8.

79. See generally the title "Venue."

80. **U. S.**—*Mississippi & M. R. Co. v. Ward*, 2 Black 585, 17 L. ed. 311. **Cal.**—*Marysville v. North Bloomfield G. Min. Co.*, 66 Cal. 343, 5 Pac. 507. **Ill.**—*People v. St. Louis*, 10 Ill. 251, 48 Am. Dec. 339. **Mo.**—*State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S. W. 1078, 123 Am. St. Rep. 393, 15 L. R. A. (N. S.) 747, 13 Ann. Cas. 787. **Pa.**—*Morris v. Remington*, 1 Pars. Eq. Cas. 387.

[a] If a statute declares an action for the abatement of a nuisance to be local, then the venue must be laid in the county or district where the nuisance has its source. *Horne v. Buffalo*, 49 Hun 76, 1 N. Y. Supp. 801, 15 Civ. Proc. 81, 17 N. Y. St. 212.

[b] **When Nuisance Not Local.** *Jefferies v. Duncombe*, 11 East 226, 103 Eng. Reprint 991.

81. *People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 124 Pac. 692, 124 Pac. 1135, Ann. Cas. 1913E, 1267; *Drinkhouse v. Spring Valley Water-Works*, 80 Cal. 308, 22 Pac. 252; *Marysville v. North Bloomfield Gravel Min. Co.*, 66 Cal. 343, 5 Pac. 507; *Lohmiller v. Indian Ford Water Power Co.*, 51 Wis. 683, 8 N. W. 601. *Contra, In re Eldred*, 46 Wis. 530, 545, 1 N. W. 175, which however arose out of an indictment.

82. *Mississippi & M. R. Co. v. Ward*, 2 Black (U. S.) 485, 17 L. ed. 311; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538, 23 Fed. Cas. No. 13,446, since the remedy is quasi in

rem and must act upon the thing itself which is causing the damage.

83. See generally the title "Parties."

84. **U. S.**—*United States v. Luce*, 141 Fed. 385. **Ala.**—*Tedescki v. Berger*, 150 Ala. 649, 43 So. 960, 11 L. R. A. (N. S.) 1060. **Ark.**—*Blass Dry Goods Co. v. Reinman*, 102 Ark. 287, 143 S. W. 1087. **Cal.**—*Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82. **Ga.**—*Ruff v. Phillips*, 50 Ga. 130. **Ill.**—*Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680; *People ex rel. Dyer v. Clark*, 187 Ill. App. 613. **Ind.**—*Pettis v. Johnson*, 56 Ind. 139. **Ky.**—*Louisville & N. R. Co. v. Franklin*, 170 Ky. 645, 186 S. W. 643. **N. J.**—*Stockham v. Browning*, 18 N. J. Eq. 390. **Pa.**—*Hechelman v. Kindt*, 22 Pa. Dist. 791. **P. R.**—*Gimenez v. Guarch's Estate*, 11 Porto Rico 67. **Tex.**—*Stark v. Coe* (Tex. Civ. App.), 134 S. W. 373; *Boyd v. Schreiner* (Tex. Civ. App.), 116 S. W. 100.

See generally, 8 STANDARD PROC. 455, et seq.; 13 STANDARD PROC. 9, et seq.

85. **N. J.**—*Anthony Shoe Co. v. West Jersey R. Co.*, 57 N. J. Eq. 607, 42 Atl. 279. **N. Y.**—*Leonard v. Spencer*, 108 N. Y. 338, 15 N. E. 397; *Hutchins v. Smith*, 63 Barb. 251. **R. I.**—*Clark v. Peckham*, 9 R. I. 455.

86. *Lowe v. Prospect Hill Cem. Assn.*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

87. **La.**—*State v. King*, 46 La. Ann. 78, 14 So. 423. **Mo.**—*Clarke v. Thatcher*, 9 Mo. App. 436. **Neb.**—*Lowe v. Prospect Hill Cem. Assn.*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237. **N. Y.**—*Delaney v. Blizzard*, 7 Hun 7; *Hudson River R. Co. v. Loeb*, 7 Robt. 418. **Wash.**—*Grantham v. Gibson*, 41 Wash. 125, 83 Pac. 14, 111 Am. St. Rep. 1003, 3 L. R. A. (N. S.) 447.

person in possession, providing such possession is coupled with some interest in the premises.⁸⁸ If the nuisance is a public one, the proper official institutes the abatement proceedings in behalf of the people,⁸⁹ in the name of the state or people,⁹⁰ the territory,⁹¹ municipality,⁹² or on the relation of a private person.⁹³ But the fact that the nuisance is a public one does not preclude a person who suffers special injury thereby from proceeding in his own name to abate it.⁹⁴

88. *Denner v. Chicago*, etc. R. Co., 57 Wis. 218, 15 N. W. 158.

89. *Cal.*—*People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581. *Ga.*—*Augusta v. Reynolds*, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 69 L. R. A. 564. *Idaho.*—*Sand Point v. Doyle*, 11 Idaho 642, 83 Pac. 598, 4 L. R. A. (N. S.) 810. *Ill.*—*Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393. *Ind.*—*State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. *Mass.*—*Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87. *Mo.*—*State v. Vandalia*, 119 Mo. App. 406, 94 S. W. 1009. *N. C.*—*Pedrick v. Raleigh*, etc. R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554. *Ohio.*—*State v. Dayton*, etc. R. Co., 36 Ohio St. 434.

[a] A private relator cannot be authorized by the court to proceed in the name of the attorney general. *State v. Milwaukee*, 102 Wis. 509, 78 N. W. 756.

90. *Cal.*—*People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581. *Ga.*—*Augusta v. Reynolds*, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 69 L. R. A. 564. *Ill.*—*People v. Smith*, 275 Ill. 256, 114 N. E. 31, L. R. A. 1917B, 1075. *Ind.*—*State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. *Mo.*—*State v. Vandalia*, 119 Mo. App. 406, 94 S. W. 1009. *Okla.*—*Balch v. State ex rel. Grigsby*, 164 Pac. 776.

91. *Reaves v. Territory*, 13 Okla. 396, 74 Pac. 951.

92. *Ala.*—*Radney v. Ashland*, 75 So. 25. *Md.*—*Havre de Grace v. Harlow*, 129 Md. 265, 98 Atl. 852. *Pa.*—*Philadelphia v. Crump*, 1 Brewst. 320.

See 13 STANDARD PROC. 23.

[a] Joinder of the state is not necessary in a suit by a municipality to enjoin a purpresture. *Philadelphia v. Crump*, 1 Brewst. (Pa.) 320.

93. *Ga.*—*Edison v. Ramsey*, 146 Ga. 767, 92 S. E. 513. *Mass.*—*Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; *Eastern District Attorney v. Lynn*, etc. Ry. Co., 16 Gray 242. *Mo.*—*State ex rel. Gibson v. Chicago, B. & Q. R. Co.* (Mo. App.), 191 S. W. 1051.

94. *U. S.*—*Southern Exp. Co. v. Long*, 202 Fed. 462, 120 C. C. A. 568; *Ladew v. Tennessee Copper Co.*, 179 Fed. 245. *Ala.*—*Horton v. Southern R. R. Co.*, 173 Ala. 231, 55 So. 531, Ann. Cas. 1914A, 685; *First Ave. Coal & Lumb. Co. v. Johnson*, 171 Ala. 470, 54 So. 598, 32 L. R. A. (N. S.) 522; *Tedescki v. Burger*, 162 Ala. 534, 50 So. 150. *Alaska.*—*Snyder v. Kelter*, 4 Alaska 447. *Ariz.*—*Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. 465. *Ark.*—*Stoutemeyer v. Sharp*, 89 Ark. 175, 116 S. W. 189, 21 L. R. A. (N. S.) 74. *Cal.*—*Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82; *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437; *Farmer v. Behmer*, 9 Cal. App. 773, 100 Pac. 901. *Conn.*—*Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 274. *Fla.*—*Brown v. Florida Chautauqua Assn.*, 59 Fla. 447, 52 So. 802; *Lutterloh v. Cedar Keys*, 15 Fla. 306. *Ga.*—*Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126; *Sylvester v. Tison*, 133 Ga. 518, 66 S. E. 246; *Waycross City v. Houk*, 113 Ga. 963, 39 S. E. 577. *Idaho.*—*Stricker v. Hills*, 15 Idaho 709, 99 Pac. 831; *Small v. Harrington*, 10 Idaho 499, 79 Pac. 461. *Ind.*—*Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Bissell Chilled Plow Works v. South Bend Mfg. Co.* (Ind. App.), 111 N. E. 932; *Merchants' Mut. Tel. Co. v. Hirschman*, 43 Ind. App. 283, 87 N. E. 238. *Ia.*—*Irvine v. Oelwein*, 150 N. W. 674; *Smith v. Jefferson*, 161 Iowa 245, 142 N. W. 220, Ann. Cas. 1916A, 97, 45 L. R. A. (N. S.) 792; *Ruthven v. Farmers' Co-op. Creamery Co.*, 140 Iowa 570, 118 N. W. 915. *Kan.*—*Douglass v. Leavenworth*, 6 Kan. App. 96, 49 Pac. 676. *Ky.*—*Louisville Ath-*

Joinder of parties plaintiff is permitted of such persons affected by the nuisance as have a community of interest,⁹⁵ even though their interests are not necessarily joint.⁹⁶

letic Club *v.* Nolan, 134 Ky. 220, 119 S. W. 800, 23 L. R. A. (N. S.) 1019; Louisville Home Tel. Co. *v.* Louisville, 130 Ky. 611, 113 S. W. 855. **La.**—Blanc *v.* Murray, 36 La. Ann. 162, 166, 51 Am. Rep. 7. **Me.** Whitmore *v.* Brown, 102 Me. 47, 65 Atl. 516, 120 Am. St. Rep. 454, 9 L. R. A. (N. S.) 868; Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696. **Md.**—Davis *v.* Baltimore, etc. R. Co., 102 Md. 371, 62 Atl. 572; Hamilton *v.* Whitridge, 11 Md. 128, 69 Am. Dec. 184. **Mass.** Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730. **Mich.**—Detroit Water Comrs. *v.* Detroit, 117 Mich. 458, 76 N. W. 70. **Minn.**—International Lumb. Co. *v.* American Suburbs Co., 119 Minn. 77, 137 N. W. 395; Nelson *v.* Swedish Evangelical, etc. Assn., 111 Minn. 149, 126 N. W. 723, 127 N. W. 626, 34 L. R. A. (N. S.) 565. **Miss.**—Pascagoula Boom Co. *v.* Dixon, 77 Miss. 587, 28 So. 724, 73 Am. St. Rep. 537. **Mo.** Atterbury *v.* West, 139 Mo. App. 180, 122 S. W. 1106; Caskey *v.* Edwards, 128 Mo. App. 237, 107 S. W. 37. **Neb.** Bischof *v.* Merchants' Nat. Bank, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. (N. S.) 486; Seifert *v.* Dillon, 83 Neb. 222, 119 N. W. 636, 131 Am. St. Rep. 642, 19 L. R. A. (N. S.) 1018, 17 Ann. Cas. 1126, excellent case collecting authorities. **N. Y.**—Buskirk *v.* O. J. Gude Co., 115 App. Div. 330, 100 N. Y. Supp. 777. **N. C.**—Pedrick *v.* Raleigh, etc. R. Co., 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554; Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 102 Am. St. Rep. 555, 65 L. R. A. 930. **Okla.**—See McKay *v.* Enid, 26 Okla. 275, 109 Pac. 520, 30 L. R. A. (N. S.) 1021. **Ore.**—Duester *v.* Alvin, 74 Ore. 544, 145 Pac. 660; Bourne *v.* Wilson, etc. Lumber Co., 58 Ore. 48, 113 Pac. 52, Ann. Cas. 1913A, 245. **Pa.**—Seibert *v.* Sebring, 22 Pa. Dist. 530. **S. C.**—Woodstock H. & S. Mfg. Co. *v.* Charleston Light, etc. Co., 63 S. E. 548. **Tex.**—Galveston, H. & S. A. R. Co. *v.* Miller, 93 S. W. 177. **Va.**—Meredith *v.* Triple Isl. Gunning Club, 113 Va. 80, 73 S. E. 721, Ann. Cas. 1913E, 531. **Wash.**—Wilcox *v.* Henry, 35 Wash. 591, 77 Pac. 1055. **Wis.**—See Rogers *v.* John Week Lum-

ber Co., 117 Wis. 5, 93 N. W. 821. **Can.**—Ireson *v.* Holt Timber Co., 30 Ont. L. Rep. 209; Alley *v.* Duchemin, 2 Pr. Edw. Isl. 266, 340.

95. U. S.—Woodruff *v.* North Bloomfield Gravel Min. Co., 16 Fed. 25, 8 Sawy. 628. **Ark.**—Blass Dry Goods Co. *v.* Reinman, 102 Ark. 287, 143 S. W. 1087. **D. C.**—Weeks *v.* Huerich, 40 App. Cas. 46, Ann. Cas. 1914A, 972. **Ky.**—Louisville & N. R. Co. *v.* Franklin, 170 Ky. 645, 186 S. W. 643; Barrett *v.* Vreeland, 168 Ky. 471, 182 S. W. 605. **N. Y.**—Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80. **Tex.** Jung *v.* Neraz, 71 Tex. 396, 9 S. W. 244.

Contra, Fogg *v.* Nevada, etc. R. Co., 20 Nev. 429, 23 Pac. 840.

[a] **Joinder of Legal and Equitable Owners as Plaintiffs.**—Weeks *v.* Heurich, 40 App. Cas. (D. C.) 46, Ann. Cas. 1914A, 972.

[b] **Life tenants and remaindermen** may join in such case. Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183.

96. Ind.—Sullivan *v.* Phillips, 110 Ind. 320, 11 N. E. 300. **Ia.**—Bushnell *v.* Robeson, 62 Iowa 540, 17 N. W. 588. **Kan.**—Atchison St. Ry. Co. *v.* Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800; Palmer *v.* Waddell, 22 Kan. 352. **Md.**—Reese *v.* Wright, 98 Md. 272, 56 Atl. 976, but damages also were allowed. **Mass.**—Cadigan *v.* Brown, 120 Mass. 493. **Mich.**—Turner *v.* Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243. **Minn.**—Nahte *v.* Hansen, 106 Minn. 365, 119 N. W. 55; Grant *v.* Schmidt, 22 Minn. 1. **N. J.**—Rider *v.* Clarkson, 77 N. J. Eq. 469, 78 Atl. 676, 140 Am. St. Rep. 614; Seastream *v.* New Jersey Exhibition Co., 67 N. J. Eq. 178, 58 Atl. 532; Rowbotham *v.* Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663. **N. Y.**—Heughes *v.* Galusha Stove Co., 133 App. Div. 814, 118 N. Y. Supp. 109; Peek *v.* Elder, 3 Sandf. 126; Murray *v.* Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773. **W. Va.**—Snyder *v.* Cabell, 29 W. Va. 48, 1 S. E. 241.

[a] **Damages Cannot Be Separately Assessed.**—Paducah *v.* Allen, 20 Ky. L. Rep. 1342, 49 S. W. 343.

[b] **Necessity of intervention of**

2. Defendant.—All parties having a substantial interest in the maintenance or continuance of the nuisance are proper parties defendant in an action to enjoin it.⁹⁷

If the nuisance complained of is the result of the contribution of several parties, all those who are concerned may be joined as defendants, although they did not act in concert with joint intent to produce the injury.⁹⁸ But an election is possible in such cases and the several parties involved may be sued separately.⁹⁹

F. PETITION, BILL OR COMPLAINT.—Plaintiff must set forth in concise language facts¹ showing an existing² or a threatened³ nuisance

private relator, see *Cal.*—*People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581. *Mass.*—*Eastern District Attorney v. Lynn*, etc. Ry., 16 Gray 242. *N. J.*—*Newark Aqueduct Bd. v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55.

97. Ia.—*Danner v. Hotz*, 74 Iowa 389, 37 N. W. 969. *Minn.*—*Eastman v. St. Anthony Falls Water Power Co.*, 12 Minn. 137. *Neb.*—*State ex rel. English v. Fanning*, 96 Neb. 123, 147 N. W. 215. *N. Y.*—*O'Sullivan v. New York Elev. R. Co.*, 7 N. Y. Supp. 51, 25 N. Y. St. 903; *Brady v. Weeks*, 3 Barb. 157. *Ohio.*—*Mazza v. Heister*, 5 Ohio Dec. (Reprint) 430. *Va.*—*Virginia R. Co. v. Echols*, 117 Va. 182, 83 S. E. 1082.

[a] **Landlord and tenant** (1) must be joined where the nuisance was put upon the premises prior to the lease (*State ex rel. English v. Fanning*, 96 Neb. 123, 147 N. W. 215; *Brady v. Weeks*, 3 Barb. [N. Y.] 157; *O'Sullivan v. New York El. R. Co.*, 7 N. Y. Supp. 51, 26 N. Y. St. 903), (2) or where the same is maintained with the landlord's consent. *Robinson v. Smith*, 53 Hun 638, 7 N. Y. Supp. 38, 25 N. Y. St. 647, 3 Silv. 490.

[b] **Tenants in common** should be joined. *Glass v. Clark*, 53 Ga. 380.

[c] **Grantor and grantee** should be joined where the conveyance took place after the nuisance was created. *Brown v. Woodworth*, 5 Barb. (N. Y.) 550.

[d] **A mere employe** enjoined from operating a dumb waiter. *Darr v. Cohen*, 94 Misc. 471, 158 N. Y. Supp. 324.

98. U. S.—*Woodruff v. North Bloomfield Gravel Min. Co.*, 16 Fed. 25, 8 Sawy. 628. *Cal.*—*People v. Gold Run Ditch & M. Co.*, 66 Cal. 138, 4 Pac. 1152, 46 Am. Rep. 80. *Md.*—*Woodyear*

v. Schaefer, 57 Md. 1, 9, 40 Am. Rep. 419. *N. Y.*—*Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566. *Eng.*—*Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279.

99. *People v. Gold Run Ditch & M. Co.*, 66 Cal. 138, 4 Pac. 1152, 46 Am. Rep. 80; *Bucks v. Strawn*, 182 Ill. App. 644.

1. *Weeks v. Huerich*, 40 App. Cas. (D. C.) 46, Ann. Cas. 1914A, 972; *Plouge v. Boyer*, 38 Ind. 115.

[a] **Conclusions, Innuendoes or Opinions Will Not Suffice.**—*U. S.*—*Spooner v. McConnell*, 1 McLean 337, 22 Fed. Cas. No. 13,245. *Cal.*—*Payne v. McKinley*, 54 Cal. 532. *Fla.*—*Garnett v. Jacksonville, St. A. & H. R. Ry. Co.*, 20 Fla. 889; *Thebault v. Canova*, 11 Fla. 143. *Ga.*—*Burrus v. Columbus*, 105 Ga. 42, 31 S. E. 124; *Coast Line R. Co. v. Cohen*, 50 Ga. 451. *Ind.*—*Begein v. Anderson*, 28 Ind. 79. *Md.*—*Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516. *Mo.*—*Holke v. Herman*, 87 Mo. App. 125. *Pa.*—*Hough v. Doylestown*, 4 Brewst. 333. *R. I.*—*O'Reilly v. Perkins*, 22 R. I. 364, 48 Atl. 6. *Tenn.*—*Lytton v. Steward*, 2 Tenn. Ch. 586. *Va.*—*Talley v. Tyree*, 2 Rob. (41 Va.) 500. See generally the title "Conclusions of Law."

2. *St. Louis v. Knapp*, etc. Co., 104 U. S. 658, 26 L. ed. 883; *Androseoggin & K. R. Co. v. Androseoggin R. Co.*, 49 Me. 392.

[a] **The character of the nuisance** should appear from the averments. *Hoadley & M. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997; *Ryan v. Copes*, 11 Rich. (S. C.) 217.

3. U. S.—*Parker v. Winnipiseogee Lake C. & W. Mfg. Co.*, 2 Black (U. S.) 545, 17 L. ed. 333. *Ala.*—*Rosser v. Randolph*, 7 Port. 238, 31 Am. Dec. 712. *Del.*—*Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435. *Fla.*—*Garnett v. Jacksonville, St. A. & H. R. Ry. Co.*, 20

maintained by defendant⁴ in contravention of plaintiff's rights;⁵ and should also allege facts giving the court jurisdiction to abate the same.⁶ Special injury must be shown where the nuisance is also a public one.⁷

Prayer.—The prayer for relief may ask not only that defendant be enjoined, but also include a prayer for damages as a result of the nuisance.⁸

G. AMENDMENTS.—In accordance with the general principles controlling amendments,⁹ the plaintiff may amend his pleading in respect

Fla. 889. **Ill.**—*Flood v. Consumers Co.*, 105 Ill. App. 559. **Ind.**—*Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381. **Mass.**—*Attorney General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264. **Neb.**—*Braasch v. Cemetery Assn.*, 69 Neb. 300, 95 N. W. 646. **N. J.**—*Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1; *Duncan v. Hayes*, 22 N. J. Eq. 25. **N. Y.**—*Rochester v. Erickson*, 46 Barb. 92. **Ohio.**—*Hutchinson v. Thompson*, 9 Ohio 52. **Pa.**—*Com. v. Rush*, 14 Pa. 186. **Tex.**—*Dunn v. Austin*, 77 Tex. 139, 11 S. W. 1125. **W. Va.**—*Chambers v. Cramer*, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545.

4. *State Board of Health v. Jersey City*, 55 N. J. Eq. 116, 35 Atl. 835.

5. **D. C.**—*Dewey Hotel Co. v. United States Electric Lighting Co.*, 17 App. Cas. 356. **Ind.**—*Over v. Dehne*, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883. **Me.**—*Sterling v. Littlefield*, 97 Me. 479, 54 Atl. 1108. **Mass.**—*Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844. **N. Y.**—*Ellsworth v. Putnam*, 16 Barb. 565. **N. C.**—*Threadgill v. Anson County*, 99 N. C. 352, 6 S. E. 189. **Va.**—*E. W. Face v. Cherry*, 117 Va. 41, 84 S. E. 10, Ann. Cas. 1917E, 418.

6. **Ga.**—*Burrus v. Columbus*, 105 Ga. 42, 31 S. E. 124. **Mo.**—*Peterson v. Beha*, 161 Mo. 513, 62 S. W. 462. **N. Y.**—*Fisk v. Wilber*, 7 Barb. 395. **R. I.**—*Sprague v. Rhodes*, 4 R. I. 301.

[a] The inadequacy of the legal remedy must be alleged by setting out the facts indicative of such inadequacy. **D. C.**—*Weeks v. Heurich*, 40 App. Cas. 46, Ann. Cas. 1914A, 972. **Ind.**—*Ploughe v. Boyer*, 38 Ind. 115. **Eng.**—*Chastey v. Ackland* (1895), L. R. 2 Ch. Div. 389, 64 L. J. Q. B. 523, 72 L. T. N. S. 845, 43 Wkly. Rep. 627. See 13 STANDARD PROC. 82, et seq.

[b] A judgment at law establishing the nuisance must be shown except where the thing is a nuisance per se, or where the mischief is irreparable and not capable of compensation in damages. *Kennerty v. Etiwan Phosphate Co.*, 17 S. C. 411, 43 Am. Rep. 607.

7. **Cal.**—*Spring Valley Waterworks v. Fifield*, 136 Cal. 14, 68 Pac. 108. **Colo.**—*People ex rel. L'Abbe v. Lake County Dist. Court*, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850. **Ill.**—*Oglesby Coal Co. v. Paseo*, 79 Ill. 164. **Ind.**—*Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478. **N. Y.**—*Whitridge v. Calestock*, 100 Misc. 367, 165 N. Y. Supp. 640. **S. C.**—*Hellams v. Switzer*, 24 S. C. 39.

[a] But in a suit by a solicitor general on information of a citizen as relator, no special injury need be alleged. *Edison v. Ramsey*, 146 Ga. 767, 92 S. E. 513.

8. **Cal.**—*Will v. Sinkwitz*, 41 Cal. 588; *Yolo County v. Sacramento*, 36 Cal. 193. **Ind.**—*Smith v. Fitzgerald*, 24 Ind. 316. **Md.**—*Reese v. Wright*, 98 Md. 272, 56 Atl. 976. **Mo.**—*Baker v. McDaniel*, 178 Mo. 447, 77 S. W. 531; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254. **N. Y.**—*Miller v. Edison Electric Illum. Co.*, 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. (N. S.) 1060; *Garrett v. Wood*, 57 App. Div. 242, 68 N. Y. Supp. 157, 9 N. Y. Ann. Cas. 292. **Ore.**—*Fleischner v. Citizens*, etc. Inv. Co., 25 Ore. 119, 35 Pac. 174. **Tenn.**—*Richi v. Chattanooga Brew. Co.*, 105 Tenn. 651, 58 S. W. 646. **Wis.**—*Wendlandt v. Cavanaugh*, 85 Wis. 256, 55 N. W. 408.

See generally the title "**Prayer**;" and 13 STANDARD PROC. 86, et seq.

Amendments as to prayer, see *infra*, IV, G.

9. See the title "**Amendments and Jeofails**."

to such matters as parties,¹⁰ allegations as to the injury,¹¹ and the prayer.¹² But it is not permissible by amendment to change the action from an equitable to a legal one.¹³

H. PRELIMINARY INJUNCTION.—Pending the hearing on the merits, the court may grant a restraining order, if the injury alleged is of such nature that irreparable damage may result.¹⁴ But the granting or refusing of a preliminary injunction is a matter within the discretion of the court, and not reversible upon appeal unless there is a clear abuse of discretion.¹⁵ If the answer denies all of the equities of the bill or complaint, the preliminary injunction will be dissolved.¹⁶

I. HEARING OR TRIAL.—The court will not permanently enjoin a nuisance until a hearing or trial is had on the merits.¹⁷ It is within

10. *Dana v. Valentine*, 5 Mete. (Mass.) 8. See generally the title "**Parties.**"

[c] **Failure to show title to relief** on the part of some of the plaintiffs will authorize the court to allow an amendment, even after issue joined and evidence published, striking out such plaintiffs. *Dana v. Valentine*, 5 Mete. (Mass.) 8.

11. *Stowe v. Miles*, 39 Conn. 426.

[a] **Plaintiff Aggrieved.**—A petition averring a nuisance to the public and to the inhabitants of the neighborhood but failing to show that complainant was aggrieved may be amended in respect to such latter averment. *Stowe v. Miles*, 39 Conn. 426.

12. *Ennis v. Gilder*, 32 Tex. Civ. App. 351, 74 S. W. 585, prayer for abatement of the nuisance may be introduced by amendment where the original pleading asks only for damages.

[a] **Multifariousness Obviated.** Where the remedy sought is both preventive relief and damages, the multifarious character of the bill may be obviated by striking out of the bill that part of the prayer which asks for damages. *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

13. *Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28. See generally the title "**New Cause of Action or Defense.**"

[a] **Unless by Consent.**—*Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28.

14. **D. C.**—*Standard Oil Co. v. Oeser*, 11 App. Cas. 80. **Ia.**—*Hughes v. Eckerson*, 55 Iowa 641, 8 N. W. 484. **La.**—*Violett v. King*, 46 La. Ann. 78, 14 So. 423. **Mass.**—*Ingraham v. Dunnell*, 5 Mete. 118. **N. J.**—*Rider v. Clarkson*, 77 N. J. Eq. 469, 78 Atl.

676, 140 Am. St. Rep. 614; *Cronin v. Bloemecke*, 58 N. J. Eq. 313, 43 Atl. 605. **N. Y.**—*Wilsey v. Callanan*, 66 Hun 629, 21 N. Y. Supp. 165, 49 N. Y. St. 530. **N. C.**—*Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566; *Evans v. Wilmington, etc. R. Co.*, 96 N. C. 45, 1 S. E. 529. **Pa.**—*Dennis v. Eckhardt*, 3 Grant Cas. 390; *Smith v. Cummings*, 2 Pars. Eq. Cas. 92. **Tex.**—*San Antonio v. Hamilton* (Tex. Civ. App.), 180 S. W. 160. **Wash.**—*Grantham v. Gibson*, 41 Wash. 125, 83 Pac. 14, 111 Am. St. Rep. 1003, 3 L. R. A. (N. S.) 447, excellent case collecting authorities. **W. Va.**—*McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936. **Wis.**—*State ex rel. Zabel v. Grefig*, 164 Wis. 74, 159 N. W. 560. **Can.**—*Alley v. Duchemin*, 2 Pr. Edw. Isl. 266, 340.

[a] **Target Shooting Dangerous to Public, Preliminary Injunction Granted.**—*Wolcott ex rel. Maloney v. Doremus* (Del. Ch.), 95 Atl. 904.

15. *Angell v. Continental Oil Co.*, 19 Idaho 746, 115 Pac. 692.

[a] **Irreparable Injury Doubtful.** The affidavits filed by the defendant render it at least doubtful whether complainant can be said to suffer irreparable injury from the acts of the defendant. Under these conditions a preliminary injunction must be denied. *Nowak v. Baier*, 78 N. J. Eq. 112, 77 Atl. 1062.

16. **Ind.**—*Rayle v. Indianapolis, etc. R. Co.*, 32 Ind. 259. **Miss.**—*Miller v. McDougall*, 44 Miss. 682. **N. Y.**—*Finnegan v. Lee*, 18 How. Pr. 186. **Pa.**—*Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441. **W. Va.**—*Peterson v. Parriott*, 4 W. Va. 42.

17. *Van Bergen v. Van Bergen*, 2

the court's discretion to submit the issues to a jury;¹⁸ but a jury cannot be demanded as a matter of right where the relief prayed for is purely equitable.¹⁹ Whether under disputed facts a nuisance exists is a question of fact for the jury.²⁰

The general rules governing instructions,²¹ verdict,²² and findings,²³ are applicable.

J. JUDGMENT OR DECREE.—The judgment or decree should be specific²⁴ and complete as concerns the relief awarded.²⁵ But it should

Johns. Ch. (N. Y.) 272. See the titles "**Hearing**;" "**Injunctions**."

18. Mich.—*Robinson v. Baugh*, 31 Mich. 290. **N. Y.**—*Parker v. Laney*, 58 N. Y. 469; *Dillon v. Acme Oil Co.*, 49 Hun 565, 2 N. Y. Supp. 289. **Va.** *Miller v. Truehart*, 4 Leigh (31 Va.) 569.

19. Ala.—*Richards v. Daugherty*, 133 Ala. 569, 31 So. 934. **Cal.**—*McCarthy v. Gaston Ridge M. & M. Co.*, 144 Cal. 542, 78 Pac. 7. Mich.—*Robinson v. Baugh*, 31 Mich. 290. **N. J.** *Carlisle v. Cooper*, 21 N. J. Eq. 576. **N. Y.**—*Miller v. Edison Electric Illum. Co.*, 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. (N. S.) 1060. **Wis.**—*Robinson v. Baugh*, 31 Mich. 290.

[a] But a purely legal demand for damages already sustained by a nuisance is triable by a jury, notwithstanding an injunction to restrain the nuisance is also asked for. *Threatt v. Brewer Min. Co.*, 42 S. C. 92, 19 S. E. 1009.

20. *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N. E. 371, Ann. Cas. 1915B, 1054; *Pawlowicz v. American Locomotive Co.*, 90 Misc. 450, 154 N. Y. Supp. 768. See also *supra*. III, F, 2.

21. See the following: **Cal.**—*Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65. **Ga.**—*Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S. E. 193. **N. Y.**—*Dunsbach v. Hollister*, 49 Hun 352, 2 N. Y. Supp. 94. **Ohio.**—*Columbus Gaslight & C. Co. v. Freeland*, 12 Ohio St. 392. **Pa.**—*Price v. Grantz*, 118 Pa. 402, 11 Atl. 794, 4 Am. St. Rep. 601. **Tex.**—*Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556. **Va.** *Jeremy Imp. Co. v. Com.*, 106 Va. 482, 56 S. E. 224.

And see generally the title "**Instructions**."

22. *Cromwell v. Lowe*, 14 Ind. 234. See the title "**Verdict**."

[a] General verdict for damages

sufficient to authorize abatement. *Learned v. Castle* (Cal.), 4 Pac. 191.

[b] All the issues should be determined. *Parker v. Laney*, 58 N. Y. 469.

23. *Baker v. McDaniel*, 178 Mo. 447, 77 S. W. 531. See the title "**Findings and Conclusions**."

24. **Cal.**—*McMenomy v. Band*, 87 Cal. 134, 138, 26 Pac. 795. **Ia.**—*Trulock v. Merte*, 72 Iowa 510, 34 N. W. 307. **Md.**—*Singer v. James*, 130 Md. 382, 100 Atl. 642, excellent case collecting authorities. Mich.—*Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321.

25. **Ala.**—*Roberts v. Vest*, 126 Ala. 355, 28 So. 412. **Conn.**—*Platt v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691. **Mo.**—*Baker v. McDaniel*, 178 Mo. 447, 77 S. W. 531. **N. H.**—*Coe v. Winnepisiogee, etc. Co.*, 37 N. H. 254. **Pa.** *Keppel v. Lehigh, etc. Co.*, 9 Pa. Dist. 219. **Tenn.**—*Richi v. Chattanooga Brew. Co.*, 105 Tenn. 651, 58 S. W. 646.

[a] Money damages may be awarded. *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N. E. 371, Ann. Cas. 1915B, 1054.

[b] Though the nuisance has ceased (1) before the hearing, damages may be awarded where the plaintiff has established his right to an injunction at the time of filing his bill. **Cal.**—*McCarthy v. Gaston Ridge M. & M. Co.*, 144 Cal. 542, 78 Pac. 7. **Ind.**—*Miller v. Gates*, 62 Ind. App. 37, 112 N. E. 538. **N. Y.**—*Whaley v. New York*, 83 App. Div. 6, 81 N. Y. Supp. 1043; *Rosenheimer v. Standard Gaslight Co.*, 39 App. Div. 482, 57 N. Y. Supp. 330. (2) And it has been held that an injunction will be decreed even in this case. *Dean & Chapter Chester v. Smelting Corp.*, 85 L. T. N. S. (Eng.) 67. *Contra*, *Perry v. Howe Co-Op. Creamery Co.*, 125 Iowa 415, 101 N. W. 150.

be so framed as to accomplish the desired relief without doing any unnecessary damage.²⁶

The amount of the costs should be stated in the decree although a decree will not be reversed on this account.²⁷

K. APPEAL. — An appeal may be taken from the granting or refusing to grant a decree against an alleged nuisance.²⁸ If an appeal be taken from a part of a decree, the part appealed from is deemed conclusive and final.²⁹

V. CRIMINAL REMEDY. — A. JURISDICTION AND VENUE. — Questions of jurisdiction³⁰ and venue³¹ in prosecutions for a nuisance are governed in the main by local statutes.

B. INDICTMENT OR INFORMATION. — 1. Description of Offense. a. *In General.* — The information or indictment should set out the essential ingredients of the offense which characterize the public nuisance, setting forth the facts sufficiently to show a prima facie case

26. Cal.—*People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 124 Pac. 692, Ann. Cas. 1913E, 1267 (decree not too broad); *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795. Ga.—*Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315. Ia.—*Trulock v. Merte*, 72 Iowa 510, 34 N. W. 307; *Richards v. Holt*, 61 Iowa 529, 16 N. W. 595. Ky.—*Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133. Mass.—*Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N. E. 371, Ann. Cas. 1915B, 1054. Minn.—*State ex rel. Robertson v. Lane*, 126 Minn. 78, 147 N. W. 951, Ann. Cas. 1915D, 549, 52 L. R. A. (N. S.) 932. Miss.—*Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378, where grievances can be remedied by scientific appliances, court will not decree perpetual injunction. Mo.—*Schaub v. Perkinson Bros. Const. Co.*, 108 Mo. App. 122, 82 S. W. 1094. N. J.—*Cronin v. Bloemcke*, 58 N. J. Eq. 313, 43 Atl. 605; *Cleveland v. Cifizens' Gaslight Co.*, 20 N. J. Eq. 201. N. Y.—*Chamberlain v. Douglas*, 24 App. Div. 582, 48 N. Y. Supp. 710. Wash.—*Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055. Wis.—*Wahrer v. Aldrich*, 161 Wis. 36, 152 N. W. 456.

[a] **Extent of Decree.** — A conservative and moderate decree granting injunctive relief is to be commended when it meets the exigencies of the case, for certainly freedom of action on the part of a citizen ought not to be curtailed more than is necessary for the public welfare or the protection of the rights of some other citizen. *Schaub v. Perkinson Bros.*

Const. Co., 108 Mo. App. 122, 82 S. W. 1094.

[b] Where defendant abated the nuisance in part after the bill was filed, a contention that injunction should not issue because the legal remedy was now adequate was not well taken. *Carlisle v. Cooper*, 21 N. J. Eq. 576.

27. *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N. E. 371, Ann. Cas. 1915B, 1054. See further the title "Costs," 5 STANDARD PROC. 746, et seq.

28. See the title "Appeals," 2 STANDARD PROC. 106, et seq.

29. *State ex rel. English v. Fanning*, 96 Neb. 123, 147 N. W. 215.

30. See generally the statutes, and *Ala.*—*State v. Bell*, 5 Port. 365. *Ky.* *Wilson v. Com.*, 12 B. Mon. 2. *Wash.* *State v. Schaffer*, 31 Wash. 305, 71 Pac. 1088.

See also the title "Jurisdiction."

31. See generally the statutes, and *State v. De Wolfe*, 67 Neb. 321, 93 N. W. 746; also the title "Venue."

[a] Although a nuisance may have its source in another county or state, the venue may be laid in the county and state where the actual consummation of the offense occurs. Ia.—*State v. Smith*, 82 Iowa 423, 48 N. W. 727. N. H.—*State v. Lord*, 16 N. H. 357. Ohio.—*American Strawboard Co. v. State*, 70 Ohio St. 140, 71 N. E. 284. See also *Com. v. Lyons*, 1 Clark (Pa.) 497, 3 Pittsb. L. J. 167.

[b] Where unlawful act becomes effective, determines venue. *American*

and enable the defendant to prepare his defense.³² If the nuisance complained of is statutory, the statutory terms or description must appear.³³ But a substantial compliance with the statute and the language thereof is sufficient.³⁴ It is not necessary to aver that the commission of the act complained of was unnecessary or to negative any other defense,³⁵ unless a statutory description of the nuisance declares certain exceptions; if so, then such exceptions must be negated in the indictment or information.³⁶

b. *Location*.—It is not generally necessary to allege the place where the nuisance is kept or maintained with more certainty than to charge that the offense was committed within the county and state wherein the prosecution is had.³⁷ But if an abatement of the nuisance

Strawboard Co. v. State, 70 Ohio St. 140, 71 N. E. 284.

32. **Haw.**—Territory v. Henriques, 21 Hawaii 50. **Ill.**—Seacord v. People, 121 Ill. 623, 13 N. E. 194. **Ind.**—Keefer v. State, 174 Ind. 588, 92 N. E. 656. **Ky.**—Com. v. Straight Creek Coal & C. Co., 147 Ky. 790, 145 S. W. 738; Louisville & N. R. Co. v. Com., 144 Ky. 558, 139 S. W. 785. **Mo.**—State v. Murray, 237 Mo. 158, 140 S. W. 899. **Neb.**—State v. Kendall, 38 Neb. 817, 57 N. W. 525. **N. J.**—State v. Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299. **N. Y.**—People v. Kings County Iron Foundry Co., 209 N. Y. 207, 102 N. E. 598; People v. Bink, 151 App. Div. 271, 135 N. Y. Supp. 733. **N. D.**—State v. Kruse, 19 N. D. 203, 124 N. W. 385; State v. Ball, 19 N. D. 782, 123 N. W. 826. **Ore.**—State v. Waymire, 52 Ore. 281, 97 Pac. 46, 132 Am. St. Rep. 699, 21 L. R. A. (N. S.) 56. **Pa.**—Com. v. Ashley Borough, 37 Pa. Super. 254. **Can.**—Rex v. Toronto R. R. Co., 10 Ont. L. R. 26, 5 Ont. W. R. 621.

[a] Where the definition of the nuisance contains generic terms, it is not sufficient to allege the species of the crime, but the pleader must descend to particulars. State v. Southern Indiana Gas Co., 169 Ind. 124, 81 N. E. 1149, 13 Ann. Cas. 908, conclusions will not suffice.

[b] When a thing is not a nuisance of itself, but becomes so by special circumstances, same must be alleged. Seacord v. People, 121 Ill. 623, 13 N. E. 194.

For a form of information or indictment, see 9 STANDARD PROC. 885, et seq.

33. State v. Osgood, 85 Me. 288, 27

Atl. 154; Com. v. Lavonsair, 132 Mass. 1.

34. **D. C.**—Moses v. United States, 16 App. Cas. 428, 50 L. R. A. 532. **Ill.**—Seacord v. People, 121 Ill. 623, 13 N. E. 194. **Kan.**—State v. Wahl, 35 Kan. 608, 11 Pac. 911. **Ky.**—Illinois Cent. R. Co. v. Com., 29 Ky. L. Rep. 756, 96 S. W. 467. **Me.**—State v. Stevens, 40 Me. 559. **Mass.**—Com. v. Buxton, 10 Gray 9. **Minn.**—St. Paul v. Hennessy, 38 Minn. 94, 35 N. W. 576. **N. J.**—State v. Middlesex, etc. Co., 67 N. J. L. 14, 50 Atl. 354. **Ore.**—State v. Bergman, 6 Ore. 341.

See generally 12 STANDARD PROC. 447, et seq.

35. State v. Atwood, 54 Ore. 526, 102 Pac. 295, 104 Pac. 195, 21 Ann. Cas. 516. See generally 12 STANDARD PROC. 350, et seq.

36. State v. Tamler, 19 Ore. 528, 25 Pac. 71, 9 L. R. A. 853. See generally 12 STANDARD PROC. 458, et seq.

37. **Ill.**—Seacord v. People, 121 Ill. 623, 13 N. E. 194, affirming 22 Ill. App. 279. **Ind.**—Dronberger v. State, 112 Ind. 105, 13 N. E. 259; Huber v. State, 25 Ind. 175; State v. Staker, 3 Ind. 570. **Ia.**—Jasper v. Sparham, 125 Iowa 464, 161 N. W. 134; State v. Crogan, 8 Iowa 523. **Ky.**—King v. Com., 154 Ky. 829, 159 S. W. 593, 48 L. R. A. (N. S.) 253; Ehrlick v. Com., 33 Ky. L. Rep. 979, 112 S. W. 565. **Me.**—State v. Stevens, 40 Me. 559. **Mass.**—Com. v. Shea, 150 Mass. 314, 23 N. E. 47; Com. v. Welsh, 1 Allen 1. **Mich.**—People v. Saunders, 29 Mich. 269. **Miss.**—Handy v. State, 63 Miss. 207, 56 Am. Rep. 803. **Mont.**—State v. Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666. **N. H.**—State v. Prescott, 33 N. H. 212. **N. J.**—State v. Pennsylvania R. Co., 84 N. J. L. 550, 87 Atl. 86.

is an object of the prosecution, the place where it is maintained should be described sufficiently to enable the officer charged with execution of the order to act understandingly.³⁸

c. *Time*.—The time when the alleged nuisance was committed must be alleged with certainty.³⁹ But if the nuisance alleged is a continuing one, great particularity as to time is not required,⁴⁰ though under some circumstances, time is held material where the act is a continuing one, and precision of averment in reference thereto is required.⁴¹ It must, however, appear that the act or offense was committed before the finding of the indictment and within the statute of limitations.⁴²

d. *Intent and Knowledge*.—It is not necessary to allege that the defendant had a criminal or evil intent in maintaining the nuisance alleged.⁴³ And no averment that the defendant knowingly maintained the annoyance is essential.⁴⁴

N. D.—*State v. Kelly*, 22 N. D. 5, 132 N. W. 223, Ann. Cas. 1913E, 974; *State v. Ball*, 19 N. D. 782, 123 N. W. 826; *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883. **Pa.**—*Com. v. McCormick*, 5 Pa. Dist. 535. **S. D.**—*State v. Cambron*, 20 S. D. 282, 105 N. W. 241. **Wis.**—*Jenks v. State*, 17 Wis. 665. **Can.** *Rex v. Kay*, 38 N. Brunsw. 536.

[a] **Names of persons** (1) **near whose dwelling-houses** the alleged nuisance was erected and maintained need not be given (*Dronberger v. State*, 112 Ind. 105, 13 N. E. 259), (2) though if made they must be proved substantially, "some of the cases say precisely," as made. *Dronberger v. State*, 112 Ind. 105, 13 N. E. 259. See also *State v. Kelly*, 22 N. D. 5, 132 N. W. 223, Ann. Cas. 1913E, 974.

[b] **If the locality becomes part of description of offense**, it must be aptly averred, however. *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *State v. Davis*, 80 Me. 488, 15 Atl. 41.

Averments as to place generally, see 12 STANDARD PROC. 426, et seq.

38. **Ill.**—*Seacord v. People*, 121 Ill. 623, 13 N. E. 194. **Ind.**—*Dronberger v. State*, 112 Ind. 105, 13 N. E. 259. **Ia.**—*State v. Schilling*, 14 Iowa 455. **Ky.**—*King v. Com.*, 154 Ky. 829, 159 S. W. 593, 48 L. R. A. (N. S.) 253; *Com. v. T. J. Megibben Co.*, 101 Ky. 195, 40 S. W. 694. **Me.**—*State v. Stevens*, 40 Me. 559. **Mass.** *Com. v. Shea*, 150 Mass. 314, 23 N. E. 47. **Miss.**—*Handy v. State*, 63 Miss. 207, 56 Am. Rep. 803. **N. D.** *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883. **Ohio.**—*Matthews v. State*, 25 Ohio St. 536. **Tenn.**—*State v. Sneed*,

16 Lea 450, 1 S. W. 282. **Wis.**—*Jenks v. State*, 17 Wis. 665. **Eng.**—*Rex v. Taylor*, 3 Barn. & C. 502, 5 D. & R. 422, 3 L. J. K. B. O. S. 68, 10 E. C. L. 231, 107 Eng. Reprint 820.

39. **Ky.**—*Com. v. Louisville & N. R. Co.*, 26 Ky. L. Rep. 493, 82 S. W. 231. **Me.**—*State v. Davis*, 80 Me. 488, 15 Atl. 41. **N. J.**—*State v. Pennsylvania R. Co.*, 84 N. J. L. 550, 87 Atl. 86. **Wash.** *State v. Schaffer*, 31 Wash. 305, 71 Pac. 1088.

Averments as to time generally, see 12 STANDARD PROC. 411, et seq.

40. *State v. Dufour*, 123 Minn. 451, 143 N. W. 1126, 49 L. R. A. (N. S.) 792 (reviewing cases); *State v. Pennsylvania R. Co.*, 84 N. J. L. 550, 87 Atl. 86.

41. **Me.**—*State v. Small*, 80 Me. 452, 14 Atl. 942; *State v. Cofren*, 48 Me. 364. **Mass.**—*Com. v. Dunster*, 145 Mass. 101, 13 N. E. 350 (liquor nuisance); *Com. v. Connors*, 116 Mass. 35; *Wells v. Com.*, 12 Gray 326, illustrates sufficient averment. **Tex.**—*Fleming v. State*, 28 Tex. App. 234, 12 S. W. 605.

[a] **Proof as to Time Must Conform to the Allegation.**—*Com. v. Briggs*, 11 Mete. (Mass.) 573.

42. *State v. Waltz*, 74 Iowa 610, 38 N. W. 494; *State v. Schilling*, 14 Iowa 455; *State v. Kruse*, 19 N. D. 203, 124 N. W. 385; *State v. Ball*, 19 N. D. 782, 123 N. W. 826.

43. *Com. v. Shea*, 150 Mass. 314, 23 N. E. 47; *State v. Towler*, 13 R. I. 661.

Averring intent generally, see 12 STANDARD PROC. 402, et seq.

44. *State v. Ryan*, 81 Me. 107, 16

e. *Public Character of Nuisance.*—The accusation should allege facts showing the public character of the nuisance charged as the offense.⁴⁵

When Nuisance Involves Violation of Public Duty.—An allegation of the official or public duty and the special circumstances creating it must be distinctly alleged, in all cases involving a neglect of public duty resulting in a nuisance.⁴⁶

2. *Conclusion.*—At common law it is necessary to allege in conclusion that the acts complained of were “to the common nuisance (*ad commune nocumentum*) of all of the citizens of the state there residing, inhabiting and passing,” or words of similar import.⁴⁷ But this is no longer necessary in some states.⁴⁸

C. TRIAL.⁴⁹—1. *Variance.*—The general rule obtains in a prosecution for a nuisance that the issues of fact raised by the pleadings and the proof must substantially correspond.⁵⁰

Atl. 406. But see *Stein v. State*, 37 Ala. 123.

45. See the following: *Ind.*—*State v. Houck*, 73 Ind. 37. *Ia.*—*State v. Smith*, 82 Iowa 423, 48 N. W. 727. *Ky.*—*Illinois Cent. R. Co. v. Com.*, 29 Ky. L. Rep. 754, 96 S. W. 467. *Me.*—*State v. Haines*, 30 Me. 65. *Mass.*—*Com. v. Sweeney*, 131 Mass. 579. *Mich.*—*Messersmidt v. People*, 46 Mich. 437, 9 N. W. 485. *Mo.*—*State v. Brown*, 66 Mo. App. 280. *N. J.*—*State v. Uvalde Asphalt Pav. Co.*, 68 N. J. L. 512, 53 Atl. 299, and that its noisome effects reached the public highways or dwelling-houses of the citizens of the city. *N. Y.*—*People v. Kings County Iron Foundry Co.*, 209 N. Y. 207, 102 N. E. 598. *Pa.*—*Barker v. Com.*, 19 Pa. 412.

[a] *Sufficient Averment.*—Where the indictment alleged that the acts of the defendant injured and endangered the comfort and repose, health and safety of the persons using the streets and living in the dwellings, buildings and premises in the neighborhood, it was held sufficient; the court said the expression “any considerable number of persons” is used solely to differentiate a public nuisance from a private nuisance. But a considerable number of persons does not mean, necessarily, a very great or any particular number of persons. *People v. Kings County Iron Foundry Co.*, 209 N. Y. 207, 102 N. E. 598.

[b] The general conclusion, “to the great injury, annoyance and common nuisance of all the citizens of the state,” etc., does not supply the defect in the

main body of the allegation. *State v. Houck*, 73 Ind. 37.

46. *Ky.*—*Com. v. Kinnaird*, 18 Ky. L. Rep. 647, 37 S. W. 840, members of city council. *N. J.*—*State v. Middlesex, etc. Co.*, 67 N. J. L. 14, 50 Atl. 354, traction company for failure to keep streets in repair. *N. C.*—*State v. Hall*, 97 N. C. 474, 1 S. E. 683, mayor and alderman.

47. *Ind.*—*Mains v. State*, 42 Ind. 327, 13 Am. Rep. 364. *Mass.*—*Com. v. Sweeney*, 131 Mass. 579; *Com. v. Kimball*, 7 Gray 328. *Pa.*—*Com. v. Mohn*, 52 Pa. 243, 91 Am. Dec. 153.

48. *Com. v. Enright*, 98 Ky. 635, 33 S. W. 1111, quoted with approval in *Illinois Cent. R. Co. v. Com.*, 29 Ky. L. Rep. 756, 96 S. W. 467, objection was made to the indictment because it did not contain the words “to the common nuisance of all good citizens of the commonwealth residing in the neighborhood or passing by,” or other words of similar import, and the court held that as the acts stated in the indictment in themselves constituted a nuisance, and they were set out in the manner and with the degree of certainty required by the code, that the omission of the words quoted did not render the indictment defective.

49. See generally the title “*Trial*.”
50. See the following: *Ark.*—*West v. State*, 71 Ark. 144, 71 S. W. 483, state must establish its case in all essential particulars. *Ind.*—*Dronberger v. State*, 112 Ind. 105, 13 N. E. 259; *State v. Wabash Paper Co.*, 21 Ind. App. 167, 48 N. E. 653 (rehearing denied, 51 N. E. 949); *Fulk v. State*,

2. **Evidence.**—Questions of evidence are fully treated in another work.⁵¹

3. **Questions of Fact.**⁵²—Whether the state of facts complained of amounts to a nuisance is a question for the jury,⁵³ unless the same amounts to a nuisance per se, in which case it is the duty of the court to so declare it.⁵⁴

D. **SENTENCE AND JUDGMENT.**⁵⁵—Under the rules of the common law a sentence of fine or imprisonment or both was the usual penalty for maintaining a nuisance.⁵⁶ Statutes provide similar penalties.⁵⁷

Abatement.—If the information or indictment charges a continuing nuisance an order of abatement may, upon conviction of defendant, be ordered by the court.⁵⁸

19 Ind. App. 356, 49 N. E. 465. **Ind. Ter.**—Carter v. United States, 1 Ind. Ter. 342, 37 S. W. 204. **Ia.**—Jasper v. Sparham, 125 Iowa 464, 161 N. W. 134. **Me.**—State v. Beal, 94 Me. 520, 48 Atl. 124. **Mass.**—Com. v. Harris, 101 Mass. 29; Com. v. Gallagher, 1 Allen 592; Com. v. Howe, 13 Gray 26. **Mo.**—State v. Eyermann, 115 Mo. App. 660, 90 S. W. 1168. **N. Y.**—People v. Townsend, 3 Hill 479. **N. C.**—State v. Wolfe, 112 N. C. 889, 17 S. E. 528; State v. Holman, 104 N. C. 861, 10 S. E. 758. **Pa.**—Com. v. Vansickle, 4 Clark 104, 7 Pa. L. J. 82.

See generally the title "**Variance and Failure of Proof.**"

[a] Only the nuisance complained of and specifically charged in the information can be proved. Com. v. Brown, 13 Met. (Mass.) 365; Chute v. State, 19 Minn. 271.

[b] **Material Variance Fatal.**—Dennis v. State, 91 Ind. 291.

[c] **Redundancy of Proof Not Variance.**—Chute v. State, 19 Minn. 271.

[d] **No Variance if Proof Pro Tanto Supports Charge.**—State v. Beal, 94 Me. 520, 48 Atl. 124.

51. See 9 ENCY. OF EV. 11, et seq.

52. See generally the title "**Province of Judge and Jury.**"

53. **U. S.**—Hickerson v. United States, 2 Hayw. & H. 228, 30 Fed. Cas. No. 18,301. **N. J.**—State v. Erie R. Co., 83 N. J. L. 231, 84 Atl. 698. **Pa.** Com. v. Yost, 11 Pa. Super. 323, 344. Compare *supra*, III, F, 2.

54. **N. C.**—State v. Wolfe, 112 N. C. 889, 17 S. E. 528. **Pa.**—Com. v. Kemeel, 30 Pa. Super. 199; Com. v. Yost, 11 Pa. Super. 323, 344. **Vt.**—State v. Woodward, 23 Vt. 92.

55. See generally the title "**Sentence and Judgment.**"

56. *Slaughter v. People*, 2 Doug. (Mich.) 334, and note; *State v. Noyes*, 30 N. H. 279.

57. See the statutes, and **Cal.**—Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688; Matter of Kurtz, 68 Cal. 412, 9 Pac. 449. **Ia.**—State v. Munzenmaier, 24 Iowa 87. **Me.**—State v. Haines, 30 Me. 65. **Mich.**—Crippen v. People, 8 Mich. 117. **Wash.**—State v. Paggett, 8 Wash. 579, 36 Pac. 487.

58. **Fla.**—Palatka & I. R. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395. **Ky.**—Ehrlick v. Com., 125 Ky. 742, 102 S. W. 289, 128 Am. St. Rep. 269, 10 L. R. A. (N. S.) 995; *Respass v. Com.*, 31 Ky. L. Rep. 371, 102 S. W. 331; *Enright v. Com.*, 31 Ky. L. Rep. 442, 102 S. W. 799. **Me.**—State v. Beal, 94 Me. 520, 48 Atl. 124; State v. Haines, 30 Me. 65. **Mo.**—State v. Murray, 237 Mo. 158, 140 S. W. 899. **N. H.**—State v. Noyes, 30 N. H. 279. **N. Y.**—People v. High Ground Dairy Co., 166 App. Div. 81, 151 N. Y. Supp. 710. **Pa.**—Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570. **Tenn.**—Wright v. State, 130 Tenn. 279, 170 S. W. 57. **Wash.**—Coffer v. Territory, 1 Wash. 325, 25 Pac. 632, 11 L. R. A. 296. **W. Va.**—Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616.

[a] **Destruction of building** should not be ordered unless it is found to be absolutely necessary. *Shepard v. People*, 40 Mich. 487.

[b] **But the abatement of a nuisance does not follow as of course upon conviction, but it is discretionary with the court.** **Me.**—State v. Beal, 94 Me. 520, 48 Atl. 124. **Mich.**—Crippen v. People, 8 Mich. 117. **Wash.**—State v. Paggett, 8 Wash. 579, 36 Pac. 487.

E. REVIEW.⁵⁹ — A writ of error lies to review the judgment of conviction;⁶⁰ or an appeal may be taken.⁶¹

[c] **Character of Nuisance Immaterial.**—(1) An abatement may be ordered whether the nuisance be moral or physical. *Bollinger v. Com.*, 98 Ky. 574, 35 S. W. 553. (2) If the party convicted is an employe or servant, an order to abate the nuisance maintained on the employer's property would be obviously improper. *State v. Paggett*, 8 Wash. 579, 36 Pac. 487.

[d] No judgment of abatement will be ordered (1) if the rights of innocent third parties would be affected

thereby. *State v. Haines*, 30 Me. 65. (2) But the fact that the nuisance is located upon the land of a stranger is no bar to the enforcement of the abatement order. *Delaware Division Canal Co. v. Com.*, 60 Pa. 367, 100 Am. Dec. 570.

59. See generally the titles "Review;" "Writ of Error."

60. *Crippen v. People*, 8 Mich. 117.

61. *Illinois Cent. R. Co. v. Com.*, 29 Ky. L. Rep. 754, 96 S. W. 467.

NULLITY SUIT. — See Marriage.

NUL TIEL CORPORATION. — See Corporations.

NUL TIEL RECORD

By the Editorial Staff.

I. DEFINITION AND GENERAL STATEMENT, 697

II. CONCLUSION OF PLEA, 698

III. TRIAL UPON ISSUE FORMED, 698

CROSS-REFERENCES:

Nul tiel record as proper plea in debt or scire facias on recognizance, see "Recognizances and Bail;" in action on bond, see 4 STANDARD PROC. 515; in action on replevin bond, see the title "Replevin;" to judgments upon proceeding by scire facias to revive, see 16 STANDARD PROC. 518.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND GENERAL STATEMENT.—A plea of nul tiel record literally means "no such record."¹

Scope of and Issue Raised by Plea.—Nul tiel record is the proper plea to an action founded upon a record,² and puts in issue the existence of the record;³ matters of special defense cannot be shown under

1. Cyclopedic Law Dict., 640.

2. 6 STANDARD PROC. 488; 7 STANDARD PROC. 64, 76.

[a] Defects appearing on the face of the record may be taken advantage of upon its production under a plea of nul tiel record. **U. S.**—Hill v. Mendenhall, 21 Wall. 453, 22 L. ed. 616. **Ill.**—Bank of Eau Claire v. Reed, 232 Ill. 238, 83 N. E. 820, 122 Am. St. Rep. 66, want of jurisdiction. **N. Y.**—Hoffheimer v. Stiefel, 17 Misc. 236, 39 N. Y. Supp. 714.

3. 6 STANDARD PROC. 488; 7 STANDARD PROC. 76; 16 STANDARD PROC. 380.

As proper plea to put in issue the existence of (1) a domestic judgment (see 16 STANDARD PROC. 379; also 6 STANDARD PROC. 489); (2) a judgment of a court of a sister state (see 16 STANDARD PROC. 400; also 6 STANDARD PROC. 489; 7 STANDARD PROC. 65); (3) of a foreign judgment (see 7 STANDARD PROC. 65; 16 STANDARD PROC. 412); (4) of judgments of a court not of record (see 7 STANDARD PROC. 65); (5) of a decree in equity, see 16 STANDARD PROC. 402.

In an action on a bond the breach assigned being a failure to pay a judg-

a plea of nul tiel record, however.⁴

A general denial, under the code system of pleading, is equivalent to a plea of nul tiel record.⁵

II. CONCLUSION OF PLEA.—As a plea of nul tiel record raises a question for the court,⁶ it should conclude with a verification, and not to the country,⁷ unless charged by statute.⁸

III. TRIAL UPON ISSUE FORMED.—The old plea of nul tiel record creates an issue to be determined by the court on an inspection and examination of the record.⁹ Such a plea raises no issue to be determined by the jury,¹⁰ unless the statute provides otherwise.¹¹ In fact the issue raised should be determined by the court before the jury is sworn,¹² or at least before any issue is submitted to them.¹³ Such plea is met by the production of the record itself valid upon its face,¹⁴ or by an exemplification duly authenticated.¹⁵

ment, nul tiel record is a proper plea to test the existence of the judgment. See 4 STANDARD PROC. 515.

4. See 16 STANDARD PROC. 380, 402.

5. 16 STANDARD PROC. 380, 402.

[a] **The general denial puts nothing more in issue** than does the plea of nul tiel record. *Brown v. Balde*, 3 Lans. (N. Y.) 283; *Hoffheimer v. Stiefel*, 17 Misc. 236, 39 N. Y. Supp. 714.

6. 6 STANDARD PROC. 489; 7 STANDARD PROC. 76.

7. 16 STANDARD PROC. 379, 403. See 6 STANDARD PROC. 489.

8. 16 STANDARD PROC. 403. See 6 STANDARD PROC. 489.

9. 16 STANDARD PROC. 522; 7 STANDARD PROC. 76.

[a] **No witnesses** are examined. *Davidson v. Carter*, 9 Ga. 501; *Simpson v. Watson*, 15 Mo. App. 425.

10. **U. S.**—*Bassett v. United States*, 9 Wall. 38, 19 L. ed. 548. **Ga.**—*Davidson v. Carter*, 9 Ga. 501. **Ill.**—*Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820, 122 Am. St. Rep. 66. **Ky.** *Carson v. Pearl*, 4 J. J. Marsh.

92. **Mass.**—*Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **Mo.**—*Simpson v. Watson*, 15 Mo. App. 425. **Pa.** *Koons v. Headley*, 49 Pa. 168; *Oliver v. Foster*, 3 Clark 388, 5 Pa. L. J. 335. **R. I.**—*Cambio v. Ibello*, 32 R. I. 307, 79 Atl. 789; *State v. Sutcliffe*, 16 R. I. 410, 16 Atl. 710. **Vt.**—*Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345.

See 16 STANDARD PROC. 383, note.

11. *Fasnacht v. Stehn*, 53 Barb. (N. Y.) 650, 5 Abb. Pr. (N. S.) 338; *Trotter v. Mills*, 6 Wend. (N. Y.) 512, justice's judgment not one of record.

12. *Koons v. Headley*, 49 Pa. 168.

13. *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345.

14. **U. S.**—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616. **Mass.**—*Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **N. Y.**—*Hoffheimer v. Stiefel*, 17 Misc. 236, 39 N. Y. Supp. 714.

See also 6 STANDARD PROC. 489.

15. *Hill v. Mendenhall*, 21 Wall. (U. S.) 453, 22 L. ed. 616; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356.

OATH AND AFFIRMATION

By the Editorial Staff.

I. DEFINITIONS AND DISTINCTIONS, 699

II. BY WHOM ADMINISTERED, 700

A. *By Court or Its Officers*, 700

B. *Various Enumerated Officers*, 700

III. FORM AND SUFFICIENCY, 702

IV. REFUSAL TO ADMINISTER OR TO TAKE OATH, 704

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CROSS-REFERENCES:

Blasphemy;	Officers;
Depositions;	Perjury;
Information and Belief;	Profanity;
Juries and Jurors;	Verification;
Witnesses.	

For further references and cross-references, see the index to this work and the cross-references throughout this title.

I. DEFINITIONS AND DISTINCTIONS. — An oath is a declaration or promise¹ made by calling on God to witness the truth of what

1. **Kan.**—*In re* Heath, 40 Kan. 333, 19 Pac. 926. **La.**—*State v.* Washington, 49 La. Ann. 1602, 22 So. 841, 42 L. R. A. 553. **Pa.**—*Cubbison v. McCreary*, 2 Watts & S. 262.

[a] For other definitions, see the following: **Ala.**—*Birmingham Ry., L. & P. Co. v. Jung*, 161 Ala. 461, 49 So. 434; *Blocker v. Burness*, 2 Ala. 354. **Conn.**—*Arnold v. Middletown*, 41 Conn. 206; *Atwood v. Welton*, 7 Conn. 66. **Idaho.**—*State v. Jones*, 28 Idaho 428, 154 Pac. 378. **La.**—*State v. Washington*, 49 La. Ann. 1602, 22 So. 841, 42 L. R. A. 553. **Neb.**—*Pumphrey v.*

State, 84 Neb. 636, 122 N. W. 19, 23 L. R. A. (N. S.) 1023; *Priest v. State*, 10 Neb. 393, 6 N. W. 468. **Ohio.** *Brook v. Milligan*, 10 Ohio 121. **Pa.** *Blair v. Seaver*, 26 Pa. 274; *Respublica v. Newell*, 3 Yeates 407, 2 Am. Dec. 381. **Eng.**—*Omychund v. Barker*, 1 Atk. 21, 26 Eng. Reprint 15.

[b] A judicial oath is one taken in any suit, matter or cause pending in a court. *State v. Dreifus*, 38 La. Ann. 877; *State v. Scatena*, 84 Minn. 281, 87 N. W. 764.

[c] A non-judicial or extra-judicial oath is one taken ex parte before an

is said. The word "oath" includes affirmation,² or any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully and truthfully.³

II. BY WHOM ADMINISTERED.⁴—**A. BY COURT OR ITS OFFICERS.**—Courts or the judges thereof have the inherent power to administer an oath or affirmation connected with any matter pending before them.⁵ But an oath administered by the clerk or other person in open court, under its direction, is an oath administered by the court.⁶

B. VARIOUS ENUMERATED OFFICERS.—In the absence of statute or constitutional provision permitting officers, as such, to administer oaths or affirmations, they have no authority or power to do so.⁷ But the

officer having authority to administer it. *State v. Dreifus*, 38 La. Ann. 877; *State v. Scatena*, 84 Minn. 281, 87 N. W. 764.

[d] **A corporal oath** is one in which there is some bodily manifestation accompanying the taking of the oath. **Ind.**—*Jackson v. State*, 1 Ind. 184, taking oath with uplifted hand or touching the Bible. **Ky.**—*Com. v. Jarboe*, 89 Ky. 143, 12 S. W. 138, touching the Bible. **N. H.**—*State v. Norris*, 9 N. H. 96. **Pa.**—*Respublica v. Newell*, 3 Yeates 407, 2 Am. Dec. 381.

[e] **Solemn oath and corporal oath** are synonymous terms. *Jackson v. State*, 1 Ind. 184; *Com. v. Jarboe*, 89 Ky. 143, 12 S. W. 138.

2. Ky.—*Com. v. Jarboe*, 89 Ky. 143, 12 S. W. 138. **Me.**—*State v. Welch*, 79 Me. 99, 8 Atl. 348. **N. Y.**—*People v. Nolte*, 19 Misc. 674, 44 N. Y. Supp. 443. **Ohio.**—*In re Sage*, 24 Ohio Cir. Ct. (N. S.) 7. **Okla.**—*Checotah v. Eufaula*, 31 Okla. 85, 119 Pac. 1014. **Tex.**—*Riddles v. State* (Tex. Crim.), 46 S. W. 1058.

3. Minn.—*State v. Gay*, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389. **N. Y.**—*People v. Nolte*, 19 Misc. 674, 44 N. Y. Supp. 443. **Okla.**—*Checotah v. Eufaula*, 31 Okla. 85, 119 Pac. 1014.

[a] **An oath embraces every method** whereby the conscience of a person is obligated to testify to the truth. *In re Sage*, 24 Ohio Cir. Ct. (N. S.) 7.

[b] **A professional statement made by an attorney** to the court is the equivalent of an oath. *In re Winslow's Will* (Iowa), 122 N. W. 971.

Form and sufficiency, see *infra*, III.

4. Oath to grand jury, see 10 STANDARD PROC. 484.

Oath to appraisers of property seized

by attachment, see 3 STANDARD PROC. 531.

5. U. S.—*United States v. Ambrose*, 2 Fed. 556. **Idaho.**—*Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110. **Ia.**—*State v. Caywood*, 96 Iowa 367, 65 N. W. 385. **Mich.**—*Keator v. People*, 32 Mich. 484. **Ohio.**—*State v. Townley*, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636. **Okla.**—*Milton v. State*, 7 Okla. Crim. 407, 124 Pac. 81. **S. D.**—*Guernsey v. Tuthill*, 12 S. D. 584, 82 N. W. 190.

6. Cal.—*Oaks v. Rodgers*, 48 Cal. 197. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Server v. State*, 2 Blackf. 35. **Ia.**—*State v. Caywood*, 96 Iowa 367, 65 N. W. 385. **La.**—*State v. Dreifus*, 38 La. Ann. 877, though the officer is incompetent. **Mich.**—*Keator v. People*, 32 Mich. 484. **N. Y.**—*People v. Nolte*, 19 Misc. 674, 44 N. Y. Supp. 443. **Ohio.**—*State v. Townley*, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636. **Okla.**—*Milton v. State*, 7 Okla. Crim. 407, 124 Pac. 81. **Pa.**—*Com. v. Jongrass*, 181 Pa. 172, 37 Atl. 207; *Com. v. McCue*, 46 Pa. Super. 416. **Tenn.**—*Ayrs v. State*, 5 Coldw. 26; *Stephens v. State*, 1 Swan 157, even though the person actually administering the oath is not a legally appointed deputy clerk. **Can.**—*Reg. v. Coleman*, 30 Ont. 93.

7. Thomas v. Boise City, 25 Idaho 522, 138 Pac. 1110; *Anderson v. Com.* (Ky.), 117 S. W. 364; *Tompert v. Lithgow*, 1 Bush (Ky.), 176; *Trabue's Heirs v. Holt*, 2 Bibb (Ky.), 393.

[a] **An oath administered by one without authority** is of no effect. **Ind.**—*Albee v. May*, 8 Blackf. 310. **Ky.**—*Tompert v. Lithgow*, 1 Bush 176. **Tenn.**—*Graham v. Caldwell*, 8 Baxt. 69. **Can.**—*Reg. v. McIntosh*, 12 N. Brunsw. 372.

statutes variously provide who may administer oaths,⁸ those named being county officers,⁹ clerks of the court,¹⁰ or their deputies,¹¹ justices¹²

[b] If a statute does not designate the particular officer before whom oath may be taken, it may be done before any officer having general authority under the public statutes to administer oaths. *United States v. Winchester*, 2 McLean 135, 28 Fed. Cas. No. 16,739; *Dunn v. Ketchum*, 38 Cal. 93.

8. See generally the statutes.

[a] An oath administered by a de facto holder of an office, the occupant of which is given the authority to administer oaths, is as binding and valid as that of the de jure holder of such office. *Walker v. State*, 107 Ala. 5, 18 So. 393; *Izer v. State*, 77 Md. 110, 26 Atl. 282.

9. See the statutes, and *State v. Jones*, 28 Idaho 428, 154 Pac. 378; *Wheat v. Ragsdale*, 27 Ind. 191, clerk of board of commissioners.

[a] County (1) clerks (Colo.—*Roberts v. People*, 9 Colo. 458, 13 Pac. 630. Ill.—*Tabor v. People ex rel. Rumsey*, 84 Ill. 202. Neb.—*Merriam v. Coffee*, 16 Neb. 450, 20 N. W. 389), (2) or their deputies. Colo.—*Roberts v. People*, 9 Colo. 458, 13 Pac. 630. Mich.—*Torrans v. Hicks*, 32 Mich. 307. Neb.—*Merriam v. Coffee*, 16 Neb. 450, 20 N. W. 389.

[b] Prosecuting Attorney.—*Steward v. State*, 180 Ind. 397, 103 N. E. 316.

[c] Sheriff, or his deputy. *Conable v. Hylton*, 10 Iowa 593. That he may administer oath to appraisers of attached property, see 3 STANDARD PROC. 531.

[a] Recorders (1) (Ky.—*Henderson v. Com.*, 122 Ky. 296, 91 S. W. 1141. Nev.—*Arrington v. Wittenberg*, 12 Nev. 99. Pa.—*Gibbons v. Sheppard*, 2 Brewst. 1. Can.—*Smith v. Lawrence*, 3 U. C. Q. B. [O. S.] 18), (2) and their deputies. *Henderson v. Com.*, 122 Ky. 296, 91 S. W. 1141.

[e] Auditors.—*Garneau v. Port Blakeley Mill Co.*, 8 Wash. 467, 36 Pac. 463.

[f] Treasurers or their deputies. *Maloney v. Mahar*, 1 Mich. 26.

10. Cal.—*Payne v. San Francisco*, 3 Cal. 122. Ga.—*Graves v. Warner*, 26 Ga. 620. Ill.—*Fergus v. Hoard*, 15 Ill. 357. Ind.—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Wheat v. Rags-*

dale, 27 Ind. 191. Kan.—*Ferguson v. Smith*, 10 Kan. 396. Ky.—*Anderson v. Com.*, 117 S. W. 364; *Laha v. Daly's Admr.*, 1 Bush 221. La.—*State v. Isaac*, 3 La. Ann. 359, only in open court. Mich.—*Greenvault v. Farmers' & Mechanics' Bank*, 2 Doug. 498, cannot administer oath in vacation, but only in open court. Pa.—*Gibbons v. Sheppard*, 2 Brewst. 1; *Roberts v. Central Passenger Ry. Co.*, 1 Brewst. 538, only in open court. P. R.—*People v. Purcell*, 10 Porto Rico 222. Tenn.—*Ayrs v. State*, 5 Coldw. 26; *Campbell v. Boulton*, 3 Baxt. 354, either in term or vacation, by express provision. Tex.—*Smith v. Wilson*, 15 Tex. 132; *Carlee v. Smith*, 8 Tex. 134. W. Va.—*Parker v. Clark*, 7 W. Va. 467; *Chesapeake & O. Ry. Co. v. Patton*, 5 W. Va. 234.

11. Ala.—*Walker v. State*, 107 Ala. 5, 18 So. 393. Ga.—*Graves v. Warner*, 26 Ga. 620. Ind.—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Muir v. State*, 8 Blackf. 154, deputy must be duly qualified. Ia.—*Finn & Co. v. Rose*, 12 Iowa 565; *Wood v. Bailey*, 12 Iowa 46. Kan.—*Ferguson v. Smith*, 10 Kan. 396. Ky.—*Ellison v. Stevenson*, 6 Mon. 271. N. M.—*Bucher v. Thompson*, 7 N. M. 115, 32 Pac. 498. Ohio.—*Warwick v. State*, 25 Ohio St. 21. Pa.—*Reigart v. McGrath*, 16 Serg. & R. 65. Tenn.—*Atkinson v. Micheaux*, 1 Humph. 312 (only qualified deputy); *Campbell v. Boulton*, 3 Baxt. 354. W. Va.—*Chesapeake & O. Ry. Co. v. Patton*, 5 W. Va. 234.

[a] Assistant clerk has no such power unless it is specially delegated to him by the court. *Ellison v. Stevenson*, 6 Mon. (Ky.) 271.

12. Ala.—*Bloodgood v. Smith*, 14 Ala. 423. Ark.—*Humphries v. McCraw*, 5 Ark. 61, may administer oath anywhere within limits of his county. Cal.—*Payne v. San Francisco*, 3 Cal. 122. Conn.—*Betts v. Dimon*, 3 Conn. 107, within county limits. Dak.—*St. Paul & S. C. R. Co. v. Covell*, 2 Dak. 483, 11 N. W. 106. Ga.—*Collins v. Rutherford*, 38 Ga. 29; *Hutchins v. State*, 8 Ga. App. 409, 69 S. E. 309 within county limits. Idaho.—*State v. Jones*, 28 Idaho 428, 154 Pac. 378. Ind.—*State ex rel. Coppage v. Reichard*, 59 Ind. App. 338, 109 N. E. 438. Ia.

of the peace, notaries public,¹³ commissioners appointed (by the governor) for the state, in other states of the union,¹⁴ representatives of the United States in a foreign government,¹⁵ special commissioners,¹⁶ and attorneys.¹⁷ An officer cannot administer an oath to himself.¹⁸

III. FORM AND SUFFICIENCY.¹⁹ — The manner of taking the oath is not material in the absence of an express statute, as oaths should be administered to the person according to his own opinion and as it most affects his conscience.²⁰ It is not necessary that the oath

Snell *v.* Eckerson, 8 Iowa 284. **Ky.** Anderson *v.* Com., 117 S. W. 364. **La.** State *v.* Isaac, 3 La. Ann. 359. **Mass.** Com. *v.* Smith, 11 Allen 243. **N. J.** Munn *v.* Merry, 14 N. J. L. 183.

[a] The fact that the justice of the peace is also the attorney of the party taking the oath does not disqualify him. **Me.**—McLean *v.* Weeks, 61 Me. 277. **Mass.**—Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38. **Tenn.** Phipps *v.* Burnett, 96 Tenn. 175, 33 S. W. 925; Ayrs *v.* State, 5 Coldw. 26.

[b] A superior court judge sitting as a magistrate cannot call in a clerk or other officer to administer oaths. *In re* Sing, 13 Cal. App. 736, 110 Pac. 693.

[c] It will be presumed that the justice of the peace administered the oath in his own county. Snell *v.* Eckerson, 8 Iowa 284.

13. **Cal.**—Payne *v.* San Francisco, 3 Cal. 122. **Ill.**—Peck *v.* People, 153 Ill. 454, 39 N. E. 117. **Ky.**—Anderson *v.* Com., 117 S. W. 364. **Minn.**—State *v.* Scatena, 84 Minn. 281, 87 N. W. 764. **Ohio.**—*In re* Sage, 24 Ohio Cir. Ct. (N. S.) 7.

[a] No authority at common law to administer oaths. Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290.

[b] Administration of oaths not an incident to the office of a notary. Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909.

[c] Notary public cannot administer oath to his co-partner in a matter in which the firm is interested under a statute prohibiting notaries public, who are attorneys, to administer oaths in causes in which they are professionally engaged. Smalley *v.* Bodinus, 120 Mich. 363, 79 N. W. 567, 77 Am. St. Rep. 602.

14. **Ga.**—Sugar *v.* Sackett, 13 Ga. 462. **Ind.**—Andrews *v.* Ohio & M. R. Co., 14 Ind. 169; Draper *v.* Williams,

8 Blackf. 574. **Mass.**—Com. *v.* Smith, 11 Allen 243.

15. Seidel *v.* Peschkaw, 27 N. J. L. 427. Compare Herman *v.* Herman, 4 Wash. C. C. 555, 12 Fed. Cas. No. 6,407, wherein the consul of the United States was held not a proper officer to administer the oath within the meaning of the agreement entered into by the attorneys.

16. Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668; Phillippi *v.* Bowen, 2 Pa. 20.

[a] A failure to take the oath of office required of a special commissioner renders him incapable of administering an oath to appraisers. Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668.

17. Snyder *v.* Hemingway, 47 Mich. 549, 11 N. W. 381.

18. Phillips *v.* State, 5 Ga. App. 597, 63 S. E. 667; *In re* South Beaver Road, 8 Kulp (Pa.) 75.

19. Oath of jury, see 17 STANDARD PROC. 426, et seq.; of grand jury, see 10 STANDARD PROC. 627, et seq.

Oath of witnesses, see 14 ENCY. OF EV. 605.

20. See the following: **Ill.**—Gill *v.* Caldwell, 1 Ill. 53. **Ia.**—State *v.* Browning, 153 Iowa 37, 133 N. W. 330. **Ky.**—Com. *v.* Jarboe, 89 Ky. 143, 12 S. W. 138. **Mass.**—Com. *v.* Buzzell, 16 Pick. 153. **Mo.**—State *v.* Chyo Chiagk, 92 Mo. 395, 4 S. W. 704. **Neb.**—Pumphrey *v.* State, 84 Neb. 636, 122 N. W. 19, 23 L. R. A. (N. S.) 1023. **N. J.** Newman *v.* Newman, 7 N. J. Eq. 26. **N. Y.**—Bookman *v.* New York, 200 N. Y. 53, 93 N. E. 190; O'Reilly *v.* People, 86 N. Y. 154, 40 Am. Rep. 525. **Ohio.**—Clinton *v.* State, 33 Ohio St. 27. **Tex.**—Riddles *v.* State (Tex. Crim.), 46 S. W. 1058; Sullivan *v.* First Nat. Bank, 37 Tex. Civ. App. 228, 83 S. W. 421. **Vt.**—Arnold *v.* Arnold's Estate, 13 Vt. 362. **Wash.**—State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961. **Eng.** Anonymous, 1 Vern. Ch. 263, 23 Eng. Reprint 459; Reg. *v.* Entrehman, C. &

administered should be formal,²¹ for any act done in the presence of the officer by the person to be bound whereby he consciously takes upon himself the obligation of an oath,²² and which act shows the intent of the officer to administer an oath,²³ is all that is necessary to complete the act of swearing. But where the statute provides the form of the oath, or manner of taking it,²⁴ a substantial compliance therewith is generally deemed sufficient.²⁵

M. 248, 41 E. C. L. 139. **Can.**—Shajoo Ram v. King, 51 Can. Sup. Ct. 392, 20 Brit. Col. 581, 19 Dom. L. R. 313, 30 West. L. R. 65.

[a] **Choice of Several Forms of Administering Oath.**—If the person taking the oath regards the one taken as binding on his conscience it is sufficient, although he might regard another form as more solemn, or more binding upon him than the one taken. *State v. Browning*, 153 Iowa 37, 133 N. W. 330.

[b] **An oath administered through an interpreter** is sufficient if correctly given to the person taking it, although it was incorrectly given to the interpreter. *Territory v. Kawano*, 20 Hawaii 469, Ann. Cas. 1913B, 258. As to how oath is administered to witness through an interpreter, see 7 ENCY. OF EV. 658.

21. *McCain v. Bonner*, 122 Ga. 842, 51 S. E. 36; *Briggs v. Murdock*, 13 Pick. (Mass.) 305.

[a] **It need not be reduced to writing** or an affidavit unless the statute demands it. *Outlaw v. Davis*, 27 Ill. 467; *Ewing v. State* (Tex. Crim.), 38 S. W. 618.

[b] **The oath of an officer of a corporation** need not state his official position. *Old Settlers' Inv. Co. v. White*, 158 Cal. 236, 110 Pac. 922. As to who may make verification of pleadings of an action by a corporation, see 5 STANDARD PROC. 651; and generally the title "Verification."

[c] **Objection to the form of oath** must be made previous to its administration, or it will be deemed waived. *State v. Browning*, 153 Iowa 37, 133 N. W. 330.

22. **Ala.**—Hyde v. Adams, 80 Ala. 111. **Ga.**—McCain v. Bonner, 122 Ga. 842, 51 S. E. 36. **N. Y.**—Bookman v. New York, 200 N. Y. 53, 93 N. E. 190; *O'Reilly v. People*, 86 N. Y. 154, 40 Am. Rep. 525 (something must be present to distinguish between the oath and a bare assertion); *People v. Cook*,

8 N. Y. 67, 59 Am. Dec. 451; *People v. Nolte*, 19 Misc. 674, 44 N. Y. Supp. 443. **Tenn.**—Doss v. Birks, 11 Humph. 431. **Tex.**—Sullivan v. First Nat. Bank, 37 Tex. Civ. App. 228, 83 S. W. 421. **Can.**—Shajoo Ram v. King, 51 Can. Sup. Ct. 392, 20 Brit. Col. 581, 19 Dom. L. R. 313, 30 West. L. R. 65.

[a] **The test of the sufficiency** of an oath is whether or not it furnishes a foundation for an indictment for perjury. *Ward v. Brooklyn*, 32 App. Div. 430, 53 N. Y. Supp. 41, affirmed in 164 N. Y. 591, 58 N. E. 1093.

[b] **Need not swear** (1) by uplifted hand (*McCain v. Bonner*, 122 Ga. 842, 51 S. E. 36), (2) nor on the Bible. *Gill v. Caldwell*, 1 Ill. 53.

[c] **Administering the oath over the telephone** is not sufficient. *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421. Verification over telephone, see the title "Verification."

23. *McCain v. Bonner*, 122 Ga. 842, 51 S. E. 36.

[a] **Insufficient Administration.**—The mere handing to an officer authorized to administer oaths of an affidavit previously signed by one who is recited therein as having been duly sworn, and in whose presence the officer signed the jurat without administering a formal oath, does not amount to the administration of an oath. *McCain v. Bonner*, 122 Ga. 842, 51 S. E. 36; *O'Reilly v. People*, 86 N. Y. 154, 10 Abb. N. C. 53, 40 Am. Rep. 525.

24. See generally the statutes.

[a] **Some statutes require** that the oath be taken and administered with the utmost solemnity. See the statutes, and *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475; *State v. Davis*, 69 N. C. 383.

25. **Ga.**—Johnson v. State, 76 Ga. 790; *Sugar v. Sackett*, 13 Ga. 462. **Mass.**—Com. v. Smith, 11 Allen 243, provision as to the form held directory. **Mich.**—Andres v. Arnold, 77 Mich. 85, 43 N. W. 857, 6 L. R. A. 238, the place

IV. REFUSAL TO ADMINISTER OR TO TAKE OATH.—A refusal to be sworn may be punished as a contempt,²⁶ and refusal of an officer authorized to administer oaths to do so subjects him to indictment for a wilful neglect of duty.²⁷

Mandamus To Compel Officer To Administer Oath.—The administration of an oath being a ministerial act only, mandamus will lie against an official to compel him to perform such act.²⁸

V. OATHS OF QUALIFICATION²⁹ should be administered by the person,³⁰ and in the form³¹ demanded by the statute.³²

or building in which oath was administered is immaterial providing the oath was taken within the officer's jurisdiction. **Minn.**—*State v. Gay*, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; *Hugo v. Miller*, 50 Minn. 105, 52 N. W. 381; *Montour v. Purdy*, 11 Minn. 284, 88 Am. Dec. 88. **N. H.**—*Flint v. Clinton Co.*, 12 N. H. 430.

As to necessity of complying with form provided by statute in swearing a jury, see 17 STANDARD PROC. 429.

[a] **Presumptions.**—Where the statute provides the form of the oath, it will be presumed that the oath was administered in such form. *Outlaw v. Davis*, 27 Ill. 467.

26. *In re Sage*, 24 Ohio Cir. Ct. (N. S.) 7.

27. *People v. Brooks*, 1 Denio (N. Y.) 457, 43 Am. Dec. 704.

28. **Ala.**—*Huey v. Jones*, 140 Ala. 479, 37 So. 193. **Idaho.**—*Blake v. Board of Comrs.*, 5 Idaho 163, 47 Pac. 734. **Ky.**—*Day v. Justices of Fleming County Court*, 3 B. Mon. 198; *Greenup County Court v. Clifton*, 5 Ky. L. Rep. 241. **N. Y.**—*People ex rel. Young v. Straight*, 128 N. Y. 545, 28 N. E. 762; *Achley's Case*, 4 Abb. Pr. 35. **Can.**—*Ex parte Richards*, 13 N. Bruns. 131.

See generally the title "**Mandamus.**"

[a] But the court will not issue a mandamus to compel the officer to accept and administer the oath where the person applying has lost his right to the office. *Com. v. County Comrs.*, 6 Whart. (Pa.) 476.

[b] Where the office sought for is full, quo warranto and not mandamus is the appropriate remedy to pursue. *Queen v. Burke*, 29 Nova Scotia (Can.) 227. See *Ex parte Richards*, 13 N. Bruns. (Can.) 131.

[c] **Discretion Involved in Refusal To Administer.**—A writ of mandate will not issue to compel the justices of a court to allow a deputy sheriff to take the oath of office where it appears that they have a discretion to see that the person appointed by the sheriff is honest and competent. *Day v. Justices of Fleming County Court*, 3 B. Mon. (Ky.) 198.

29. See generally the title "**Officers.**"

Necessity of jury commissioners taking oath, see 16 STANDARD PROC. 958.

Necessity of appraiser of homestead property taking oath, see 11 STANDARD PROC. 518.

30. **Cal.**—*Payne v. San Francisco*, 3 Cal. 122. **Ky.**—*Tompert v. Lithgow*, 1 Bush 176. **Me.**—*Inhab. of Orneville v. Palmer*, 79 Me. 472, 10 Atl. 451. **N. H.**—*Drew v. Morrill*, 62 N. H. 23.

31. **N. Y.**—*Shattuck v. Bascom*, 105 N. Y. 39, 12 N. E. 283; *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47; *Matter of Gilroy*, 85 Hun 424, 32 N. Y. Supp. 891, 66 N. Y. St. 208. **Pa.**—*In re Cambria Street*, 75 Pa. 357. **Eng.**—*Lancaster & Carlisle Ry. Co. v. Heaton*, 8 E. & B. 952, 4 Jur. N. S. 707, 27 L. J. Q. B. 195, 6 Wkly. Rep. 293, 92 E. C. L. 951, 120 Eng. Reprint 354.

32. See the statutes.

OBJECTIONS AND EXCEPTIONS

By the Editorial Staff.

I. DEFINITIONS AND DISTINCTIONS, 705

II. NECESSITY FOR OBJECTIONS AND EXCEPTIONS, 706

III. ENLARGEMENT OF ISSUES BY FAILURE TO OBJECT TO EVIDENCE, 706

IV. PRESERVATION OF OBJECTONS AND EXCEPTIONS, 708

CROSS-REFERENCES:

Appeals;	Certiorari;
Arguments;	Instructions;
Bills and Answers;	Jurisdiction;
Bills of Exceptions;	Review.

Raising and waiving objections to jurisdiction, see the title "Jurisdiction."

Objections as to parties, see the title "Parties."

Exceptions to sufficiency of sureties, see the title "Justification of Sureties."

Objections or exceptions to master's or referee's report, see the title "References."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITIONS AND DISTINCTIONS.—Although the terms "objection" and "exception" have been used somewhat interchangeably and have been even regarded as synonymous,¹ strictly speaking the two terms are distinct. In the course of a trial, an objection is made to the act of a person other than the court for the purpose of

1. *Harding v. Missouri Pac. Ry. Co.*, 232 Mo. 444, 134 S. W. 641, Ann. Cas. 1912B, 1221; *Grant v. Wyatt*, 61 W. Va. 133, 56 S. E. 187. See also 2 STANDARD PROC. 272; 13 STANDARD PROC. 988. [a] The word "objection" when used in excepting to findings of fact is equivalent to the word "exception." *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773. To same effect, see *Elsner v. Supreme Lodge*, 98 Mo. 640, 11 S. W. 991.

obtaining a ruling of the court,² and when the court acts the error is preserved by an exception to its ruling.³ A demurrer is an objection to a pleading;⁴ and exceptions as a means of testing the sufficiency of pleadings are recognized in equity,⁵ under the civil law,⁶ and by statute.⁷

II. NECESSITY FOR OBJECTIONS AND EXCEPTIONS.—In order to obtain appellate review of errors, except as to substantial matters appearing in the record proper, objections must be made and exceptions taken and made to appear by bill of exceptions.⁸

III. ENLARGEMENT OF ISSUES BY FAILURE TO OBJECT TO EVIDENCE.—The failure to object to the admission of evidence bearing on an issue not made by the pleadings will not authorize an adjudication of that issue, when the evidence is relevant to other issues made by the pleadings. But it is otherwise where the evidence would not be admissible if objected to.⁹ In the latter case instructions

2. *Harding v. Missouri Pac. Ry. Co.*, 232 Mo. 444, 134 S. W. 641, Ann. Cas. 1912B, 1221.

3. *Board of Comrs. v. Home Sav. Bank*, 200 Fed. 28, 118 C. C. A. 256; *Harding v. Missouri Pac. Ry. Co.*, 232 Mo. 444, 134 S. W. 641, Ann. Cas. 1912B, 1221. See also 2 STANDARD PROC. 272; 9 ENCY. OF EV. 134.

[a] "An exception is but the formula of dissent from a ruling, expressed with sufficient clearness and definiteness to raise some concrete point upon appeal. This dissent, and the intention to question the ruling thereafter, are usually expressed by the phrase, 'I except.' The right of review, however, is not lost merely because this technical phrase does not happen to be employed. Any other clear expression will suffice, provided such expression be adequate to convey the idea which underlies all exceptions. That idea is nonassent and non-submission to the ruling." *Snelling v. Yetter*, 25 App. Div. 590, 49 N. Y. Supp. 917.

4. See 6 STANDARD PROC. 849.

5. See 8 STANDARD PROC. 485.

6. See 6 STANDARD PROC. 849.

7. See generally the statutes, and *Grant v. Wyatt*, 61 W. Va. 133, 56 S. E. 187.

[a] In a statute providing that a pleading may be excepted to, the word "except" is synonymous with the word "object" and as a demurrer is an objection to a pleading, a demurrer interposed will be treated as an exception within the statute. *Grant v. Wyatt*, 61 W. Va. 133, 56 S. E. 187.

8. See 2 STANDARD PROC. 247, 272, et seq.

Exception to rulings on challenge to juries, see 17 STANDARD PROC. 113, 268.

Objections to evidence, see 9 ENCY. OF EV. 28, 134.

Objection to an order requiring witness to be recalled or testimony read to jury, see 17 STANDARD PROC. 582.

Exceptions to instructions, see 13 STANDARD PROC. 986.

Objections to findings, see 8 STANDARD PROC. 1076.

As to necessity for objection and exception in particular cases, see the specific titles.

9. U. S.—*Gunther v. Liverpool L. & G. Ins. Co.*, 85 Fed. 846. Ia.—*Andrews v. Chicago, G. W. R. Co.*, 129 Iowa 162, 105 N. W. 404; *Ankrum v. Marshalltown*, 105 Iowa 493, 75 N. W. 360. Kan.—*Avery v. Lambertson*, 74 Kan. 304, 86 Pac. 456. La.—*Shreveport v. Chatwin*, 139 La. 531, 71 So. 791; *Wall v. Rabito*, 138 La. 609, 70 So. 531; *Rogers v. Southern Fiber Co.*, 119 La. 714, 44 So. 442, 121 Am. St. Rep. 537. Mo.—*Chamlee v. Planters Hotel Co.*, 155 Mo. App. 144, 134 S. W. 123; *Litton v. Chicago, B. & Q. R. Co.*, 111 Mo. App. 140, 85 S. W. 978. Wis.—*Atkinson v. Harran*, 68 Wis. 405, 32 N. W. 756.

And see the following cases: Ala.—*Morrison v. Clark*, 14 Ala. App. 323, 70 So. 200. N. Y.—*Langley v. Rouss*, 106 App. Div. 225, 94 N. Y. Supp. 108. Tex.—*El Paso & S. R. Co. v. Darr* (Tex. Civ. App.), 93 S. W. 166.

[a] Rule Stated.—"Evidence received without objection enlarges

may be predicated upon the evidence so admitted,¹⁰ and counsel in their arguments may comment thereon.^{10½} And on appeal due credit will be given to incompetent evidence admitted without objection.¹¹ Thus in an action for damages, evidence as to special damages not alleged which is admitted without objection may be considered by the jury,¹² unless the evidence was admissible as tending to show the damage alleged.¹³

pleadings only when it would not have been admissible if objected to." *Shreveport v. Chatwin*, 139 La. 531, 71 So. 791.

[b] Where the parties to an action contest a question of fact by examining and cross-examining witnesses with references thereto without objection by either, although such fact is not at issue under the pleadings, neither party will be heard to say that a finding as to such fact is without the issues in the case. *Avery Mfg. Co. v. Lambertson*, 74 Kan. 304, 86 Pac. 456.

10. Ala.—*Birmingham Ry. & E. Co. v. Wildman*, 119 Ala. 547, 24 So. 548. Ill.—*Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079; *Donk Bros. Coal & Coke Co. v. Thil*, 228 Ill. 233, 81 N. E. 857. Ia.—*Boerner Fry Co. v. Mucci*, 158 Iowa 315, 138 N. W. 866; *Struebing v. Stevenson*, 129 Iowa 25, 105 N. W. 341; *Collins v. Collins*, 46 Iowa 60. Mo.—*Joseph v. Metropolitan S. R. Co.*, 129 Mo. App. 603, 107 S. W. 1055; *Litton v. Chicago, B. & Q. R. Co.*, 111 Mo. App. 140, 85 S. W. 978; *Twelkemeier v. St. Louis Transit Co.*, 102 Mo. App. 190, 76 S. W. 682; *Madison v. Missouri Pac. R. Co.*, 60 Mo. App. 599. Pa.—*Arons v. Smit*, 173 Pa. 630, 34 Atl. 234; *Scott v. Sheakly*, 3 Watts 50. S. D.—*Totten v. Stevenson*, 29 S. D. 71, 135 N. W. 715. Tex.—*McDonald v. Humphries* (Tex. Civ. App.), 146 S. W. 712. Vt.—*Boville v. Dalton Paper Mills*, 86 Vt. 305, 85 Atl. 623. Wis.—*Tomlinson v. Wallace*, 16 Wis. 224.

Contra, *Provident Sav. Life Assur. Soc. v. Beyer*, 23 Ky. L. Rep. 2460, 67 S. W. 827. And see *Eller v. Loomis*, 106 Iowa 276, 76 N. W. 686, holding the admission of immaterial testimony without objection does not justify an instruction on issues raised solely by such evidence.

[a] Where evidence as to items of damage not prayed for is admitted without objection. *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Scholl v. Grayson*, 147

Mo. App. 652, 127 S. W. 415; *Spengler v. St. Louis Transit Co.*, 108 Mo. App. 329, 83 S. W. 312. *Contra*, *Lennox v. Interurban St. R. Co.*, 104 App. Div. 617, 93 N. Y. Supp. 1137. Compare *Stewart v. Swartz*, 57 Ind. App. 249, 106 N. E. 719.

10½. *Birmingham Ry. & E. Co. v. Wildman*, 119 Ala. 547, 24 So. 548; *Chicago & E. I. R. Co. v. Mochell*, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318, affirming 96 Ill. App. 178.

11. Ind.—*Littler v. Robinson*, 38 Ind. App. 104, 77 N. E. 1145, citing local cases. Ia.—See *Healy v. Patterson*, 123 Iowa 73, 98 N. W. 576. Mont. *Archer v. Chicago, M. & St. P. Ry. Co.*, 41 Mont. 56, 108 Pac. 571, 137 Am. St. Rep. 692, citing local cases. N. Y. *Union Bank v. Case*, 84 N. Y. Supp. 550.

[a] But parol evidence to prove a promise within the statute of frauds will not be given effect, even if received without objection. *Levy v. Du Bois*, 24 La. Ann. 398. See also *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499.

12. Cal.—See *Doolin v. Omnibus Cable Co.*, 140 Cal. 369, 73 Pac. 1060. Ga.—*Ocean Steamship Co. v. Williams*, 69 Ga. 251. Mo.—*Mellor v. Missouri Pac. R. Co.*, 105 Mo. 445, 16 S. W. 849, 10 L. R. A. 36; *Harrison v. Coleman*, 171 Mo. App. 633, 154 S. W. 456; *Cole v. Metropolitan St. Ry. Co.*, 133 Mo. App. 440, 113 S. W. 684. Tex. *International & G. N. Ry. Co. v. Bibbott*, 24 Tex. Civ. App. 4, 57 S. W. 974. Wash.—*Gallamore v. Olympia*, 34 Wash. 279, 75 Pac. 978. Wis.—*Atkinson v. Harran*, 68 Wis. 405, 32 N. W. 756.

13. *Ankrum v. Marshalltown*, 105 Iowa 493, 75 N. W. 360.

[a] Illustration.—Where the defendant, without objection, permits the plaintiff to introduce evidence of pain and suffering which tends to prove the alleged disability, he does not thereby concede plaintiff's right to recover for bodily pain and mental anguish not prayed for in the petition. *Ankrum v.*

IV. PRESERVATION OF OBJECTIONS AND EXCEPTIONS.

The exceptions which have been made to the rulings of a court are brought up for review by an appellate court by a bill of exceptions.¹⁴

Marshalltown, 105 Iowa 493, 75 N. W. | 14. See the title "Bills of Excep-
360. | tions."

OBLIGATION. — See **Implied and Express Agreements.**

Vol. XX

OBSCENITY

By the Editorial Staff.

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CROSS-REFERENCES:

Adultery;	Lewdness;
Assault and Battery;	Post Office;
Disorderly Conduct;	Profanity;
Disorderly House;	Prostitution.

For forms, see 9 STANDARD PROC. 888, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INDICTMENT OR INFORMATION.¹—A. **OBSCENITY GENERALLY.**—1. **Under Statute.**—In accordance with the general rules of charging statutory offenses,² an indictment or information charging obscenity under a statute defining the offense is sufficient if it substantially follows the language of the statute or its equivalent.³ Generally, however, the indictment or information must disclose the existence of the facts which the statute makes necessary to constitute the offense.⁴ But where the offense is indictable under the common law an indictment, though insufficient under a statute, will not be quashed, where it meets the requirements of the common law.⁵

2. **At Common Law.**—An indictment or information which charges obscenity under the common law must contain a specific statement of the acts and conduct alleged to constitute the offense.⁶ An averment that the acts charged are contrary to the statute is mere surplusage and does not vitiate the indictment or information.⁷

B. **UTTERING OBSCENE LANGUAGE.**—1. **Words Spoken.**—While it is not necessary to set out in the indictment or information the whole conversation in which the use of the obscene language occurred,⁸ enough of the language should be averred to show that the offense has been committed.⁹ Where the offense of uttering obscene language in the presence of a female is charged and the language is not obscene or licentious per se, it must be shown by extrinsic averments that the language was used in an obscene sense and that the female so under-

1. See generally the title "**Indictment and Information.**"

2. See 12 **STANDARD PROC.** 437 et seq.

3. **Ala.**—*Weaver v. State*, 79 Ala. 279; *Yancy v. State*, 63 Ala. 141. **Ark.**—*Moore v. State*, 50 Ark. 25, 6 S. W. 17; *State v. Hutson*, 40 Ark. 361. **Cal.**—*Ex parte Foley*, 62 Cal. 508. **Conn.**—*State v. McKee*, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542. **Ill.**—*Fuller v. People*, 92 Ill. 182. **Ia.**—*State v. Martin*, 125 Iowa 715, 101 N. W. 637; *State v. Bauguess*, 106 Iowa 107, 76 N. W. 508. **Mich.**—*People v. Kennedy*, 176 Mich. 384, 142 N. W. 771. **Mo.**—*State v. Gardner*, 28 Mo. 90. **Tex.**—*Moffit v. State*, 43 Tex. 346.

[a] **Indictment for having in one's possession** a certain obscene and indecent drawing or picture sufficient where it substantially follows the language of statute. *Fuller v. People*, 92 Ill. 182.

4. **Ala.**—*Ivey v. State*, 61 Ala. 58. **Minn.**—*State v. Claire*, 121 Minn. 521, 140 N. W. 747. **Miss.**—*Stark v. State*, 81 Miss. 397, 33 So. 175. **N. D.**—*State v. Stevens*, 33 N. D. 540, 157 N. W. 668. **Ore.**—*State v. Hollinshead*, 77

Ore. 473, 151 Pac. 710. **Tex.**—*Moffit v. State*, 43 Tex. 346.

5. *Truett v. State*, 3 Ala. App. 114, 57 So. 512; *State v. Rose*, 32 Mo. 560; *State v. Appling*, 25 Mo. 315, 69 Am. Dec. 469.

As to indictment at common law, see *infra*, I. A. 2.

6. *Knowles v. State*, 3 Day (Conn.) 103.

7. *Knowles v. State*, 3 Day (Conn.) 103.

8. *State v. Steele*, 3 Heisk. (Tenn.) 135. See also *Barker v. Com.*, 19 Pa. 412.

[a] **Under an ordinance denouncing** the utterance of language having a tendency to create a breach of the peace, it is not necessary to recite the words spoken. *Ex parte Foley*, 62 Cal. 508.

[b] **Where the indictment follows the language of the statute** the obscene words spoken need not be set out. *Yancy v. State*, 63 Ala. 141; *Moore v. State*, 50 Ark. 25, 6 S. W. 17.

9. **Ohio.**—*Hummel v. State*, 10 Ohio Dec. 492, 8 Ohio N. P. 48. **Tenn.**—*Bell v. State*, 1 Swan 42. **Wis.**—*Stener v. State*, 59 Wis. 472, 18 N. W. 433.

[a] **An allegation that the accused**

stood the words.¹⁰ But it is not necessary to allege that it was heard by the female averred to have been present,¹¹ or that the language was used of or to another female.¹²

2. **Words Written.**¹³ — Where it is intended to charge defendant with the use of obscene language in writing, it is necessary to allege the writing,¹⁴ and describe it.¹⁵

3. **Place of Commission of Offense.** — Under a statute defining the offense as the use of obscene language in a public place, it is essential to show in the indictment that the offense was committed in a public place.¹⁶ Where a statute prohibits the use of language in the presence of another tending to cause a breach of the peace, it must appear from the indictment that the language was uttered in the presence of the person of whom they were spoken.¹⁷

4. **Common Nuisance.** — Where the use of obscene language is charged as a common law offense, it must be averred in the indictment that the language was uttered in the hearing of various persons,¹⁸ and that it constituted a common nuisance.¹⁹

C. **PUBLISHING AND DISTRIBUTING OBSCENE MATTER.** — 1. **Description Thereof.** — An indictment or information charging the offense of publishing obscene matter must specifically describe the obscene language of the publication,²⁰ unless it is averred that the publication is so obscene that it cannot be properly spread upon the court's record.²¹

used obscene language is the statement of a mere conclusion. *State v. Burrell*, 86 Ind. 313.

10. *State v. Cone*, 16 Ind. App. 350, 45 N. E. 345; *State v. Coffing*, 3 Ind. App. 304, 29 N. E. 615.

11. *Yancy v. State*, 63 Ala. 141.

12. *Kelly v. State*, 126 Ga. 547, 55 S. E. 482.

13. **Indictment for publishing obscene matter**, see *infra*, I, C.

14. *Stevenson v. State*, 90 Ga. 456, 16 S. E. 95.

15. *Stevenson v. State*, 90 Ga. 456, 16 S. E. 95, holding that its contents ought to be recited so that defendant is informed what he is to defend.

16. *Ala.*—*Ivey v. State*, 61 Ala. 58. *Minn.*—*State v. Claire*, 121 Minn. 521, 140 N. W. 747. *N. D.*—*State v. Stevens*, 33 N. D. 540, 157 N. W. 668. *Ore.*—*Barton v. La Grande*, 17 Ore. 577, 22 Pac. 111.

Averments as to place generally, see 12 STANDARD PROC. 426 et seq.

17. *Ex parte Kearny*, 55 Cal. 212 (under ordinance); *State v. Clarke*, 31 Minn. 207, 17 N. W. 344.

18. *State v. Pepper*, 68 N. C. 259, 12 Am. Rep. 637.

19. *Gaines v. State*, 7 Lea (Tenn.)

410, 40 Am. Rep. 64. *Contra*, *Barker v. Com.*, 19 Pa. 412.

20. *Fla.*—*Reyes v. State*, 34 Fla. 181, 15 So. 875. *Ill.*—*McNair v. People*, 89 Ill. 441. *Ky.*—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. *Mass.*—*Com. v. McCance*, 164 Mass. 162, 41 N. E. 133, 29 L. R. A. 61. *Mo.*—*State v. Hayward*, 83 Mo. 299. *N. Y.*—*People v. Danahy*, 63 Hun 579, 18 N. Y. Supp. 467, 45 N. Y. St. 98, 10 N. Y. Crim. 192. *Vt.*—*State v. Brown*, 27 Vt. 619. *Eng.*—*Bradlaugh v. Queen*, 3 Q. B. Div. 607, 14 Cox C. C. 68, 38 L. T. N. S. 118, 26 Wkly. Rep. 410.

[a] **Whenever an indictment undertakes to set out the contents of the publication**, it must be done in the very words of which it is composed. *Com. v. Tarbox*, 1 Cush. (Mass.) 66.

21. *U. S.*—*United States v. Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14,571. *Fla.*—*Reyes v. State*, 34 Fla. 181, 15 So. 875. *Ky.*—*Kinnaird v. Com.*, 134 Ky. 575, 121 S. W. 489. *Mich.*—*People v. Girardin*, 1 Mich. 90. *N. Y.*—*People v. Kaufman*, 14 App. Div. 305, 43 N. Y. Supp. 1046, 12 N. Y. Crim. 263. *Ohio.*—*State v. Zurhorst*, 75 Ohio St. 232, 79 N. E. 238. *R. I.*—*State v. Smith*, 17 R. I. 371, 22 Atl. 282. *Vt.*—*State v. Brown*, 27 Vt. 619.

Although such averment is made, the indictment is nevertheless insufficient, unless it describes the publication in general terms so that it can be clearly identified,²² and its obscene character can be discerned.²³ It is not necessary, however, to set out the particulars in which the obscenity consists.²⁴ Where the prosecution is under a statute, an indictment substantially following the language of the statute is held sufficient without a specific description of the obscene publication.²⁵

2. Knowledge of Obscenity.—In accordance with the general rule, if a statute makes knowledge on the part of the defendant of the indecency of the publication an essential element of the offense, it must be averred that the published matter was obscene to the knowledge of defendant.²⁶ Where under the statute knowledge is not a necessary element of the offense, it need not be averred, however.²⁷

3. Criminal Intent.—Where criminal intent is not part of the statutory definition of the offense of publishing obscene matter, such intent need not be averred in the indictment.²⁸ But where the statute prohibits the distributing of obscene matter with an unlawful purpose, the indictment is not sufficient unless such purpose is alleged.²⁹

4. Publication and Distribution.—In an indictment for publishing obscene matter, it is not necessary to allege the place of publication.³⁰ Nor is it necessary to allege to whom it was sold.³¹ Where the statute characterizes the obscene publication as designed to corrupt the morals of youth, the indictment must show the manner of its publication.³²

[a] **An application of the defendant to require the prosecution to file such printed matter is one addressed to the discretion of the court.** *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. ed. 799.

22. U. S.—*United States v. Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14,571. *Mass.*—*Com. v. Wright*, 139 Mass. 382, 1 N. E. 411; *Com. v. Holmes*, 17 Mass. 336, general description sufficient. *N. Y.*—*People v. Hallenbeck*, 2 Abb. N. C. 66, 52 How. Pr. 502.

23. U. S.—*Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. ed. 550. *N. Y.*—*People v. Danahy*, 63 Hun 579, 18 N. Y. Supp. 467, 45 N. Y. St. 98, 10 N. Y. Crim. 192. *Tex.*—*Abendroth v. State*, 34 Tex. Crim. 325, 30 S. W. 787; *State v. Hanson*, 23 Tex. 232.

24. Fuller v. People, 92 Ill. 182.

25. Conn.—*State v. McKee*, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542. *Ill.*—*Strohm v. People*, 160 Ill. 582, 43 N. E. 622, 60 Ill. App. 128. *Mo.*—*State v. Van Wye*, 136

Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627. *Pa.*—*Com. v. Havens*, 6 Pa. Co. Ct. 545. *P. I.*—*People v. Feliciano*, 13 Porto Rico 8.

26. See *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. ed. 727. See generally, 12 STANDARD PROC. 399, et seq.

[a] **Sufficient Averment.**—(1) An allegation that the defendant knowingly distributed (*State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800), (2) or knowingly offered for sale (*State v. Hol-edger*, 15 Wash. 443, 46 Pac. 652) an obscene publication sufficiently charges the defendant with knowledge of its obscene character.

27. Com. v. Havens, 6 Pa. Co. Ct. 545.

28. State v. Smith, 17 R. I. 371, 22 Atl. 282.

29. State v. Smith, 46 N. J. L. 491.

30. State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

31. State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

32. Abendroth v. State, 34 Tex. Crim. 325, 30 S. W. 787.

Where the statute prohibits the distribution of printed matter containing obscene language, the manner of distribution must be alleged in the indictment,³³ although it is not necessary to allege the circumstances attending the printing and publishing thereof.³⁴

D. INDECENT EXPOSURE. — 1. Under Statute. — According to the general rule of charging statutory offenses,³⁵ an indictment or information for the offense of indecent exposure which substantially follows the language of the statute or its equivalent is sufficient.³⁶ Where the statute requires an exposure in public or in a public place the accusation must set forth such an exposure,³⁷ but need not show that the exposure was made in the actual sight of any person.³⁸ Nor is it necessary to state to whom the defendant exposed his person.³⁹

2. At Common Law. — An indictment charging indecent exposure under the common law must show that it took place in public and was capable of being seen by more than one person,⁴⁰ and must allege the criminal intent.⁴¹

E. OBSCENE EXHIBITION. — An indictment charging the offense of exhibiting an obscene picture need not specifically describe wherein

33. *State v. Smith*, 17 R. I. 371, 22 Atl. 282.

34. *Smith v. State*, 24 Tex. App. 1, 5 S. W. 510.

35. See 12 STANDARD PROC. 437 et seq.; also *supra*, I, A, 1.

36. **Ark.**—*State v. Hazle*, 20 Ark. 156. **Cal.**—*Ex parte Hutchings*, 74 Cal. xix, 16 Pac. 234. **Ia.**—*State v. Bauguess*, 106 Iowa 107, 76 N. W. 508. **Me.** *State v. Cole*, 112 Me. 56, 90 Atl. 709. **Mo.**—*State v. Gardner*, 28 Mo. 90. **Tex.** *State v. Griffin*, 43 Tex. 538; *Moffit v. State*, 43 Tex. 346.

[a] **Need not designate portion of body exposed.** *State v. Bauguess*, 106 Iowa 107, 76 N. W. 508.

[b] **Where the statute requires the exhibition to be "willfully and lewdly" made**, an indictment charging that it was "unlawfully and willfully" made, omitting the word "lewdly" is insufficient. *Stark v. State*, 81 Miss. 397, 33 So. 175.

37. See notes following.

[a] **On a Public Road.**—Where the statute prohibits indecent exposure "in public" it is not sufficient to allege that the defendant did make an obscene exhibition of his person on a public road. *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135; *Moffit v. State*, 43 Tex. 346.

[b] **But an allegation that the offense was committed in a public place, viz., a blacksmith shop, sufficiently**

shows the public character of the place where the crime was committed. *Lorimer v. State*, 76 Ind. 495.

[c] **Exposure in Presence of One Person.**—Where the indictment charges that the accused publicly exposed his person in the presence of one named person but does not show that the exposure was in a public place or in any other place where it could have been seen by more than one person, a demurrer thereto must be sustained. *Lockhart v. State*, 116 Ga. 557, 42 S. E. 787.

38. *State v. Martin*, 125 Iowa 715, 101 N. W. 637; *State v. Roper*, 18 N. C. 208.

[a] **An averment that the defendant indecently exposed his person to public view is sufficient.** *State v. Roper*, 18 N. C. 208.

39. *State v. Bauguess*, 106 Iowa 107, 76 N. W. 508.

40. *Reg. v. Farrell*, 9 Cox. C. C. (Eng.) 446; *Queen v. Watson*, 2 Cox C. C. (Eng.) 376.

41. *Truett v. State*, 3 Ala. App. 114, 57 So. 512.

[a] **Criminal intent (1) is sufficiently shown by an averment that the indecent exposure was willfully done** (*State v. Burgess*, 77 N. H. 170, 89 Atl. 452), or (2) **for the purpose of corrupting the morals of the people.** *Com. v. Haynes*, 2 Gray (Mass.) 72, 61 Am. Dec. 437.

the obscenity consisted;⁴² but the exhibition should be sufficiently described to show that it constituted the offense charged.⁴³

F. **JOINDER OF PARTIES.**⁴⁴—Several persons cannot be jointly indicted for using obscene language.⁴⁵ But the offense of indecent exposure may be charged against several persons jointly where they agree in concert to do the acts constituting the crime.⁴⁶

II. **TRIAL.**⁴⁷—A. **VARIANCE.**—The general rules pertaining to variance⁴⁸ apply to prosecutions for obscenity.⁴⁹ So a variance in reference to the place where the offense is alleged to have been committed,⁵⁰ or in the description of the obscene act⁵¹ is fatal.

B. **PROVINCE OF COURT AND JURY.**—The general rule that questions of fact are for the jury obtains in prosecutions for obscenity.⁵²

42. *State v. Pennington*, 5 Lea (Tenn.) 506.

43. *Knowles v. State*, 3 Day (Conn.) 103.

[a] An averment that the defendant exhibited an obscene painting for money is sufficient without an averment that the defendant published such painting. *Com. v. Sharpless*, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632.

44. See generally 12 STANDARD PROC. 495, *et seq.*

45. *Ala.*—*Cox v. State*, 76 Ala. 66. *Ark.*—*State v. Lancaster*, 36 Ark. 55. *Tenn.*—*State v. Roulstone*, 3 Sneed 107.

46. *People ex rel. Lee v. Bixby*, 67 Barb. (N. Y.) 221.

47. See generally the title "Trial."

48. See the title "Variance and Failure of Proof."

49. See the following notes.

[a] **Immaterial Variance.**—Where obscene words are averred in the indictment to have been spoken, the variance is not material, if the words are substantially, though not exactly, proved as laid. *Benson v. State*, 68 Ala. 544; *Bell v. State* 1 Swan (Tenn.) 42.

50. *Quin v. State*, 65 Miss. 479, 4 So. 548.

[a] An averment that an obscene writing was posted on the dwelling house is not sustained by proof that such writing was left in an outhouse. *Gober v. State*, 140 Ala. 153, 37 So. 78.

51. *Com. v. de Jardin*, 126 Mass. 46, 30 Am. Rep. 652.

[a] **Allegation of Painting Not Proved by Carving.**—An allegation that a human head and ear were painted on a board is not sustained by proving that the head and ear were cut in the board and that no paint was used. *State v. Powers*, 34 N. C. 5.

[b] **Obscene Exhibition Not Proved by Obscene Writing.**—A charge that the defendant did in public make an obscene exhibition of the persons of others is not sustained by proof that the defendant placed obscene writing upon the clothes worn by other persons. *Tucker v. State*, 28 Tex. App. 541, 13 S. W. 1004.

52. See generally the title "Province of Judge and Jury," and the following notes.

[a] Thus, whether the language (1) imputed to the defendant (*Carter v. State*, 107 Ala. 146, 18 So. 232), or (2) the publication alleged to have been distributed by him (*United States v. Clarke*, 38 Fed. 500), (3) is obscene ordinarily is to be determined by the jury under appropriate instructions of the court, though there is authority to the contrary. *McNair v. People*, 89 Ill. 441; *Smith v. State*, 24 Tex. App. 1, 5 S. W. 510. (4) The questions as to whether the language used was calculated to cause a breach of the peace (*Moore v. State*, 50 Ark. 25, 6 S. W. 17), or (5) whether the act charged was committed publicly (*Gunn v. Territory*, 19 Okla. 240, 91 Pac. 861), or (6) whether the defendant sold the alleged obscene publication (*State v. McKee*, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542; *Com. v. Dowling*, 14 Pa. Co. Ct. 607), or (7) whether it was designed by defendant to corrupt the public morals (*Smith v. State*, 24 Tex. App. 1, 5 S. W. 510), likewise are questions of fact to be decided by the jury from all the circumstances of the case, (8) but where it is admitted that the publication was of a certain character, the court may determine as a matter of law whether that class of printed

C. INSTRUCTIONS.—The general rules regulating the giving and refusing of instructions⁵³ are applicable to prosecutions of offenses founded on obscenity.⁵⁴

matter comes within the statutory definition of obscenity. *State v. McKee*, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

[b] **The question whether a picture or publication is obscene** falls within the range of ordinary intelligence and the jury is not required to be informed by an expert before finding its verdict. *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635, 2 N. Y. Crim. 375.

53. See 13 STANDARD PROC. 698, *et seq.*

54. See the following notes.

[a] **Thus** (1) the court is not required to define at length the meaning of the term "obscene" as it may be assumed to be understood in its common meaning by the jury. *Com. v. Buckley*, 200 Mass. 346, 86 N. E. 910, 128 Am. St. Rep. 425, 22 L. R. A. (N. S.) 225. (2) But the court may instruct

the jury as to the principles by which they are to be guided in determining the guilt of the defendant. *State v. McKee*, 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

[b] **The court should not assume** in its instructions facts not in evidence. *State v. Andrews*, 35 Ore. 388, 58 Pac. 765.

[c] **An essential element of the offense** alleged to have been committed by the defendant should not be omitted from the charge. *Stark v. State*, 81 Miss. 397, 33 So. 175.

[d] **Presumptions.** Where the instructions actually given by the court are not disclosed by the record it may be presumed that such instructions covered the defendant's requests so far as they stated the law correctly. *Andrews v. United States*, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. ed. 1023.

OBSTRUCTING JUSTICE

By the Editorial Staff.

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CROSS-REFERENCES:

Bribery;	Officers;
Conspiracy;	Prisons and Prisoners;
Contempt;	Rescue;
Embracery;	Service of Process and Papers;
Juries and Jurors;	Sheriffs, Constables and Marshals.

For forms, see 9 STANDARD PROC. 890, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INDICTMENT OR INFORMATION.¹—**A. IN GENERAL.**—All the facts and circumstances material to the crime of obstructing justice as defined by law should be set forth in the indictment or information,² with requisite certainty,³ and with due regard to the rules against duplicity,⁴ and surplusage.⁵

The official character of the person obstructed must be shown,⁶ and where knowledge⁷ or intent⁸ are ingredients of the offense they must

1. See generally the title "Indictment and Information."

2. **Ala.**—*King v. State*, 89 Ala. 43, 8 So. 120, 18 Am. St. Rep. 89. **Mass.** *Com. v. Reynolds*, 14 Gray 87, 74 Am. Dec. 665. **Mich.**—*People v. Hamilton*, 71 Mich. 340, 38 N. W. 921. **N. H.**—*State v. Cassady*, 52 N. H. 500; *State v. Roberts*, 52 N. H. 492; *State v. Barrett*, 42 N. H. 466. **R. I.**—*State v. Maloney*, 12 R. I. 251. **Vt.**—*State v. Burt*, 25 Vt. 373. **Wash.**—*Armstrong v. Van De Vanter*, 21 Wash. 682, 59 Pac. 510.

[a] Where the word "legally" is employed in the statute it is not sufficient to use the word "duly," as the two words are not synonymous and the one is not the equivalent of the other. *State v. Clancy*, 56 Vt. 698.

[b] If the elements of a common law offense are set out, the pleading will be good as to such offense, however, though it does not sufficiently charge the statutory crime. **Mo.** *State v. Phipps*, 34 Mo. App. 400. **N. C.**—*State v. Dunn*, 109 N. C. 839, 13 S. E. 881. **S. C.**—*State v. Hailey*, 12 Strobb. 73. **Tex.**—*Johnson v. State*, 26 Tex. 117. **Vt.**—*State v. Carpenter*, 54 Vt. 551; *State v. Burt*, 25 Vt. 373.

[c] The means employed to accomplish the purpose of a conspiracy to obstruct justice need not be alleged in an indictment or information charging such conspiracy. **Me.**—*State v. Ripley*, 31 Me. 386; *State v. Bartlett*, 30 Me. 132. **N. Y.**—*People v. Chase*, 16 Barb. 495. **Vt.**—*State v. Noyes*, 25 Vt. 415.

3. *State v. Barrett*, 42 N. H. 466. See generally 12 STANDARD PROC. 327.

[a] A bill of particulars is obtainable by defendant. *State v. Pickett*, 118 N. C. 1231, 24 S. E. 350; *State v. Dunn*, 109 N. C. 839, 13 S. E. 881; *Com. v. McClure*, 2 Chest. Co. 557, 1 Pa. Co. Ct. 182.

4. **Fla.**—*Johnson v. State*, 51 Fla. 44, 40 So. 678. **Kan.**—*State v. Appleby*, 66 Kan. 351, 71 Pac. 847. **La.**

State v. Sullivan, 125 La. 560, 51 So. 588. **Pa.**—*Com. v. Grube*, 20 Pa. Dist. 212. **Tex.**—*State v. Coffey*, 41 Tex. 46. **Vt.**—*State v. Ferry*, 61 Vt. 624, 18 Atl. 451. **Wash.**—*State v. Wingard*, 92 Wash. 219, 158 Pac. 725.

See generally 12 STANDARD PROC. 499.

[a] Alternative allegations do not render the pleading duplicitous where the statute describes the offense in the alternative. *Slicker v. State*, 13 Ark. 397.

[b] The use of the qualifying words "violent or tumultuous" disjunctively as used in the statute is not fatal where one term is used only as explaining the other and does not render the statement of the offense uncertain. *Bonneville v. State*, 53 Wis. 680, 11 N. W. 427.

5. *People v. Rounds*, 67 Mich. 482, 35 N. W. 77. See generally 12 STANDARD PROC. 480.

[a] An unnecessary description of the manner in which the offense was committed does not vitiate the indictment, but is surplusage. *Davey v. United States*, 208 Fed. 237, 125 C. C. A. 437.

[b] Conclusion against the statute is surplusage unless the indictment is good under the statute. *State v. Burt*, 25 Vt. 373.

6. **U. S.**—*United States v. McDonald*, 8 Biss. 439, 26 Fed. Cas. No. 15,667. **Ill.**—*McQuoid v. People*, 8 Ill. 76. **N. C.**—*State v. Pickett*, 118 N. C. 1231, 24 S. E. 350, police officer. **Tenn.** *Mavery v. State*, 10 Lea 729.

7. **U. S.**—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419. **Mo.**—*State v. Phipps*, 34 Mo. App. 400. **Ore.**—*State v. Smith*, 11 Ore. 205, 8 Pac. 343. **R. I.**—*State v. Maloney*, 12 R. I. 251. **Tex.**—*Johnson v. State*, 26 Tex. 117; *Bristow v. State*, 36 Tex. 379, 37 S. W. 326. **Vt.**—*State v. Carpenter*, 54 Vt. 551. **Va.** *Israel's Case*, 4 Leigh (31 Va.) 675.

See *infra*, II, B, 3; II, C, 3.

8. See *infra*, II, B, 3.

be averred in accordance with the general rules.⁹ The specific acts of resistance need not be stated in the indictment; but it is sufficient to allege that the defendant resisted the officer in the discharge of his duty.¹⁰

The statute may prescribe a form of indictment,¹¹ and it is, of course, sufficient to follow the language of the statute,¹² providing every element of the offense is embraced therein.¹³

An affidavit in support of the information is sometimes necessary.¹⁴

B. RESISTING OR OBSTRUCTING EXECUTION OF PROCESS.¹⁵ — **1. Averments as to Process.** — The nature and effect of the process should appear from the indictment or information;¹⁶ but it is not necessary to set it out in *haec verba*,¹⁷ nor to describe it with great particularity.¹⁸

9. See the preceding notes and generally 12 STANDARD PROC. 399, *et seq.*

10. **Ark.**—*Oliver v. State* 17 Ark. 508. **Cal.**—*People v. Hunt*, 120 Cal. 281, 52 Pac. 658. **Mass.**—*Com. v. Delehan*, 148 Mass. 254, 19 N. E. 221. **Mo.**—*State v. Estis*, 70 Mo. 427. **Vt.** *State v. Carpenter*, 54 Vt. 551; *State v. Burt*, 25 Vt. 373.

See also *infra* I, B, 4; I, C. 4.

[a] The order of a justice which the officer resisted was about to enforce need not be recited, as the only object in reciting it would be to show the particular acts of resistance. *State v. Copp*, 15 N. H. 212.

[b] But where the offense consists in furnishing a certificate which the defendant knew to be false, it must be expressly charged that the defendant made the certificate and furnished it with corrupt intent. *Johnson v. United States*, 87 Fed. 187, 30 C. C. A. 612.

11. See the statutes and the following: **Ala.**—*Lewis v. State*, 3 Ala. App. 133, 57 So. 1035. **Kan.**—*State v. Morrison*, 46 Kan. 679, 27 Pac. 133. **Mass.** *Com. v. Delehan*, 148 Mass. 254, 19 N. E. 221. **Mich.**—*People v. Rounds*, 67 Mich. 482, 35 N. W. 77. **N. H.**—*State v. Webster*, 39 N. H. 96.

12. **Ala.**—*Batre v. State*, 18 Ala. 119. **Ark.**—*Putman v. State*, 49 Ark. 449, 5 S. W. 715. **Cal.**—*People v. Hunt*, 120 Cal. 281, 52 Pac. 658; *Maness v. Superior Court*, 25 Cal. App. 533, 144 Pac. 298. **Ind.**—*State v. Gilbert*; 21 Ind. 474. **La.**—*State v. Ashworth*, 43 La. Ann. 204, 8 So. 625. **N. H.** *State v. Roberts*, 52 N. H. 492; *State v. Fifield*, 18 N. H. 34. **Wis.**—*State v. Welch*, 37 Wis. 196.

See generally 12 STANDARD PROC. 442.

13. **Ky.**—*Com. v. Stout*, 7 B. Mon. 247. **Mich.**—*People v. Hamilton*, 71 Mich. 340, 38 N. W. 921. **Ohio.**—See *Aylmore v. State*, 11 Ohio Dec. (Reprint) 900, 30 Wkly. L. Bul. 376; *Lamberton v. State*, 11 Ohio 282. **R. I.** *State v. Maloney*, 12 R. I. 251. **Vt.** *State v. Clancy*, 56 Vt. 698.

14. **Ark.**—*Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675. **Ind.**—*Brunson v. State*, 97 Ind. 95. **Pa.**—*Com. v. Higgins*, 5 Kulp 269.

[a] Probable cause should appear from the affidavit. *Johnston v. United States*, 87 Fed. 187, 30 C. C. A. 612.

15. As to statutory form in Alabama see *Howard v. State*, 121 Ala. 21, 25 So. 1000; *Drake v. State*, 60 Ala. 62.

16. *Hunter v. State*, 4 Ga. App. 579, 61 S. E. 1130; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482.

[a] A description sufficient to identify the process will do. *State v. Moore*, 125 Iowa 749, 101 N. W. 732.

[b] A possessory warrant for the recovery of personal property issued by a magistrate named sufficiently describes the process, the obstruction of which is charged in an indictment. *Gibson v. State*, 118 Ga. 29, 44 S. E. 811.

[c] The indorsement of the writ need not be specifically alleged where the allegation of the indorsement is a part of the description of the writ. *State v. Fifield*, 18 N. H. 34.

17. **Ill.**—*McQuoid v. People*, 8 Ill. 76. **N. H.**—*State v. Roberts*, 52 N. H. 492. **N. C.**—*State v. Pickett*, 118 N. C. 1231, 24 S. E. 350.

18. *Oliver v. State*, 17 Ark. 508; *Slicker v. State*, 13 Ark. 397; *State v. Dunn*, 109 N. C. 839, 13 S. E. 881.

[a] It is not necessary to allege that the judgment was rendered by a

Legality of Process. — That the process was legal should be shown,¹⁹ by an averment thereof in terms,²⁰ or by a statement of facts from which such legality is necessarily inferable.²¹

2. Authority of Officer. — It is necessary that the indictment or information disclose the authority of the person attempting to execute the process;²² and that he was in the due exercise of such authority when obstructed by the accused.²³

competent court, on which the writ of execution in the indictment set forth was issued. *State v. Dickerson*, 24 Mo. 365.

[b] **Indictment according to rules of common law is fatally defective** unless it avers the issuance of the summons by proper authority with a proper description of it, the time of its return and service by a proper officer. *Drake v. State*, 60 Ala. 62.

19. **U. S.**—*United States v. Stowell*, 2 Curt. 153, 27 Fed. Cas. No. 16,409. **Ark.**—*Oliver v. State*, 17 Ark. 508. **Ill.**—*Bowers v. People*, 17 Ill. 373; *Cantrill v. People*, 8 Ill. 356. **Mo.**—*State v. Henderson*, 15 Mo. 486. **N. H.**—*State v. Flagg*, 50 N. H. 321; *State v. Beasom*, 40 N. H. 367. **S. C.**—*State v. Hailey*, 2 Strobb. 73. **Tenn.**—*Farris v. State*, 14 Lea 295. **Tex.**—*Toliver v. State*, 32 Tex. Crim. 444, 24 S. W. 286. **Vt.**—*State v. Burt*, 25 Vt. 373; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482. **Wash.**—*State v. Knapf*, 50 Wash. 229, 96 Pac. 1076, 21 L. R. A. (N. S.) 66.

[a] **That a search warrant, the execution of which was resisted, was founded upon a sufficient affidavit** should be averred. *State v. Tuell*, 6 Blackf. (Ind.) 344.

[b] **Authority of the court or officer to issue the writ should appear.** **U. S.**—*United States v. Stowell*, 2 Curt. 153, 27 Fed. Cas. No. 16,409. **Ga.**—*Paschal v. State*, 16 Ga. App. 155, 84 S. E. 725. **Ill.**—*Cantrill v. People*, 8 Ill. 356; *McQuoid v. People*, 8 Ill. 76.

[c] **It is not a sufficient statement of the legality of the process to merely allege that the officer was in the due and lawful execution of his office;** *State v. Flagg*, 50 N. H. 321; *State v. Beasom*, 40 N. H. 367.

[d] **Where the process is a writ of replevin the indictment should show that the bond required by law to be given by the plaintiff before the service thereof had been given and the fact that the writ is set out in haec**

veeba does not show that it was legal. *State v. Beasom*, 40 N. H. 367.

20. *United States v. Tinklepaugh*, 3 Blatchf. 425, 28 Fed. Cas. No. 16,526; *Bowers v. People*, 17 Ill. 373.

[a] **An averment that the process was lawful without any other allegation showing that fact has been held insufficient.** *Paschal v. State*, 16 Ga. App. 155, 84 S. E. 725.

21. **Ala.**—*Drake v. State*, 60 Ala. 62. **La.**—*State v. Perkins*, 43 La. Ann. 186, 8 So. 439. **Me.**—*State v. Bushey*, 96 Me. 151, 51 Atl. 872.
See also *Gibson v. State*, 118 Ga. 29, 44 S. E. 811.

22. **U. S.**—*United States v. Tinklepaugh*, 3 Blatchf. 425, 28 Fed. Cas. No. 16,526. **Ga.**—*Paschal v. State*, 16 Ga. App. 155, 84 S. E. 725; *Hunter v. State*, 4 Ga. App. 579, 61 S. E. 1130. **Ill.**—*Bowers v. People*, 17 Ill. 373. **Mass.**—*Com. v. Doherty*, 103 Mass. 443. **N. H.**—*State v. Sherburne*, 59 N. H. 90. **S. C.**—*State v. Hailey*, 2 Strobb. 73. **Vt.**—*State v. Hooker*, 17 Vt. 658.

[a] **If it appears upon the face of an indictment charging the offense of resisting an officer of the United States in the performance of his duty in serving a writ, that the person resisted was not an officer of the United States, it must be quashed on motion.** *United States v. Mullin*, 71 Fed. 682.

[b] **A general allegation, however, that the person resisted was a public officer authorized to execute the process is sufficient.** *United States v. Mullin*, 71 Fed. 682; *Bowers v. People*, 17 Ill. 373.

[c] **From a description of the officer the power to execute the process may be inferable; in such case it is not necessary to aver that the officer was duly authorized to serve the process.** *State v. Cassady*, 52 N. H. 500 (sheriff); *State v. Pickett*, 118 N. C. 1231, 24 S. E. 350, police officer.

23. *State v. Sherburne*, 59 N. H. 90; *State v. Roberts*, 52 N. H. 492.

3. Knowledge and Intent.—Knowledge of the official capacity of the person executing the process need not be averred,²⁴ unless such knowledge is an element of the offense under the statute.²⁵

Intent to impede the officer in the fulfillment of his duties should be set out where the prosecution is for an offense at common law;²⁶ but not, however, where the charge is based on a statute.²⁷

4. Acts of Resistance.—Resistance to the officer in the execution of the process should be shown.²⁸ An allegation in the language of the statute is sufficient;²⁹ and except, perhaps, in a few jurisdictions,³⁰ the particular acts or mode of obstruction need not be detailed.³¹

C. RESISTING ARREST.—**1. In General.**—In charging the offense of resisting arrest, it is necessary to state whether the arrest was being sought with or without a warrant,³² the county where the offense was committed;³³ and that the resistance was made in order to impede

[a] **It is sufficient** to charge the assault as made upon the officer, he being in the due execution of his office. *State v. Dunn*, 109 N. C. 839, 13 S. E. 881.

[b] **It has been held insufficient** to aver merely that the officer resisted was engaged in the due execution of his office. *Jones v. State*, 60 Ala. 99; *State v. Johnson*, 42 La. Ann. 559, 7 So. 588.

[c] **Possession of the process** by the officer should appear either by express averment or by implication from the language used. *State v. Bushey*, 95 Me. 151, 51 Atl. 872; *State v. Fifield*, 18 N. H. 34.

[d] **The place where the writ was delivered** to the officer need not be averred. *State v. Hooker*, 17 Vt. 658.

[e] **Where an officer's assistant** (1) is impeded in the service of process, it need not be alleged that such person was requested by the officer to aid him. *State v. Emery*, 65 Vt. 464, 27 Atl. 167. (2) Nor need it be averred that such assistance was necessary, if it appears from the indictment that the defendant knew that the person resisted was assisting the officer. *State v. Emery*, 65 Vt. 464, 27 Atl. 167.

24. *State v. Perkins*, 43 La. Ann. 186, 8 So. 439.

25. *Blake v. United States*, 71 Fed. 286, 18 C. C. A. 117; *United States v. Tinklepaugh*, 3 Blatchf. 425, 28 Fed. Cas. No. 16,526; *State v. Perry*, 109 Iowa 353, 80 N. W. 401.

[a] Under a statute using the word "willfully" in defining the offense of obstruction of justice, it must be shown that the defendant knew that

his act would have the effect of obstructing an officer in the performance of his duties. *Ratcliff v. State*, 12 Okla. Crim. 448, 158 Pac. 293.

26. *State v. Lovett*, 3 Vt. 110.

27. *United States v. Keen*, 5 Mason 453, 26 Fed. Cas. No. 15,511.

28. **Ark.**—*Oliver v. State*, 17 Ark. 508. **Ill.**—*McQuoid v. People*, 8 Ill. 76. **N. H.**—*State v. Fifield*, 18 N. H. 34; *State v. Copp*, 15 N. H. 212.

[a] **Actual violence** to the officer need not be charged; but threats and acts calculated to terrify are sufficient even though he be not prevented thereby from executing his process. *United States v. Smith*, 1 Dill. 212, 27 Fed. Cas. No. 16,333.

[b] **The assault must be alleged** as a part of the offense of assaulting and obstructing an officer. *State v. Webster*, 39 N. H. 96.

29. *Oliver v. State*, 17 Ark. 508; *State v. Fifield*, 18 N. H. 34. See also *supra*, II, A, and generally 12 **STANDARD PROC.** 447, et seq.

30. **S. C.**—*State v. Hailey*, 2 Strobbh. 73. **Tex.**—*Horan v. State*, 7 Tex. App. 183. **Vt.**—*State v. Burt*, 25 Vt. 375; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482.

31. **U. S.**—*United States v. Hudson*, 1 Hask. 527, 26 Fed. Cas. No. 15,412. **Ga.**—*Gibson v. State*, 118 Ga. 29, 44 S. E. 811; *Paschal v. State*, 16 Ga. App. 155, 84 S. E. 725. **Ill.** *McQuoid v. People*, 8 Ill. 76.

See also *supra*, I, A.

32. *Harless v. State*, 53 Tex. Crim. 319, 109 S. W. 934.

33. *People v. Craig*, 59 Cal. 370.

the attempted arrest.³⁴ But the name of the person arrested need not be alleged,³⁵ nor the manner in which the officer was attempting to discharge his duty.³⁶

If the crime is that of resisting arrest under warrant, the nature of the warrant,³⁷ and its legality,³⁸ must be averred. Neither the offense named in the warrant,³⁹ nor the elements constituting such offense,⁴⁰ need be set forth in the indictment. Nor is it necessary to aver that the officer had the warrant in his possession,⁴¹ or that the accused obstructed the officer at the time of the alleged attempt by him to execute the warrant.⁴² Where it appears that the arrest was being made without warrant, it must also be shown that no warrant was necessary.⁴³

2. Authority of Officer.—It must appear from the indictment or information that the officer who endeavored to make the arrest was authorized to do so.⁴⁴ It has been held, however, that a charge that the arrest or attempt to arrest was made by a deputy sheriff,⁴⁵ or an officer or constable of a certain county,⁴⁶ imports that such officer was authorized to make the arrest.

3. Knowledge of Authority.—Unless the statute makes knowledge of the official character of the person resisting an element⁴⁷ of the

34. *United States v. Wardell*, 49 Fed. 914; *Hill v. State*, 43 Tex. 329.

35. *Ia.*—*State v. Garrett*, 80 Iowa 589, 46 N. W. 748; *State v. Dunn*, 109 N. C. 839, 13 S. E. 881.

36. *State v. Carpenter*, 54 Vt. 551.

37. *McGrew v. State*, 17 Tex. App. 613.

[a] A *haec verba* recital of the warrant is not necessary. *People v. De Meaux*, 194 Mich. 18, 160 N. W. 634.

38. *Mass.*—*Com. v. Doherty*, 103 Mass. 443. *Tex.*—*Harless v. State* 53 Tex. Crim. 319, 109 S. W. 934; *Pierce v. State*, 17 Tex. App. 232. *Wash.* *State v. Brown*, 6 Wash. 609, 34 Pac. 133.

[a] **Jurisdiction** to issue the warrant should appear. *U. S.*—*United States v. Stowell*, 2 Curt. 153, 27 Fed. Cas. No. 16,409. *Ala.*—*Murphy v. State*, 55 Ala. 252. *Cal.*—*People v. Craig*, 59 Cal. 370. *Mich.*—*People v. McLean*, 68 Mich. 480, 36 N. W. 231.

[b] **A description of the officer** by whom a warrant of arrest was issued as justice of the peace or notary public in the alternative, where a notary public is *ex-officio* a justice of the peace is good as against a demurrer. *Murphy v. State*, 55 Ala. 252.

39. *Howard v. State*, 121 Ala. 21, 25 So. 1000.

40. *Johnson v. State*, 51 Fla. 44, 40 So. 678.

41. *State v. Estis*, 70 Mo. 427.

42. *State v. Freeman*, 9 Iowa 428, 74 Am. Dec. 317.

43. *Lee v. State*, 45 Tex. Crim. 94, 74 S. W. 28; *McKinney v. State* (Tex. Crim.), 22 S. W. 146.

44. *N. H.*—*State v. Scammon*, 22 N. H. 44. *Tex.*—*Harless v. State*, 53 Tex. Crim. 319, 109 S. W. 934; *McGrew v. State*, 17 Tex. App. 613. *Eng.* *King v. Osmer*, 5 East 394, 102 Eng. Reprint 1086.

45. *State v. Ferry*, 61 Vt. 624, 18 Atl. 451.

46. *Lewis v. State*, 3 Ala. App. 133, 57 So. 1035. But see *Com. v. Doherty*, 103 Mass. 443, where it is held that an indictment in which it is alleged that the defendant was arrested by a police officer under a warrant from a magistrate particularly described without a statement that the officer was authorized to make the arrest or that the arrest was lawful is not sufficient.

47. *Patton v. State* (Tex. Crim.), 49 S. W. 389.

[a] **An express averment of knowledge** is not necessary; it is sufficient if the fact can be implied from the averments. *Com. v. Kirby*, 2 Cush. (Mass.) 577; *State v. Brown*, 6 Wash. 609, 34 Pac. 133.

[b] **An allegation that the defendant well knew** that the person resisted

offense, such knowledge need not be pleaded.⁴⁸

4. **Acts of Resistance.**—The particular acts of resistance of an officer engaged in the execution of a warrant of arrest, as a rule, need not be averred.⁴⁹

D. **REFUSAL TO AID IN EXECUTION OF PROCESS.**—An indictment or information charging defendant with a refusal to aid an officer in the execution of his duties when called upon to do so must show that the officer had authority to act in the premises,⁵⁰ and that the defendant was informed of the official character of the officer.⁵¹

Charging several defendants with failing to obey the summons of an officer to aid him, where the offense of each arises out of some personal duty or omission is fatally defective.⁵²

E. **DISSUADING OR INTERFERING WITH WITNESS.**—The indictment or information must show a pending cause wherein the witness was required to testify;⁵³ the name of the witness;⁵⁴ and knowledge on the part of defendant that such person was sought as a witness;⁵⁵ the character of the process;⁵⁶ and where required by statute,⁵⁷ but not otherwise,⁵⁸ the fact that the witness had been duly summoned. It is not necessary to set out the method or means employed by the de-

was a deputy sheriff shows that the defendant knew the official character of the officer at the time of the acts complained of. *State v. Ferry*, 61 Vt. 624, 18 Atl. 451.

[c] **That the officer informed the defendant that he was acting under a warrant of arrest need not be shown** *State v. Freeman*, 8 Iowa 428, 74 Am. Dec. 317.

[d] **A failure to object to an information in which the word "knowingly" is omitted is a waiver of such defect.** *People v. Haley*, 48 Mich. 495, 12 N. W. 671.

48. *Putman v. State*, 49 Ark. 449, 5 S. W. 715.

49. *People v. Hunt*, 120 Cal. 281, 52 Pac. 658; *Bonneville v. State*, 53 Wis. 680, 11 N. W. 427. See also *supra*, 1, A.

50. *State v. Shaw*, 25 N. C. 20.

51. *State v. Deniston*, 6 Blackf. (Ind.) 277.

52. *State v. Nail*, 19 Ark. 563.

Generally as to joinder of parties, see 12 STANDARD PROC. 495 and 498.

53. *Brown v. State*, 13 Tex. App. 258; *State v. Clancy*, 56 Vt. 698.

[a] **In whose behalf the witness was summoned need not be shown.** *Com. v. Reynolds*, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

[b] **Indictment of the person against whom the witness was to testi-**

fy need not be alleged. *Jackson v. State*, 43 Tex. 421.

[c] **No allegation as to the materiality of the testimony necessary.** *Del. State v. Early*, 3 Harr. 562. **Mass.** *Com. v. Reynolds*, 14 Gray 87, 74 Am. Dec. 665. **Mo.**—*State v. Biebusch*, 32 Mo. 276.

54. *Brown v. State*, 13 Tex. App. 258.

55. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *Gandy v. State*, 77 Neb. 782, 110 N. W. 862.

[a] **An averment of knowledge is sufficient which shows that the defendant for the purpose of obstructing the due course of justice unlawfully endeavored to prevent the witness from testifying.** *State v. Carpenter*, 20 Vt. 9.

56. *Harrison v. State*, 69 Tex. Crim. 152, 151 S. W. 552.

57. *Brown v. State*, 13 Tex. App. 358.

[a] **Time and place of the summoning of the witness need not be specifically alleged.** *Com. v. Reynolds*, 14 Gray (Mass.) 87, 74 Am. Dec. 665.

58. **U. S.**—*Davey v. United States*, 208 Fed. 237, 125 C. C. A. 437. **Kan.** *State v. Sills*, 85 Kan. 830, 118 Pac. 867. **Me.**—*State v. Holt*, 84 Me. 509, 24 Atl. 951. **Mo.**—*State v. Biebusch*, 32 Mo. 276. **Neb.**—*Chrisman v. State*, 18 Neb. 107, 21 N. W. 434. **Wash.**

defendant for the purpose of inducing the witness not to appear.⁵⁹ It is sufficient to set out the purpose and the resulting act so that the nature of the accusation is apparent therefrom.⁶⁰ An averment that the defendant did induce the witness to absent himself from the court is not indispensable.⁶¹

F. SUPPRESSING EVIDENCE.—It is essential to a charge of suppressing evidence that the accused had knowledge of the fact that the evidence would be required.⁶²

G. FAILURE OR REFUSAL TO RESPOND TO PROCESS.—Under a statute denouncing the offense of refusing to attend and testify as a witness in a criminal cause, the indictment or information must show that a criminal action was pending in which defendant was required to testify;⁶³ and must contain a description of the subpoena and its service.⁶⁴ But an indictment in the language of the statute which describes the facts constituting the offense is sufficient.⁶⁵

II. TRIAL.⁶⁶—A. VARIANCE.—The general rules in reference to variance are applicable to prosecutions for obstructing justice.⁶⁷ Thus, an immaterial variance between the averments of the indictment or information and the proof will not be fatal.⁶⁸ It is otherwise as

State v. Bringgold, 40 Wash. 12, 82 Pac. 132.

59. State v. Sills, 85 Kan. 830, 118 Pac. 867.

60. State v. Ames, 64 Me. 386; Brown v. State, 13 Tex. App. 358.

[a] An indictment charging that the defendant gave money to a third person for the purpose of inducing a witness to absent himself from the court is not sufficient unless it is shown that the witness himself was communicated with. State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

61. State v. Biebusch, 32 Mo. 276, as the offense may consist in an attempt to impede the due course of justice.

62. Southern Express Co., v. Com. 167 Ky. 460, 180 S. W. 839.

63. State v. Clancy, 56 Vt. 698, an allegation that the defendant was called to give evidence of what he knew in relation to all matter to be investigated by the grand jury is not in legal effect an allegation that any criminal cause was to be investigated by the grand jury.

64. Drake v. State, 60 Ala. 62.

65. Batre v. State, 18 Ala. 119.

66. See generally the title "Trial."

67. See *infra*, this section, and generally the title "Variance and Failure of Proof."

68. See *infra*, this note.

[a] Thus (1) where the warrant is

set forth in the indictment in *hæc verba*, a mere literal variance between the warrant offered in evidence and that described will not vitiate the indictment. **Mo.**—State v. Estis, 70 Mo. 427, "fales" pretenses instead of false pretenses. (2) And where the indictment describes the warrant of arrest as issued on a complaint for larceny to be heard in the police court and the proof shows that the warrant was for larceny committed in another state, the variance is not material. **Com. v. Tracy**, 5 Mete. (Mass.) 536. (3) Nor is it a fatal variance that the proof under an indictment charging the offense of resisting arrest ordered by a judicial warrant of arrest shows that the attempted arrest was made under a writ issued by a county judge. **State v. Freeman**, 8 Iowa 428, 74 Am. Dec. 317. (4) So also where an indictment for resisting an officer in the discharge of his duties incorrectly designates the name of such officer (**Ala.**—**Cooley v. State**, 7 Ala. App. 163, 62 So. 292. **Ia.**—**State v. Flynn**, 42 Iowa 164. **Mass.**—**Com. v. Beckley**, 3 Mete. 330), or (5) the office he occupied. **State v. Pickett**, 118 N. C. 1231, 24 S. E. 350. See **Lewis v. State**, 3 Ala. App. 133, 57 So. 1035, the variance is not fatal. (6) And proof of resistance to a person appointed by an officer to act for him is competent under the

to a material variance therein, however.⁶⁹

B. PROVINCE OF JUDGE AND JURY.⁷⁰ — The question of the sufficiency of a process, the execution of which had been obstructed, is to be determined by the court.⁷¹ But whether the defendant knew of the official character of the person resisted,⁷² or whether the officer informed the defendant of his intention to arrest him and of the offense he is charged with,⁷³ are questions for the jury. The intention of the defendant in offering a witness compensation and persuading him not to obey a subpoena likewise is a question of fact to be determined by the jury from all the facts and circumstances of the case.⁷⁴

C. INSTRUCTIONS in prosecutions for obstructing justice are governed by general rules governing instructions,⁷⁵ such as that instructions assuming the existence of facts which were not proven,⁷⁶ or as to which the evidence is conflicting,⁷⁷ are properly refused.

D. VERDICT. — The general rules governing verdicts obtain in such prosecutions.⁷⁸

allegations of an indictment charging resistance to an officer. *United States v. McDonald*, 8 Biss. 439, 26 Fed. Cas. No. 15,667. (7) An averment that the defendant induced a witness to absent himself and proof that no force was used by him constitutes no variance. *State v. Sills*, 85 Kan. 830, 118 Pac. 867.

69. See *infra*, this note.

[a] Thus (1) where the office occupied by the officer is described in the indictment with particularity, proof that the officer did not occupy such position constitutes a material variance. *United States v. Phelps*, 4 Day 469, 27 Fed. Cas. No. 16,041. (2) So where it is alleged that the officer was legally appointed and duly qualified, the failure to show that he was so appointed and qualified creates a fatal variance. *State v. Copp*, 15 N. H. 212.

70. See generally the title "Province of Judge and Jury."

71. *People v. De Meaux*, 194 Mich. 18, 160 N. W. 634; *Witherspoon v. State*, 42 Tex. Crim. 532, 61 S. W. 396, 96 Am. St. Rep. 812.

72. *State v. Bateswell*, 105 Mo. 609, 16 S. W. 953.

73. *Slim v. State*, 123 Ark. 583. 186 S. W. 308.

74. *State v. Wingard*, 92 Wash. 219, 158 Pac. 725.

75. See *infra*, this section and generally 12 STANDARD PROC. 698, *et seq.*

(a) The court is not required to instruct on a lesser offense than the one charged, where no request for such an

instruction is made. *People v. De Meaux*, 194 Mich. 18, 160 N. W. 634.

[b] **Erroneous Instructions on One Count.**—(1) Where an information charging resistance of an officer while serving process consists of two counts and the defendant is convicted on the first count, it is not material that the court erred in its instructions on the second count. *Witherspoon v. State*, 42 Tex. Crim. 532, 61 S. W. 396, 96 Am. St. Rep. 812. (2) And where the offense of interfering with a witness is charged in two counts and the jury finds a verdict of guilty as to both counts the judgment will be affirmed, although the court erred in its instructions as to one of the counts. *Charles v. United States*, 213 Fed. 717. 130 C. C. A. 231.

76. *Dougherty v. State*, 106 Ala. 63, 17 So. 393; *State v. Bushey*, 93 Me. 151, 51 Atl. 872.

77. *Johnson v. State*, 51 Fla. 44, 40 So. 678.

78. See *infra*, this note and generally the title "Verdict."

[a] Under an indictment (1) for an assault and battery upon a police officer and knowingly obstructing him in the discharge of his duty, the jury may return a verdict of guilty of a simple assault or a general verdict of guilty. *Mass.*—*Com. v. Delehan*, 148 Mass. 254, 19 N. E. 221. *Mich.*—*People v. Warner*, 53 Mich. 78, 18 N. W. 568. *N. H.*—*State v. Webster*, 39 N. H. 96. (2) The general verdict constitutes a finding of the aggravated assault charged in the indictment.

Com. *v.* Delehan, 148 Mass. 254, 19 N. E. 221.

[b] A finding of the jury as to a particular count is independent of and unaffected by the finding upon any other count. *Davey v. United States*, 208 Fed. 227, 125 C. C. A. 437.

[c] A general verdict will be supported by one good count of an indictment or information although some counts thereof are defective. *Faris v. State*, 3 Ohio St. 159, 2 Chitty Cr. 134.

OBSTRUCTING PROCESS. — See **Obstructing Justice.**

Vol. XX

OBTAINING PROPERTY BY FALSE PRETENSES

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CROSS-REFERENCES:

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For forms, see 9 STANDARD PROC. 892, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. VENUE.¹ — A. GENERALLY. — The general rule is that a prosecution for obtaining property by false pretenses must be brought in the jurisdiction where the property is actually obtained.² A prosecution for an attempt to obtain property by false pretenses must be brought in the jurisdiction where the attempt is made.³

B. WHEN PROPERTY DELIVERED TO CARRIER OR MAILED. — Where as a result of the false pretenses of the defendant, property has been delivered to a carrier for transportation to the defendant, the venue must be laid in the jurisdiction where such delivery was made, the carrier being regarded as the agent of the consignee.⁴ Generally where property is mailed to the defendant he should be indicted at the place of mailing.⁵ But where an instrument for the payment of money is sent through the mail to the defendant, there is some confusion in the authorities as to where the venue should be laid.⁶

1. See generally the title "Venue."

2. **U. S.**—United States *v.* Watkins, 3 Cranch C. C. 441, 28 Fed. Cas. No. 16,649. **Cal.**—People *v.* Cummings, 123 Cal. 269, 55 Pac. 898. **Fla.**—Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126. **Ga.**—Garner *v.* State, 100 Ga. 257, 28 S. E. 24. **Ill.**—Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731. **Ind.**—Stewart *v.* Jessup, 51 Ind. 413, 19 Am. Rep. 739. **Ia.**—State *v.* Jackson, 128 Iowa 543, 105 N. W. 51; State *v.* House, 55 Iowa 466, 8 N. W. 307. **Kan.**—Matter of Carr, 28 Kan. 1. **Ky.**—Com. *v.* Van Tuyl, 1 Mete. 1, 71 Am. Dec. 455. **Mo.**—State *v.* Terry, 109 Mo. 601, 19 S. W. 206; State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720; State *v.* Dennis, 80 Mo. 589. **Neb.**—*Ex parte* Parker, 11 Neb. 309, 9 N. W. 33. **N. Y.**—Adams *v.* People, 1 N. Y. 173, 4 How. Pr. 295; Skiff *v.* People, 2 Park. Crim. 139. **Ohio.**—Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291, 2 Am. Crim. Rep. 85. **Pa.**—Com. *v.* Schmunk, 207 Pa. 544, 56 Atl. 1088, 99 Am. St. Rep. 801. **Tex.**—Declard *v.* State (Tex. Crim.), 57 S. W. 813; Sims *v.* State, 28 Tex. App. 447, 13 S. W. 653. **Vt.**—State *v.* Marshall, 77 Vt. 262, 59 Atl. 916. **Eng.**—Reg. *v.* Stanbury, 31 L. J. M. C. 88, 9 Cox Cr. Cas. 94.

one jurisdiction and the property actually obtained in another, the prosecution must be brought in the courts of the latter jurisdiction. **Graham v. People**, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731. See also **Com. v. Van Tuyl**, 1 Mete. (Ky.) 1, 171 Am. Dec. 455.

3. **Graham v. People**, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731; **State v. Terry**, 109 Mo. 601, 19 S. W. 206.

4. **Kan.**—*In re* Stephenson, 67 Kan. 556, 73 Pac. 62. **Mass.**—**Com. v. Taylor**, 105 Mass. 172. **Mo.**—**State v. Lichliter**, 95 Mo. 402, 8 S. W. 720; **State v. Dennis**, 80 Mo. 589. **Ohio.**—**Norris v. State**, 25 Ohio St. 217, 18 Am. Rep. 291, 2 Am. Crim. Rep. 85.

And see *Ex parte* Parker, 11 Neb. 309, 9 N. W. 33. *Contra*, **Com. v. Schmunk**, 207 Pa. 544, 56 Atl. 1088, 99 Am. St. Rep. 801. The earlier Pennsylvania cases follow the general rule. See **Com. v. Karpowski**, 167 Pa. 225, 31 Atl. 572; **Com. v. Mayer**, 8 Pa. Dist. 571; **Com. v. Goldstein**, 3 Pa. Co Ct. 121.

5. **Com. v. Wood**, 142 Mass. 459, 8 N. E. 432; **Reg. v. Jones**, 14 Jur. (Eng.) 533, 4 Cox C. C. 198.

6. See *infra*, this note.

[a] So if the pretenses be made in

[a] It has been held (1) that where

II. INDICTMENT OR INFORMATION. — A. **GENERALLY.** — Generally speaking an indictment for obtaining property by false pretenses must aver all of the material facts necessary to be proven in order to convict; and that the pretenses were false in fact and induced the owner to part with his property.⁷ Describing the acts of the defendant in the language of the statute as "false pretenses" is sufficient.⁸

Surplusage will be disregarded.⁹ The indictment will not be quashed for want of precision or redundancy when it can be seen from the entire instrument that the charge plainly appears.¹⁰

B. **PARTICULAR ALLEGATIONS.** — 1. **Jurisdictional Matters.** — The time and place of obtaining the property should be set forth in the indictment.¹¹

2. **The Pretenses.** — a. *Generally.* — The indictment should set forth the alleged false pretenses with such certainty and precision as

the false pretenses are contained in a letter mailed in one jurisdiction and the money is obtained by means of a draft or check drawn upon a bank in another jurisdiction, which is deposited by the defendant in a bank in the former jurisdiction, the venue is properly laid in such former jurisdiction. *State v. Smith*, 162 Iowa 336, 144 N. W. 32, 49 L. R. A. (N. S.) 834. See *Dechard v. State* (Tex. Crim.), 57 S. W. 813; also *People v. Hoffmann*, 142 Mich. 531, 105 N. W. 838. (2) Other courts have held that in such case the money is deemed to have been obtained in the state where the bank drawn upon is located and the prosecution should be commenced there. *State v. Shaeffer*, 89 Mo. 271, 1 S. W. 293, 6 Am. Crim. 259. See *People v. Adams*, 3 Denio (N. Y.) 190, 45 Am. Dec. 468.

7. See the following: **Ala.** — *Tennison v. State*, 97 Ala. 78, 12 So. 391. **Cal.** — *People v. White*, 7 Cal. App. 99, 93 Pac. 683. **Colo.** — *Knepper v. People*, 167 Pac. 779. **Conn.** — *State v. Jackson*, 39 Conn. 229. **Ill.** — *People v. Robinson*, 195 Ill. App. 641. **Ind.** — *Johnson v. State*, 75 Ind. 553. **Ky.** — *Com. v. Watson*, 146 Ky. 83, 142 S. W. 200, Ann. Cas. 1913C, 272. **Me.** — *State v. Philbrick*, 31 Me. 401. **Mich.** — *People v. Behee*, 90 Mich. 356, 51 N. W. 515. **Miss.** — *State v. Freeman*, 103 Miss. 764, 60 So. 774. **Mo.** — *State v. Daggs*, 106 Mo. 160, 17 S. W. 306. **Mont.** — *State v. Phillips*, 36 Mont. 112, 92 Pac. 299; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398. **N. H.** — *State v. Falconer*, 59 N. H. 535. **N. Y.** — *People v. Chapman*, 4 Park. Crim. 56. **Ohio.** — *Horton v. State*, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R.

A. (N. S.) 423; *Du Brul v. State*, 80 Ohio St. 52, 87 N. E. 837; *Dillingham v. State*, 5 Ohio St. 280. **Okla.** — *Fuller v. Territory*, 2 Okla. Crim. 86, 99 Pac. 1098; *Taylor v. Territory*, 2 Okla. Crim. 1, 99 Pac. 628. **Tex.** — *Maranda v. State*, 44 Tex. 442; *Crutcher v. State*, 79 Tex. Crim. 496, 186 S. W. 327. **Wyo.** — *Martins v. State*, 17 Wyo. 319, 98 Pac. 709, 22 L. R. A. (N. S.) 645.

See also *infra*, II, B, 2, c; II, B, 5.

[a] Indictment for representing property to be free and unincumbered, should set forth the nature of the alleged incumbrances. *McLendon v. State*, 16 Ga. App. 262, 85 S. E. 200.

8. *State v. Switzer*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

Following the language of the statute generally, see 12 STANDARD PROC. 442 et seq.

9. See *infra*, this note, and generally 12 STANDARD PROC. 487 et seq.

[a] Thus (1) unnecessary matter of description in the indictment will be disregarded as surplusage (*State v. Switzer*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789), (2) as will immaterial allegations. *Com. v. Stevenson*, 127 Mass. 446; *State v. Woodward*, 156 Mo. 143, 56 S. W. 880.

10. *Clark v. State*, 14 Ala. App. 633, 72 So. 291 (that word "representation" is used in the conclusion for the word "pretense" is immaterial); *State v. Burke*, 108 N. C. 750, 12 S. E. 1000.

11. *State v. Bacon*, 7 Vt. 219.

Averring time and place of commission of offense generally, see 12 STANDARD PROC. 411, et seq.

[a] **Use of word "there"** in averring place, see *Connor v. State*, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

will reasonably apprise the defendant of what he will be required to answer, and so that the court may determine what evidence is admissible.¹² The indictment need not state whether the pretense was

12. **U. S.**—United States *v.* Watkins, 3 Cranch C. C. 441, 28 Fed. Cas. No. 16,649. **Ala.**—Beasley *v.* State, 59 Ala. 20; O'Connor *v.* State, 30 Ala. 9. **Ark.**—Burrow *v.* State, 12 Ark. 65. **Cal.**—People *v.* McKenna, 81 Cal. 158, 22 Pac. 488; People *v.* Haas, 28 Cal. App. 182, 151 Pac. 672. **Fla.**—Scarlett *v.* State, 25 Fla. 717, 6 So. 767; Hamilton *v.* State, 16 Fla. 288. **Ga.**—Jones *v.* State, 93 Ga. 547, 19 S. E. 250; Culuris *v.* State, 17 Ga. App. 373, 86 S. E. 1074; Whitaker *v.* State, 11 Ga. App. 208, 75 S. E. 258. **Ill.**—Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731; West *v.* People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254; Cowen *v.* People, 14 Ill. 348; People *v.* Robinson, 195 Ill. App. 641. **Ind.**—Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885; Johnson *v.* State, 75 Ind. 553. **Ia.** State *v.* Cadwell, 79 Iowa 473, 44 N. W. 711. **Kan.**—State *v.* Palmer, 40 Kan. 474, 20 Pac. 270; State *v.* Metseh, 37 Kan. 222, 15 Pac. 251. **Ky.**—Gardner *v.* Com., 164 Ky. 196, 175 S. W. 362; Com. *v.* Moore, 11 Ky. L. Rep. 971, 12 S. W. 1066. **Me.**—State *v.* Mayberry, 48 Me. 218; State *v.* Roberts, 34 Me. 320. **Md.**—State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. **Mass.**—Com. *v.* Walker, 108 Mass. 209; Com. *v.* Wallace, 16 Gray 221. **Mich.** People *v.* Arnold, 46 Mich. 268, 9 N. W. 406. **Minn.**—State *v.* Henn, 39 Minn. 464, 40 N. W. 564. **Mo.**—State *v.* Martin, 226 Mo. 538, 126 S. W. 442; State *v.* Kain, 118 Mo. 5, 23 S. W. 763. **N. H.**—State *v.* Parker, 43 N. H. 83. **N. Y.**—People *v.* Winner, 80 Hun 130, 30 N. Y. Supp. 54, 61 N. Y. St. 783, 9 N. Y. Crim. 288; People *v.* Haynes, 11 Wend. 557. **N. C.**—State *v.* Sherrill, 95 N. C. 663; State *v.* Holmes, 82 N. C. 607. **Ohio.**—Horton *v.* State, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423; Du Brul *v.* State, 80 Ohio St. 52, 87 N. E. 837. **Ore.**—State *v.* Hanscom, 28 Ore. 427, 43 Pac. 167. **Pa.**—Com. *v.* Wallace, 114 Pa. 405, 6 Atl. 685, 60 Am. Rep. 353; Com. *v.* Frey, 50 Pa. 245. **Tenn.**—State *v.* Morgan, 109 Tenn. 157, 69 S. W. 970. **Tex.**—State *v.* Dyer, 41 Tex. 520; Windham *v.* State, 71 Tex. Crim. 384, 160 S. W. 72; Warrington *v.* State, 1 Tex.

App. 168. **Vt.**—State *v.* Keach, 40 Vt. 113. **Wash.**—State *v.* Pheips, 41 Wash. 470, 84 Pac. 24. **Wis.**—State *v.* Green, 7 Wis. 676.

Contra, by statute. Jules *v.* State, 85 Md. 305, 36 Atl. 1027; State *v.* Blizzard, 70 Md. 387, 17 Atl. 270, 14 Am. St. Rep. 366.

[a] **Transaction Between Parties Should Be Set Forth.**—Horton *v.* State, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423.

[b] **An indictment (1) for obtaining signature to a writing by false pretense** which alleges that defendant by falsely representing to W that he was authorized by a corporation to draw a draft on it to W's order to procure funds to be used for the corporation, obtained W's indorsement to such a draft, without an allegation that the indorsement was for defendant's accommodation, sufficiently shows defendant what he has to meet on trial. State *v.* Hanscom, 28 Ore. 427, 43 Pac. 167. (2) And an indictment charging a false statement that a writing was a release of mortgages on three lots, when in fact it was a release of thirty-nine lots, whereby the mortgagor's signature was procured, is sufficient. State *v.* Van Ruschen, 38 S. D. 187, 160 N. W. 811.

[c] **Indictment for falsely representing instrument in form of promissory note to be a draft and obtaining money for it is not sufficient where it does not disclose in what particular the instrument was defective.** State *v.* Dyer, 41 Tex. 520.

[d] **That property was obtained "by use of the confidence game"** held sufficient description of pretenses under statute. Lacey *v.* People, 43 Colo. 199, 95 Pac. 302; People *v.* Brady, 272 Ill. 401, 112 N. E. 126; Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731.

[e] **Indictment charging that defendant represented a horse which he traded to prosecutor, "to be all right, whereas in truth and in fact he was not all right, but diseased to such an extent as to render him worthless," is too vague and indefinite.** State *v.* Lambeth, 80 N. C. 393. *Compare*, Wa-

written or spoken.¹³ Where it was charged that the defendant falsely represented himself to be out of debt, it was held necessary to set forth in the indictment specific sums owed by him.¹⁴ An information for conspiracy to defraud by false pretenses need not allege the pretenses or means;¹⁵ but an indictment for attempt to obtain property by false pretenses should show the means by which the defendant proposed to obtain the property.¹⁶

b. *When Several Pretenses Used.*—Where several pretenses were used, the indictment is sufficient if one of them is set out.¹⁷ And if several pretenses are well charged, the indictment will not be quashed because another pretense may not be properly charged.¹⁸

c. *Falsity of.*—The indictment must distinctly negative the truth of the pretenses charged.¹⁹ The use of a negative pregnant in denying

terman *v. State*, 114 Ga. 262, 40 S. E. 262.

[f] **Indictment for false packing of cotton**, using the words, "sand-packing" is not ambiguous or insufficient. *Daniel v. State*, 61 Ala. 4.

[g] **Indictment for cheating** should set out means employed. *State v. Roberts*, 34 Me. 320; *State v. Johnson*, 1 D. Chip. (Vt.) 129.

[h] **Motion in arrest of judgment** properly allowed where description in indictment of pretenses alleged to have been used, is too vague and indefinite. *State v. Lambeth*, 80 N. C. 393.

[i] **Insufficient Indictment.**—*Burrow v. State*, 12 Ark. 65.

13. *Com. v. Mulrey*, 170 Mass. 103, 49 N. E. 91.

[a] **Not Necessary To Allege That Representations Were Made by Telegram.**—*State v. Phillips*, 36 Mont. 112, 92 Pac. 299.

14. *Barber v. People*, 17 Hun (N. Y.) 366.

15. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406. Compare *State v. Roberts*, 34 Me. 320.

16. *In re Schurman*, 40 Kan. 533, 20 Pac. 277.

[a] **Sufficient Showing.**—*State v. Riddell*, 33 Wash. 324, 74 Pac. 477.

17. Ala.—*Beasley v. State*, 59 Ala. 20. Ark.—*State v. Vandimark*, 35 Ark. 396. Ill.—*Cowen v. People*, 14 Ill. 348, sufficient if main inducing cause of imposition stated. N. Y.—*Thomas v. People*, 34 N. Y. 351.

18. *Com. v. Stevenson*, 127 Mass. 446; *Com. v. Parmenter*, 121 Mass. 354.

19. U. S.—*United States v. Post*, 113 Fed. 852. Cal.—*People v. Griffith*, 122 Cal. 212, 54 Pac. 725; *People v. Moxley*, 17 Cal. App. 466, 120 Pac. 43.

People v. Carpenter, 6 Cal. App. 231, 91 Pac. 809. Fla.—*Hamilton v. State*, 16 Fla. 288. Ga.—*Jacobs v. State*, 4 Ga. App. 509, 61 S. E. 924. Ill.—See *Barton v. People*, 135 Ill. 405, 25 N. E. 776, 25 Am. St. Rep. 375, 10 L. R. A. 302; *Sperbeck v. People*, 139 Ill. App. 96. Ind.—*Campbell v. State*, 154 Ind. 309, 56 N. E. 665; *Pattee v. State*, 109 Ind. 545, 10 N. E. 421. Ia.—*State v. Tripp*, 113 Iowa 698, 84 N. W. 546. Kan.—*State v. Metsch*, 37 Kan. 222, 15 Pac. 251. Ky.—*Com. v. Nunnally*, 124 S. W. 313; *Com. v. Caldwell*, 121 S. W. 480. Md.—*State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. Mass.—See *Com. v. Sessions*, 169 Mass. 329, 47 N. E. 1034. Mich.—*People v. Behee*, 90 Mich. 356, 51 N. W. 515; *People v. Reynolds*, 71 Mich. 343, 38 N. W. 923. Miss.—*State v. Freeman*, 103 Miss. 764, 60 So. 774; *State v. Mortimer*, 82 Miss. 443, 34 So. 214. Mo.—*State v. De Lay*, 93 Mo. 98, 5 S. W. 607. Mont.—*State v. Phillips*, 36 Mont. 112, 92 Pac. 299; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398. N. J.—*State v. Murphy*, 68 N. J. L. 235, 52 Atl. 279; *State v. Luxton*, 65 N. J. L. 605, 48 Atl. 535; *Oxx v. State*, 59 N. J. L. 99, 35 Atl. 646. N. Y. *People v. Winner*, 80 Hun 130, 30 N. Y. Supp. 54, 61 N. Y. St. 783, 9 N. Y. Crim. 288; *People v. Haynes*, 11 Wend. 557; *People v. Stone*, 9 Wend. 132; *People v. Elite Distributing Co.*, 76 Misc. 577, 137 N. Y. Supp. 235. N. C.—*State v. Carlson*, 171 N. C. 818, 89 S. E. 30; *State v. Lambeth*, 80 N. C. 393; *State v. Pickett*, 78 N. C. 458. Ohio.—*Horton v. State*, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423. Pa.—*Com. v. Wallace*, 114 Pa. 405, 6 Atl. 685, 60 Am. Rep. 353. Tenn.

the truth of the pretense will render the indictment bad.²⁰

3. Intent.²¹—Generally, the indictment must distinctly aver that the pretenses were made with intent to defraud the person to whom they were made.²²

4. Scienter.²³—The indictment or information must allege that the false pretenses were made with knowledge of their falsity,²⁴ unless,

State v. Morgan, 109 Tenn. 157, 69 S. W. 970; *Amos v. State*, 10 Humph. 117; *Britt v. State*, 9 Humph. 31. **Tex.** *State v. Levi*, 41 Tex. 563, want of such averment fatal. **Wash.**—*State v. Ryan*, 34 Wash. 597, 76 Pac. 90.

[a] **Need not aver in express terms** that pretense was false. *Britt v. State*, 9 Humph. (Tenn.) 31.

[b] **But** allegation (1) that the defendant "falsely" represented (*Hamilton v. State*, 16 Fla. 288; *Com. v. Sanders*, 98 Ky. 12, 32 S. W. 129. See also *State v. Bradley*, 63 Mo. 140), (2) or that accused unlawfully and feloniously represented (*Com. v. Nunnally* [Ky.], 124 S. W. 313), (3) or "by such false and fraudulent pretense" (*State v. Levi*, 41 Tex. 563), (4) or that the accused knew the pretenses to be false (*People v. Reynolds*, 71 Mich. 343, 38 N. W. 923; *State v. Pickett*, 78 N. C. 458) is not sufficient.

[c] **Sufficient Averment.**—See *People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726.

20. *People v. Griffith*, 122 Cal. 212, 54 Pac. 725; *State v. Trisler*, 49 Ohio St. 583, 31 N. E. 881; *Redmond v. State*, 35 Ohio St. 81.

21. See generally 12 STANDARD PROC. 402 et seq.

22. **U. S.**—*Jones v. United States*, 5 Cranch C. C. 647, 13 Fed. Cas. No. 7,499. **Ala.**—*White v. State*, 86 Ala. 69, 5 So. 674; *Mack v. State*, 63 Ala. 138. **Colo.**—*Shemwell v. People*, 161 Pac. 157. **Conn.**—*State v. Penley*, 27 Conn. 587. **Ga.**—*Jacobs v. State*, 4 Ga. App. 509, 61 S. E. 924. **Ill.**—*People v. Cohen*, 147 Ill. App. 393. **Ind.**—*Todd v. State*, 31 Ind. 514. **Ia.**—*State v. Daniels*, 90 Iowa 491, 58 N. W. 891. See also *State v. Grant*, 86 Iowa 216, 53 N. W. 120. **La.**—*State v. Lewis*, 41 La. Ann. 590, 6 So. 536. **Me.**—See *State v. Philbrick*, 31 Me. 401. **Mass.** *Com. v. O'Brien*, 172 Mass. 248, 52 N. E. 77; *Com. v. Dean*, 110 Mass. 64; *Com. v. Hooper*, 104 Mass. 549. **Mich.** *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; *People v. Getchell*, 6 Mich. 496. **Minn.**—*State v. Southall*, 77 Minn. 296,

79 N. W. 1007. **Mo.**—*State v. Turley*, 142 Mo. 403, 44 S. W. 267. See *State v. Martin*, 226 Mo. 538, 126 S. W. 442. **Mont.**—*Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398. **Neb.**—*Jacobs v. State*, 31 Neb. 33, 47 N. W. 422. **N. Y.**—*Clark v. People*, 2 Lans. 329. **N. C.**—*State v. Burke*, 108 N. C. 750, 12 S. E. 1000. **Ohio.**—*State v. Mutchler*, 87 Ohio St. 268, 101 N. E. 267; *Horton v. State*, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423; *Coblentz v. State*, 84 Ohio St. 235, 95 N. E. 768. **Pa.**—*Com. v. White*, 24 Pa. Super. 178. **Tenn.** See *State v. Morgan*, 109 Tenn. 157, 69 S. W. 970. **Vt.**—*State v. Switzer*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789. **Wash.**—*State v. Phelps*, 41 Wash. 470, 84 Pac. 24. **Wyo.**—*Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8.

[a] **Exact words** "with intent to defraud" need not be used; equivalent language will suffice. *State v. Southall*, 77 Minn. 296, 79 N. W. 1007. See also *State v. Lewis*, 41 La. Ann. 590, 6 So. 536.

[b] **Allegation that representations were "falsely and fraudulently"** made by defendant has been held sufficient without a specific allegation of intent to defraud. *Sadler v. State*, 9 Ga. App. 201, 70 S. E. 969; *Isaacs v. State*, 7 Ga. App. 799, 68 S. E. 338; *Hagood v. State*, 5 Ga. App. 80, 62 S. E. 641; *Crawford v. State*, 4 Ga. App. 789, 62 S. E. 501.

[c] **Allegation that defendant "fraudulently"** made the representations is not necessary where it is alleged that they were made "designedly, falsely, and feloniously." *State v. Claudius*, 164 N. C. 521, 80 S. E. 261.

[d] **Objection that there is no such averment** may be raised for the first time on appeal. *State v. Daniels*, 90 Iowa 491, 58 N. W. 891.

23. See generally 12 STANDARD PROC. 399 et seq.

24. **Conn.**—*State v. Penley*, 27 Conn. 587. **Ga.**—*Carlisle v. State*, 2 Ga. App. 651, 58 S. E. 1068. **Ill.**—*People v. Robinson*, 195 Ill. App. 641. **Ind.**—*Bader*

it seems, the very nature of the pretenses set forth implies that the party making them must have known them to be false.²⁵

5. That False Pretense Was Inducement.—The indictment must aver that the person alleged to have been defrauded relied upon the false pretenses and that the property was obtained by reason thereof;²⁶

v. State, 176 Ind. 268, 94 N. E. 1009; *Johnson v. State*, 75 Ind. 553. **Kan.**—*In re Schurman*, 40 Kan. 533, 20 Pac. 277. **Mass.**—*Com. v. Devlin*, 141 Mass. 423, 6 N. E. 64. **Mich.**—*People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726; *People v. Reynolds*, 71 Mich. 343, 38 N. W. 923. **Mo.**—*State v. Roberts*, 201 Mo. 702, 160 S. W. 484. **N. J.**—*State v. Blauvelt*, 38 N. J. L. 306. **Tex.**—*Maranda v. State*, 44 Tex. 442; *Doxey v. State*, 47 Tex. Crim. 503, 84 S. W. 1061, 11 Ann. Cas. 830. **Vt.**—*State v. Switser*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789. **Va.**—*Com. v. Speer*, 2 Va. Cas. 65. **W. Va.**—*State v. Hurst*, 11 W. Va. 54. **Wis.**—*Baker v. State*, 120 Wis. 135, 97 N. W. 566.

[a] **Knowledge of the defendant is sufficiently alleged** (1) by saying that the prisoner knowingly, designedly, falsely and feloniously pretended the matters of fact constituting the false pretenses, specifying them. *State v. Hurst*, 11 W. Va. 54. See *State v. Scott*, 48 Mo. 422. (2) But it has been held that the use of the word "designedly" is not sufficient without an express averment of the scienter (*State v. Bradley*, 68 Mo. 140. But see *Com. v. Hulbert*, 12 Mete. [Mass.] 446), (3) though there is authority that the words "designedly, and with intent to defraud," are sufficient. *State v. Snyder*, 66 Ind. 203; *State v. Switser*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789. See also *People v. Lennox*, 106 Mich. 625, 64 N. W. 488.

[b] **Allegations** (1) that the representations were "false" and "fraudulent" (*Doxey v. State*, 47 Tex. Crim. 503, 84 S. W. 1061, 11 Ann. Cas. 830), (2) or that defendant "did unlawfully and fraudulently with intent to cheat and defraud," obtain the property (*People v. Robinson*, 195 Ill. App. 641), (3) or that the words were used "feloniously and falsely" (*State v. Bradley*, 68 Mo. 140) do not charge that the pretenses were knowingly false and are insufficient.

[c] **Where statute does not use word "knowingly."** See *Doxey v.*

State, 47 Tex. Crim. 503, 84 S. W. 1061, 11 Ann. Cas. 830.

[d] **After verdict**, an indictment stating that the pretenses were false "all of which the said A. J. then and there well knew," is sufficient. *State v. Janson*, 80 Mo. 97.

25. Ga.—*McLendon v. State*, 16 Ga. App. 262, 85 S. E. 200. **Ind.**—*State v. Smith*, 8 Blackf. 489. **Mich.**—*People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726; *People v. Behee*, 90 Mich. 356, 51 N. W. 515; *People v. Reynolds*, 71 Mich. 343, 38 N. W. 923. **Mo.**—*State v. Bradley*, 68 Mo. 140. **S. C.**—*State v. Haines*, 23 S. C. 170.

[a] **Where charge is that defendant falsely pretended that he had title in fee**, the defendant's knowledge of the falsity of the pretense must be alleged as whether a party has, in a given case, title in fee to land is matter about which there may be difference of opinion. *State v. Bradley*, 68 Mo. 140.

[b] **Objection that indictment defective in this particular** must be taken in trial court or it will not be reviewed on appeal. *State v. Haines*, 23 S. C. 170.

26. Ala.—*Meek v. State*, 117 Ala. 116, 23 So. 155; *Tennyson v. State*, 97 Ala. 78, 12 So. 391. See also *Addington v. State* (Ala. App.), 74 So. 846. **Ark.**—*Roberts v. State*, 85 Ark. 435, 108 S. W. 842. **Cal.**—*People v. Kahler*, 26 Cal. App. 449, 147 Pac. 228; *People v. White*, 7 Cal. App. 99, 93 Pac. 682. See also *People v. Canfield*, 28 Cal. App. 792, 154 Pac. 33, that a direct averment of the connection between the pretense and the obtaining of the property is not necessary where such connection appears from other averments. **Conn.**—*State v. Penley*, 27 Conn. 587. **Fla.**—*Jones v. State*, 22 Fla. 532; *Pendry v. State*, 18 Fla. 191; *Ladd v. State*, 17 Fla. 215. **Ga.**—*Jackson v. State*, 118 Ga. 125, 44 S. E. 833. *McLendon v. State*, 16 Ga. App. 262, 85 S. E. 200. **Ill.**—*Simmons v. People*, 187 Ill. 327, 58 N. E. 384; *People v. Robinson*, 195 Ill. App. 641. **Ind.**—*State v. Ferris*, 171 Ind. 562, 86 N. E. 993, 41 L. R. A. (N. S.) 173; *State v.*

and where there appears to be no natural connection between the pretenses and the delivery of the property, additional facts must be alleged to show the relation.²⁷ An allegation that by means of certain false pretenses the property was obtained is sufficient,²⁸ as is an averment that prosecutor was induced thereby to part with his property.²⁹

Williams, 103 Ind. 235, 2 N. E. 585. **Ia.**—State v. Neimeyer, 66 Iowa 634, 24 N. W. 247; State v. Dowe, 27 Iowa 273, 1 Am. Rep. 271. **Kan.**—State v. Metsch, 37 Kan. 222, 15 Pac. 251. **Ky.**—Rand v. Com., 195 S. W. 802; Smith v. Com., 141 Ky. 534, 133 S. W. 228. **Me.**—State v. Philbrick, 31 Me. 401. **Mass.**—Com. v. Dunleay, 153 Mass. 330, 26 N. E. 870. **Mich.**—People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Brown, 71 Mich. 296, 38 N. W. 916. **Minn.**—State v. Butler, 47 Minn. 483, 50 N. W. 532; State v. Thaden, 43 Minn. 325, 45 N. W. 614. **Miss.**—State v. Freeman, 103 Miss. 764, 60 So. 774; State v. Dodenhoff, 88 Miss. 277, 40 So. 641; Denley v. State, 12 So. 698. **Mo.**—State v. Smallwood, 68 Mo. 192; State v. Vorback, 66 Mo. 168; State v. Saunders, 63 Mo. 482. **Mont.**—State v. Phillips, 36 Mont. 112, 92 Pac. 299; Territory v. Underwood, 8 Mont. 131, 19 Pac. 398. **Neb.**—Jacobs v. State, 31 Neb. 33, 47 N. W. 422; Cowan v. State, 22 Neb. 519, 35 N. W. 405. **N. H.**—State v. King, 67 N. H. 219, 34 Atl. 461. **N. J.**—Oxx v. State, 59 N. J. L. 99, 35 Atl. 646; Roper v. State, 58 N. J. L. 420, 33 Atl. 969. **N. Y.**—Clark v. People, 2 Lans. 329; Conger's Case, 1 Wheel. Cr. Cas. 448, 4 City Hall Rec. 65. **N. C.**—State v. Fitzgerald, 18 N. C. 408. See also State v. Gibson, 170 N. C. 697, 86 S. E. 774; State v. Claudius, 164 N. C. 521, 80 S. E. 261; State v. Whedbee, 152 N. C. 770, 67 S. E. 60, 27 L. R. A. (N. S.) 363. **Ohio**—Horton v. State, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423; Du Brul v. State, 80 Ohio St. 52, 87 N. E. 837. **Okla.**—Taylor v. Territory, 2 Okla. Crim. 1, 99 Pac. 628. **Ore.**—State v. Bloodsworth, 25 Ore. 83, 34 Pac. 1023. **Tenn.**—State v. Morgan, 109 Tenn. 157, 69 S. W. 970. **Tex.**—Epperson v. State, 42 Tex. 79; Moore v. State (Tex. Crim.), 197 S. W. 728; Robinson v. State (Tex. Crim.), 132 S. W. 354; Johnson v. State, 57 Tex. Crim. 347, 123 S. W. 143; Lutton v. State, 14 Tex. App. 518. **Wash.**—State v. Phelps, 41 Wash. 470, 84 Pac. 24. **W. Va.**—State v. Hurst, 11 W. Va. 54.

Wis.—Owens v. State, 83 Wis. 496, 53 N. W. 736. **Wyo.**—Haines v. Territory, 3 Wyo. 167, 13 Pac. 8.

[a] **Failure Not Cured by Verdict.** Roberts v. State, 85 Ark. 435, 108 S. W. 842; Enders v. People, 20 Mich. 233.

[b] **Insufficient Averments.**—Com. v. Lannan, 1 Allen (Mass.) 590; State v. Fitzgerald, 18 N. C. 408.

[c] **But the indictment need not show that the victim acted as a prudent business man.** People v. Henninger, 20 Cal. App. 79, 128 Pac. 352.

27. **Ala.**—Jenkins v. State, 97 Ala. 66, 12 So. 110. **Ark.**—Roberts v. State, 85 Ark. 435, 108 S. W. 842. **Cal.**—People v. White, 7 Cal. App. 99, 93 Pac. 683. **Ind.**—State v. Williams, 103 Ind. 235, 2 N. E. 585. **Mass.**—Com. v. Dunleay, 153 Mass. 330, 26 N. E. 870. **Mich.**—Enders v. People, 20 Mich. 233. **Miss.**—Denley v. State, 12 So. 698. **Mo.**—State v. Bonnell, 46 Mo. 395; **Neb.**—Jacobs v. State, 31 Neb. 33, 47 N. W. 422. **N. J.**—Roper v. State, 58 N. J. L. 420, 33 Atl. 969. **Wis.**—Owens v. State, 83 Wis. 496, 53 N. W. 736.

28. **Minn.**—State v. Butler, 47 Minn. 483, 50 N. W. 532. **Mo.**—See State v. Vorback, 66 Mo. 168. **N. H.**—State v. King, 67 N. H. 219, 34 Atl. 461. **Ohio.**—Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291, 2 Am. Crim. Rep. 85. **Ore.**—State v. Bloodsworth, 25 Ore. 83, 34 Pac. 1023. **W. Va.**—State v. Hurst, 11 W. Va. 54.

See also Clark v. People, 2 Lans. (N. Y.) 329. But see Enders v. People, 20 Mich. 233.

[a] **Use of word "thereby"** is not necessary. State v. Neimeyer, 66 Iowa 634, 24 N. W. 247.

[b] **Use of words "then and there,"** see Com. v. Hooper, 104 Mass. 549.

29. **Fairy v. State**, 50 Tex. Crim. 396, 97 S. W. 700.

[a] **Sufficient to aver prosecutor relied on truth of false pretenses without alleging that except for the false pretenses he would not have parted with the money.** Smith v. Com., 141 Ky. 534, 133 S. W. 228.

So an allegation "relying on said false representations" is a sufficient averment that the representations were believed to be true.³⁰ An indictment for attempt to obtain property need not allege that the person to whom the pretenses were made believed them.³¹

6. That Pretenses Were Successful.—It must be averred that the person making the pretenses obtained the property of the victim, injury to the latter being an essential element of the offense.³² Generally the word "obtained," or some equivalent should be used.³³ An indictment for obtaining a signature to an instrument by false pretenses must allege that the instrument was delivered to the defendant.³⁴

30. *State v. Williams*, 103 Ind. 235, 2 N. E. 585.

31. *State v. Phillips*, 36 Mont. 112, 92 Pac. 299.

32. **U. S.**—*Jones v. United States*, 5 Cranch C. C. 647, 13 Fed. Cas. No. 7,499. **Ala.**—*Gardner v. State*, 4 Ala. App. 131, 58 So. 1,001. **Cal.**—*People v. Rippe*, 32 Cal. App. 514, 163 Pac. 506; *People v. White*, 7 Cal. App. 99, 93 Pac. 683. **Fla.**—*Connor v. State*, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126. **Ga.**—*Busby v. State*, 120 Ga. 858, 48 S. E. 314; *McLendon v. State*, 16 Ga. App. 262, 85 S. E. 200 (must charge that victim suffered loss); *Jacobs v. State*, 4 Ga. App. 509, 61 S. E. 924. **Ill.**—*People v. Holtzman*, 272 Ill. 447, 112 N. E. 370; *McKay v. People*, 145 Ill. App. 277. **Kan.**—*State v. Lewis*, 26 Kan. 123. **Me.**—*State v. Philbrick*, 31 Me. 401. **Md.**—*State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. **Mass.**—*Com. v. Devlin*, 141 Mass. 423, 6 N. E. 64. **Miss.**—*State v. Freeman*, 103 Miss. 764, 60 So. 774. **Mo.**—*State v. Gerhardt*, 248 Mo. 535, 154 S. W. 722; *State v. Miller*, 212 Mo. 73, 111 S. W. 18; *State v. Phelan*, 159 Mo. 122, 60 S. W. 71. **Mont.**—*State v. Phillips*, 36 Mont. 112, 92 Pac. 299; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398. **Nev.**—*In re Waterman*, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424. **N. Y.**—*People ex rel. Phelps v. Court General Sessions*, 13 Hun 395. **Ohio.**—*Herton v. State*, 85 Ohio St. 13, 96 N. E. 797, Ann. Cas. 1913B, 90, 39 L. R. A. (N. S.) 423; *Kennedy v. State*, 34 Ohio St. 310. **Tex.**—*Cannon v. State*, 15 S. W. 117; *Moore v. State (Tex. Crim.)*, 197 S. W. 728; *Robinson v. State (Tex. Crim.)*, 132 S. W. 354; *Medders v. State*, 54 Tex. Crim. 494, 113 S. W. 270. **Wash.**—*State v. Knowlton*, 11

Wash. 512, 39 Pac. 966. **Wis.**—*State v. Brown*, 143 Wis. 405, 127 N. W. 956. **Wyo.**—*Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8.

[a] **Averment of delivery alone**, is not sufficient. *Cannon v. State (Tex.)* 15 S. W. 117.

[b] **Allegation (1) that victim "was induced" to pay defendant money and not that defendant was actually paid the sum, held insufficient.** *State v. Johnston*, 154 Mo. App. 265, 134 S. W. 38. (2) So an allegation that prosecutor "was induced to then and there sell and deliver" the property is not sufficient as it fails to allege that the prosecutor did sell and deliver the property. *State v. Kelly*, 170 Mo. 151, 70 S. W. 477; *State v. Phelan*, 159 Mo. 122, 60 S. W. 71. See also *State v. Hubbard*, 170 Mo. 246, 70 S. W. 883.

[c] **Actual pecuniary loss need not appear from the information; it is sufficient to show a legal injury.** *Stoltz v. People*, 59 Colo. 342, 148 Pac. 865.

[d] **Sufficient Averment.** *Clark v. People*, 2 Lans. (N. Y.) 329.

33. *State v. Lewis*, 26 Kan. 123.

[a] **Word "induced" is sufficient as it signifies the same as "obtained."** *State v. Brown*, 143 Wis. 405, 127 N. W. 956. But see *Connor v. State*, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

34. **Ind.**—*Johnson v. State*, 75 Ind. 553. **Ia.**—*State v. Jamison*, 74 Iowa, 613, 38 N. W. 509; *State v. Clark*, 72 Iowa 30, 33 N. W. 340. **Neb.**—*Moline v. State*, 67 Neb. 164, 93 N. W. 228. **N. Y.**—*Fenton v. People*, 4 Hill 126.

[a] **Allegation that defendant "obtained" a note, is held to infer delivery of the note.** *State v. Switzer*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789. To same effect, *State v. Marion*,

Indictment for an attempt need not allege that the fraud was completed.³⁵

7. Description of Party Defrauded.—The general rule is that in the absence of any statutory provision the indictment or information must state the name of the person alleged to have been defrauded by the false representations of the defendant,³⁶ or excuse the failure to set forth the name;³⁷ but where the party defrauded is a corporation, it is sufficient to allege that the pretense was made to the corporation without naming any particular individual.³⁸ If it be charged that property of one person was obtained by false representations made to another person, the indictment is insufficient where agency or other relation between such persons is not alleged;³⁹ and where the charge is that a concern or firm was defrauded, the indictment must state whether it is a corporation, partnership, joint-stock company, or voluntary association.⁴⁰ In several jurisdictions there are statutory pro-

235 Mo. 359, 138 S. W. 491; *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8. See also *People v. Kinney*, 110 Mich. 97, 67 N. W. 1089.

35. *State v. Phillips*, 36 Mont. 112, 92 Pac. 299.

36. *Ala.*—*Bailey v. State*, 159 Ala. 4, 48 So. 791, 17 Ann. Cas. 623; *Cheshire v. State*, 8 Ala. App. 253, 62 So. 994. *Ga.*—*O'Neal v. State*, 10 Ga. App. 474, 73 S. E. 696. *Ind.*—See *Johnson v. State*, 75 Ind. 553. *Ia.*—*State v. Clark*, 141 Iowa 297, 119 N. W. 719.

Kan.—*In re Schurman*, 40 Kan. 533, 20 Pac. 277. *Mich.*—*People v. Barkelow*, 37 Mich. 455. *Mo.*—*State v. Horn*, 93 Mo. 190, 6 S. W. 96; *State v. McChesney*, 90 Mo. 120, 1 S. W. 841. *N. Y.*—*People v. Fish*, 4 Park. Crim. 206. *Tenn.*—*State v. Woodson*, 5 Humph. 55. *Tex.*—*Burd v. State*, 39 Tex. 509; *Pilgrim v. State*, 68 Tex. Crim. 175, 150 S. W. 1170.

[a] **Sufficiency of Description.**—(1) Allegation of acts done to defraud “divers of the citizens of the township of Farmington and of the county of Oakland” is insufficient (*People v. Barkelow*, 37 Mich. 455), (2) as is an allegation that the party defrauded is the “people of the state” (*People v. Fish*, 4 Park. Crim. [N. Y.] 206), (3) or a charge that defendant sold by false weights to “divers persons.” *State v. Woodson*, 5 Humph. (Tenn.) 55. (4) So too describing the party defrauded as the Houston and Texas Central Railway Company and others and one Robert Smith, is too uncertain and vague. *Burd v. State*, 39 Tex. 509.

37. *Miss.*—*State v. Tatum*, 96

Miss. 430, 50 So. 490. *Mo.*—*State v. McChesney*, 90 Mo. 120, 1 S. W. 841. *N. Y.*—*People v. Fish*, 4 Park. Crim. 206, that allegation that names of persons defrauded are to the grand jury unknown is sufficient.

38. *Ala.*—*Bailey v. State*, 159 Ala. 4, 48 So. 791, 17 Ann. Cas. 623. *Ill.*—*People v. Goodhart*, 248 Ill. 373, 94 N. E. 148, indictment for attempt to obtain money from a corporation. *Minn.*—*State v. Hulder*, 78 Minn. 524, 81 N. W. 532. *Mo.*—*State v. Turley*, 142 Mo. 403, 44 S. W. 267.

39. *Ga.*—*Livingston v. State*, 17 Ga. App. 136, 86 S. E. 449, holding that allegations that a representation was made to a named person “as president” of a named corporation, and that he “as president” of the corporation, relied upon the representation, sufficiently stated his relationship to the corporation. *Mich.*—*People v. Behee*, 90 Mich. 356, 51 N. W. 515. *Neb.*—*Jacobs v. State*, 31 Neb. 33, 47 N. W. 422. *Wis.*—*Owens v. State*, 83 Wis. 496, 53 N. W. 736.

But see *Stoughton v. State*, 2 Ohio St. 562.

40. *Nasets v. State* (Tex. Crim.), 32 S. W. 698. But see *Livingston v. State*, 17 Ga. App. 136, 86 S. E. 449, holding that the term “City National Bank,” alleged to have been defrauded, imports a corporation.

[a] **Sufficient Avertments.**—Alleging an intent to defraud “Lesser Bros. Co., a corporation,” is sufficient. *People v. Russell*, 156 Cal. 450, 105 Pac. 416.

[b] So describing the defrauded

visions that in an indictment for this offense it is sufficient to charge the act to have been done with an intent to defraud without alleging an intent to defraud any particular person. In such states the name of the person defrauded need not be set forth.⁴¹

An indictment for conspiracy to defraud by false pretenses need not specify the person or persons who were the objects of the conspiracy, and who were to be cheated and defrauded in the prosecution thereof.⁴²

8. Description and Value of Property.—The property alleged to have been obtained by reason of the false pretenses must be clearly described.⁴³ It has been said that the same particularity is required

party as the "Springfield Stove Works, a corporation duly organized and incorporated under the laws of Missouri," is sufficient. *State v. Turley*, 142 Mo. 403, 44 S. W. 267.

[c] An allegation, in an information for obtaining the money of a partnership by means of false representations, that the person to whom the representations were made, and who donated the money was a member of the firm, sufficiently alleges the authority of such person to make the donation for the firm. *People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726.

[d] When a partnership has been defrauded (1), according to some decisions it is sufficient to allege the firm name without setting forth the individual names of the co-partners (*State v. Williams*, 103 Ind. 235, 2 N. E. 585), but (2) in other jurisdictions it is held necessary to set forth the christian and surnames of the partners comprising the firm. *State v. Tatum*, 96 Miss. 430, 50 So. 490; *Bates v. State*, 124 Wis. 612, 103 N. W. 251, 4 Ann. Cas. 365.

[e] If the defrauded party is a voluntary association the names of the parties comprising it should be set forth. *State v. McChesney*, 90 Mo. 120, 1 S. W. 841.

41. Ala.—*Mack v. State*, 63 Ala. 138. Md.—*State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am St. Rep. 366. N. Y.—*People v. Rouss*, 63 Misc. 135, 118 N. Y. Supp. 433. N. C.—*State v. Ridge*, 125 N. C. 655, 34 S. E. 439; *State v. Burke*, 108 N. C. 750, 12 S. E. 1000. Eng.—*Sill v. Reg.*, 1 El. & Bl. 553, 72 E. C. L. 553, 22 L. J. M. C. 41, 17 Jur 207, 118 Eng. Reprint 542.

42. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406, offense may be complete though victims not agreed on.

43. Ark.—*Shelton v. State*, 96 Ark. 237, 131 S. W. 871; *Cain v. State*, 58

Ark. 43, 22 S. W. 954. Fla.—*Strickland v. State*, 51 Fla. 129, 40 So. 178; *Sullivan v. State*, 44 Fla. 155, 32 So. 106. Ga.—*Oglesby v. State*, 123 Ga. 506, 51 S. E. 505; *Barker v. State*, 6 Ga. App. 443, 65 S. E. 57. Ind.—*Johnson v. State*, 75 Ind. 553. Ia.—*State v. Jackson*, 128 Iowa 543, 105 N. W. 51. Ky.—See *Hayes v. Com.*, 173 Ky. 188, 190 S. W. 700. Miss.—*State v. Tatum*, 96 Miss. 430, 50 So. 490. Mo. *State v. Loesch*, 180 S. W. 875. *State v. Crooker*, 95 Mo. 389, 8 S. W. 422. Mont.—*Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398. Nev.—*In re Waterman*, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424. N. J.—*Appleby v. State*, 63 N. J. L. 526, 42 Atl. 847. Ohio—*Redmond v. State*, 35 Ohio St. 81. Tenn.—*State v. Morgan*, 109 Tenn. 157, 69 S. W. 970. Wash.—*State v. Garland*, 65 Wash. 666, 118 Pac. 907; *State v. Phelps*, 41 Wash. 470, 84 Pac. 24. W. Va.—*State v. Hurst*, 11 W. Va. 54.

[a] Disjunctive description of property bad for uncertainty. *Cain v. State*, 58 Ark. 43, 22 S. W. 954.

[b] That a certain named sum of money (1) was obtained is sufficient. U. S.—*Griggs v. United States*, 158 Fed. 572, 85 C. C. A. 596. Ala. *Houston v. State*, 153 Ala. 61, 45 So. 228. Ga.—*Barker v. State*, 6 Ga. App. 443, 65 S. E. 57. Wis.—*Bates v. State*, 124 Wis. 612, 103 N. W. 251, 4 Ann. Cas. 365. (2) Describing the property as a certain number of dollars in money, of a kind and description to the grand jury unknown is sufficient. *People v. Demick*, 107 N. Y. 13, 14 N. E. 178.

[c] Description of Check or Draft. (1) Where a check was obtained by means of the false pretenses the indictment should describe the check by setting out its substance or allege a substantial reason for not doing so.

in describing the property, as in an indictment for larceny.⁴⁴

Value. — Except where it is an element of the offense, the value of the property obtained need not be alleged,⁴⁵ so long as it appears that the thing alleged to have been obtained was of value.⁴⁶

9. Ownership of the Property.⁴⁷ — An indictment for obtaining property by false pretenses should allege the ownership of the property obtained with certainty and precision,⁴⁸ or show some legal ex-

Bonnell v. State, 64 Ind. 498. See also *Smith v. State*, 33 Ind. 159. (2) But where the indictment charged the obtaining of a written instrument commonly called a "bank check," for the sum of thirty-five dollars and the "said J. L. M. did then and there draw and sign said bank check . . . and deliver the same to" the defendant, it was held sufficient. *State v. Carter*, 112 Iowa 15, 83 N. W. 715. (3) "Two drafts," a more particular description being to the grand jurors unknown, is sufficient. *People v. Miller*, 278 Ill. 490, 116 N. E. 131, Ann. Cas. 1917E, 797.

[d] "An order for the sum of \$6, issued for the support of," etc. by the board of supervisors is sufficient. *State v. Wilkerson*, 98 N. C. 696, 3 S. E. 683.

[e] **Insufficient Descriptions.** — (1) "A large amount of dry and fancy goods." *Appleby v. State*, 63 N. J. L. 526, 42 Atl. 847. (2) "A certain lot of dry goods." *Redmond v. State*, 35 Ohio St. 81. (3) "Groceries, consisting of meats and other groceries, of the value of one dollar and ten cents." *Barker v. State*, 6 Ga. App. 443, 65 S. E. 57. (4) "Certain real and personal property." *State v. Crooker*, 95 Mo. 389, 8 S. W. 422. (5) "About 180 head" of cattle of value of "about \$15,000." *State v. Jackson*, 128 Iowa 543, 105 N. W. 51. (6) "The sum of forty and 57/100 dollars or the value thereof." *Oglesby v. State*, 123 Ga. 506, 51 S. E. 505.

[f] Under the Illinois statute an indictment for obtaining property by the confidence game need not describe the property alleged to have been obtained. *People v. Brady*, 272 Ill. 401, 112 N. E. 126.

44. Ark.—*Maxey v. State*, 85 Ark. 499, 108 S. W. 1135. **Fla.**—*Sullivan v. State*, 44 Fla. 155, 32 So. 106. **Nev.** *In re Waterman*, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.), 424. **W. Va.** *State v. Hurst*, 11 W. Va. 54.

Description in indictment for larceny, see 18 STANDARD PROC. 738, et seq.

[a] **Necessity for Stating Number of Articles Obtained as in Larceny.** *Hagerman v. State*, 54 N. J. L. 104, 23 Atl. 357. See also *State v. Burrows*, 33 N. C. 477, and *Com. v. France*, 2 Brewst. (Pa.) 568.

45. People v. Stetson, 4 Barb. (N. Y.) 151; *State v. Gillespie*, 80 N. C. 396.

[a] **That value should be stated**, see *State v. Phillips*, 36 Mont. 112, 92 Pac. 299; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398, and generally 12 STANDARD PROC. 392, et seq.

[b] **Under statute providing different punishments for obtaining property over or under the value of \$50, an information not stating the value of a \$250 note alleged to have been obtained by defendant is insufficient.** *State v. Seymour* (Utah), 163 Pac. 789.

46. State v. Vandenburg, 159 Mo. 230, 60 S. W. 79 (describing property as promissory note for \$36 of the value of \$36, sufficiently shows that property obtained was of value); *People v. Peckens*, 12 App. Div. 626, 43 N. Y. Supp. 1160.

[a] **Allegation that the sum of \$20 was obtained is sufficient and it is not necessary to allege that the \$20 was of value.** *State v. Ryan*, 34 Wash. 597, 76 Pac. 90. To same effect, *Oliver v. State*, 37 Ala. 134; *State v. Tatum*, 96 Miss. 430, 50 So. 490.

47. Alleging ownership in indictment or information generally, see 12 STANDARD PROC. 393, et seq.

48. Fla.—*Webb v. State*, 69 Fla. 697, 68 So. 943; *Strickland v. State*, 51 Fla. 129, 40 So. 178; *Moulie v. State*, 37 Fla. 321, 20 So. 554, averments insufficient. **Ga.**—*O'Neal v. State*, 10 Ga. App. 474, 73 S. E. 696. **Ill.**—*Thompson v. People*, 24 Ill. 60, 76 Am Dec. 733. **Ind.**—*State v. Miller*, 153 Ind. 229, 54 N. E. 808. *Johnson v. State*, 75 Ind. 553. **Ia.**—*State v. Kiefer*, 172

cuse for the omission.⁴⁹ This rule applies to an indictment for an attempt to obtain property by false pretenses.⁵⁰ Some courts hold that a direct allegation of ownership is not necessary; it is sufficient if the ownership of the property appears from the entire indictment.⁵¹

C. PLEADING WRITTEN INSTRUMENTS OR PAPERS.⁵²—According to some authorities whenever a written instrument is the basis of the offense of obtaining property by false pretenses, such instrument should be set out in *haec verba* in the indictment or information,⁵³ or if for some reason this is impossible, such reason should be stated and the

Iowa 306, 151 N. W. 440; *State v. Clark*, 141 Iowa 297, 119 N. W. 719; *State v. Jackson*, 128 Iowa 543, 105 N. W. 51. Md.—*State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. Miss.—*State v. Hubanks*, 99 Miss. 775, 56 So. 163. Mo.—*State v. McBrien*, 265 Mo. 594, 178 S. W. 489; *State v. Stowe*, 132 Mo. 199, 33 S. W. 799; *State v. Horn*, 93 Mo. 190, 6 S. W. 96. N. M.—*Territory v. Hubbell*, 13 N. M. 579, 86 Pac. 747. Pa.—*Com. v. Graham*, 1 Pa. Co. Ct. 282, failure to do so not cured by verdict. Tex.—*Washington v. State*, 41 Tex. 583; *Pilgrim v. State*, 68 Tex. Crim. 175, 150 S. W. 1170 (sufficient to allege ownership in employe who had charge of the property); *Mays v. State*, 28 Tex. App. 484, 13 S. W. 787. Vt.—*State v. Lathrop*, 15 Vt. 279, averment insufficient. W. Va.—*State v. Cutlip*, 78 W. Va. 239, 88 S. E. 829, L. R. A. 1916E. 783. Wyo.—*Martins v. State*, 17 Wyo. 319, 98 Pac. 709, 22 L. R. A. (N. S.) 645.

[a] Ownership should be laid in one who could maintain trespass for the property. *Jones v. State*, 22 Fla. 532.

[b] Alleging that it was property of "estate of decedent named" held insufficient on demurrer for not alleging ownership in personal representative. *State v. Cutlip*, 78 W. Va. 239, 88 S. E. 829, L. R. A. 1916E, 783.

[c] Where the property is obtained from copartners, it is sufficient to allege ownership in any one of the partners. *Gardner v. State*, 4 Ala. App. 131, 58 So. 1001.

[d] But under the statutes of some states (1) it is not necessary to allege the ownership of the property. See the statutes, and *State v. Ridge*, 125 N. C. 658, 34 S. E. 440. (2) In Kentucky an erroneous allegation as to ownership is immaterial by express statutory provision. *Hennessy v. Com.*, 88 Ky. 301, 11 S. W. 13. (3) And

in *Hayes v. Com.*, 173 Ky. 188, 190 S. W. 700, an indictment alleging that the fraud was perpetrated upon a named person, without expressly alleging that she was the owner of the money obtained was held sufficient.

49. Md.—*State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366. N. M.—*Territory v. Hubbell*, 13 N. M. 579, 86 Pac. 747, 13 Ann. Cas. 848. Tex.—*Washington v. State*, 41 Tex. 583.

[a] If the name of the owner is unknown (1), that fact should be averred. *State v. McChesney*, 90 Mo. 120, 1 S. W. 841; *State v. Lathrop*, 15 Vt. 279. (2) If the owner be known or could have been known by the exercise of ordinary diligence it must be set forth in the indictment. *State v. Stowe*, 132 Mo. 199, 33 S. W. 799.

50. *State v. Cutlip*, 78 W. Va. 239, 88 S. E. 829, L. R. A. 1916E, 783.

51. U. S.—*Griggs v. United States*, 158 Fed. 572, 85 C. C. A. 596; *Cal. People v. Skidmore*, 123 Cal. 267, 55 Pac. 984. Neb.—*McClintock v. State*, 98 Neb. 158, 152 N. W. 378. Wash.—*State v. Knowlton*, 11 Wash. 512, 39 Pac. 966.

52. In indictments or informations generally, see 12 STANDARD PROC. 380, et seq.

53. *Doxey v. State*, 47 Tex. Crim. 503, 84 S. W. 1061, 11 Ann. Cas. 830; *Scott v. State*, 27 Tex. App. 264, 11 S. W. 320; *Ferguson v. State*, 25 Tex. App. 451, 8 S. W. 479; *Dwyer v. State*, 24 Tex. App. 132, 5 S. W. 662; *State v. Green*, 7 Wis. 676. See also *Moore v. State* (Tex. Crim.), 197 S. W. 728, holding that indictment for swindling by selling personal property on false representation that it was free from incumbrance should set out a mortgage on the property with sufficient particularity to accurately describe it, but not necessarily in full.

substance of the instrument set forth.⁵⁴ In other jurisdictions, it is not necessary to set out the written instrument in full; it is sufficient to set out the purport of it.⁵⁵

D. ELECTION AND SEVERAL COUNTS.—The general rules as to the use of several counts to meet the various phases of the evidence apply to indictments for obtaining property by false pretenses.⁵⁶ The same is true of the rules governing elections.⁵⁷

E. JOINDER OF SEVERAL OFFENDERS.—Several persons who participated in the making of the false pretenses and who obtained the property may be jointly charged in an indictment.⁵⁸

F. JOINDER OF OFFENSES.⁵⁹—Counts charging the obtaining of property by false pretenses and larceny from the same person,⁶⁰ or for obtaining property by false pretenses and embezzlement of the same property,⁶¹ may be joined in a single indictment or information. Con-

54. *State v. Carter*, 112 Iowa 15, 83 N. W. 715; *Wilson v. State* (Tex. Crim.), 193 S. W. 669; *Ferguson v. State*, 25 Tex. App. 451, 8 S. W. 479.

When substance may be set forth instead of pleading in *haec verba*, see 12 STANDARD PROC. 381.

55. U. S.—*Bargie v. United States*, 2 Hayw. & H. 357, 30 Fed. Cas. No. 18,229. Ind.—*Wilson v. State*, 156 Ind. 631, 59 N. E. 380, 60 N. E. 1086, that in an indictment for presenting a false claim against a county it is not necessary to set out the claim. Miss. *State v. Tatum*, 96 Miss. 430, 50 So. 490. Eng.—Reg. *v. Brown*, 2 Cox C. C. 348.

See also *State v. Ryan*, 34 Wash. 597, 76 Pac. 90.

[a] If the written instrument is only a step in the transaction, or an incident of the offense, a particular description of the same is not necessary. *State v. Baker*, 57 Kan. 541, 46 Pac. 947.

[b] But (1) if some question turns on the form or construction of the instrument (*State v. Tatum*, 96 Miss. 430, 50 So. 490), (2) or a legal description of it is given in the indictment, the accuracy of which may be material for the court to determine (*State v. Tatum*, 96 Miss. 430, 50 So. 490) it should be set forth in *haec verba*.

56. See generally 12 STANDARD PROC. 536, et seq.

[a] Thus (1) it may be alleged in one count that the pretenses were made to a firm, and in another count that they were made to the individual members of the firm. *Oliver v. State*, 37 Ala. 134. (2) An indictment con-

taining two counts, one charging the defendant with obtaining property under false pretenses and the other with obtaining the signature to a note by false pretenses, both having reference to the same transaction, is proper. *State v. House*, 55 Iowa 466, 8 N. W. 307, both might have been charged in a single count.

57. See generally 12 STANDARD PROC. 670, et seq.

[a] Goods obtained from one person by the same false pretense, twice repeated on different days, constitutes only one transaction and is not a case in which the prosecution will be required to elect. *Beasley v. State*, 59 Ala. 20.

58. U. S.—*Jones v. United States*, 5 Cranch C. C. 647, 13 Fed. Cas. No. 7,499. Ill.—See *Cowen v. People*, 14 Ill. 348. Mass.—*Com. v. Harley*, 7 Mete. 462. Wyo.—*Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8.

Joinder of parties generally in an indictment or information, see 12 STANDARD PROC. 495, et seq.

59. Generally, see 12 STANDARD PROC. 499, et seq.

60. Ala.—*Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383, they being offenses of the same general nature, belonging to the same family of crimes, and punishable in the same manner, though with different degrees of severity. Ky.—*Com. v. Bradley*, 132 Ky. 512, 116 S. W. 761. Mich.—*People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372. Pa.—*Com. v. March*, 1 Pa. Co. Ct. 81. Va.—*Anthony v. Com.*, 88 Va. 847, 14 S. E. 834.

61. *State v. Lincoln*, 49 N. H. 464, but the court will take care not only

spiracy to obtain property by false pretenses and the obtaining of the same property by false pretenses may be charged in separate counts of an indictment.⁶²

III. TRIAL.⁶³—A. ISSUES AND VARIANCE.—On the trial of an indictment for obtaining goods by false pretenses, the prosecution will be confined in the proof to the pretenses set forth in the indictment;⁶⁴ but all the pretenses charged need not be proved; it is sufficient that proof be made of one material and inducing pretense.⁶⁵

The general rules as to variance apply to prosecutions for obtaining property by false pretenses.⁶⁶ So, a material variance between the allegations of the indictment or information and the proof is fatal;⁶⁷

that the defendant is not convicted of two offenses upon the same indictment, but also that he is not embarrassed in the presentation of his defense; and if it appear to the court during the course of the trial that the different offenses charged do not relate to the same transaction, the court may, at any stage of the proceedings, put the prosecutor to his election, or quash the indictment.

62. *Thomas v. People*, 113 Ill. 531.

63. See generally the title "Trial."

64. *Ala.*—*Meek v. State*, 117 Ala. 116, 23 So. 155. *N. J.*—*State v. Riley*, 65 N. J. L. 624, 48 Atl. 536. *Wis.* *State v. Green*, 7 Wis. 676.

65. *Ala.*—*Woods v. State*, 133 Ala. 162, 31 So. 984, allegation that defendant represented a horse and buggy were unincumbered and proof that representation was made only as to the horse not fatal variance. *Cal.*—*People v. Smith*, 3 Cal. App. 62, 84 Pac. 449. *Ia.*—*State v. Dexter*, 115 Iowa 678, 87 N. W. 417. *Mass.*—*Com. v. Morrill*, 8 Cush. 571. *Mich.*—*People v. Wakely*, 62 Mich. 297, 28 N. W. 871. *Mo.* *State v. Keyes*, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369. *Wis.* *Baker v. State*, 120 Wis. 135, 97 N. W. 566.

66. See generally the title "Variance and Failure of Proof," and *Lawson v. State*, 120 Ark. 337, 179 S. W. 818 (fatal variance between the proof and allegation); *Maxey v. State*, 85 Ark. 499, 108 S. W. 1135; *State v. Booth* (Mo.), 186 S. W. 1019, no variance between proof that money obtained from bank by opening an account by depositing an order on a fictitious firm in another state and later checking it out, and the charge that defendant received money for the draft.

[a] **No Variance.**—An allegation in an indictment, that the defendant obtained goods of A., B. and C., partners in trade, by false pretenses made to them, is supported by proof that the defendant made the alleged false pretenses to their clerk and salesmen, who communicated them to B., and that the goods were delivered to the defendant in consequence of those false pretenses. *Com. v. Harley*, 7 Metc. (Mass.) 462.

67. See *infra*. this note.

[a] **Thus** (1), a variance between the allegation and proof as to the ownership of the property obtained (*Cal.*—*People v. Lapique*, 10 Cal. App. 669, 103 Pac. 164, where ownership of property constituted false pretense. *Ga.*—*Oliver v. State*, 15 Ga. App. 452, 83 S. E. 641; *O'Neal v. State*, 10 Ga. App. 474, 73 S. E. 696. *Wyo.*—*Martins v. State*, 17 Wyo. 319, 98 Pac. 709, 22 L. R. A. (N. S.) 645. *Contra*, under statute. *State v. Ridge*, 125 N. C. 658, 34 S. E. 440), (2) the description of the property obtained (*Ark.*—*Silvie v. State*, 117 Ark. 108, 173 S. W. 857. *Cal.*—*People v. Cummings*, 117 Cal. 497, 49 Pac. 576. *Tex.*—*Lieske v. State*, 60 Tex. Crim. 276, 131 S. W. 1126), (3) the property alleged to have been given by the defendant to the prosecutor for the latter's property (*State v. Davis*, 150 N. C. 851, 64 S. E. 498), (4) as to the person defrauded (*Oliver v. State*, 15 Ga. App. 452, 83 S. E. 641; *O'Neal v. State*, 10 Ga. App. 474, 73 S. E. 696. *Contra*, by reason of statute. *State v. Bourne*, 86 Minn. 432, 90 N. W. 1103; *State v. Salisbury Ice & Fuel Co.*, 166 N. C. 366, 81 S. E. 737, Ann. Cas. 1916C, 456, 52 L. R. A. [N. S.] 216), (5) the person to whom the representation was made. *Broznack v. State*, 109 Ga. 514, 35 S. E. 123, holding an allegation that

but it is otherwise as to an immaterial variance.⁶⁸ There is no variance between the charge that defendant obtained money and proof that a check was obtained.⁶⁹ But an allegation of obtaining money is not sustained by proof of obtaining a satisfaction of a debt,⁷⁰ or proof that a note was obtained.⁷¹

B. QUESTIONS FOR COURT AND JURY. — The general rule obtains in such prosecutions that questions of fact are properly for the jury to determine.⁷²

a given representation was made to one member of a firm with a view to procuring credit, not to be supported by proof that such a representation was made solely to another member of the firm, has been held fatal.

68. See *infra*, this note.

[a] Thus (1) a variance between the amount of money alleged to have been obtained and the amount proved (*Ala.*—*Cheshire v. State*, 10 *Ala. App.* 139, 64 *So.* 544; *Hope v. State*, 5 *Ala. App.* 123, 59 *So.* 326. *Cal.*—*People v. Osborn*, 12 *Cal. App.* 148, 106 *Pac.* 891. *Del.*—*State v. Briscoe*, 6 *Penne.* 401, 67 *Atl.* 154. *Fla.*—*Bowman v. State*, 54 *Fla.* 16, 45 *So.* 308. *Ia.*—*State v. Gibson*, 132 *Iowa* 53, 106 *N. W.* 270. *Mass.*—*Com. v. Sessions*, 169 *Mass.* 329, 47 *N. E.* 1034. *N. J.* *Cunningham v. State*, 61 *N. J. L.* 67, 38 *Atl.* 347. *Wis.*—*Bates v. State*, 124 *Wis.* 612, 103 *N. W.* 251, 4 *Ann. Cas.* 365), (2) or the amount of property obtained (*State v. Dexter*, 115 *Iowa* 678, 87 *N. W.* 417; *Com. v. Lee*, 149 *Mass.* 179, 21 *N. E.* 299), (3) as to the manner in which a check fraudulently obtained was cashed (*State v. Marsh*, 162 *N. C.* 603, 77 *S. E.* 839 [whether by a railroad, pay clerk or through a bank is immaterial]), has been held immaterial and not fatal.

[b] An allegation that defendant obtained a "horse" and proof that he obtained a "mare" is not a variance. *Hale v. Com.*, 151 *Ky.* 639, 152 *S. W.* 773.

69. *Cal.*—*People v. Leavens*, 12 *Cal. App.* 178, 106 *Pac.* 1103. *Ia.*—*State v. Gibson*, 132 *Iowa* 53, 106 *N. W.* 270. *Md.*—*Schaumloeffel v. State*, 102 *Md.* 470, 62 *Atl.* 803. *Mass.*—See *Com. v. Brown*, 167 *Mass.* 144, 45 *N. E.* 1, where part of the money alleged to have been obtained was shown to have been given by check. *Ore.*—*State v. Germain*, 54 *Ore.* 395, 103 *Pac.* 521. *S. C.*—*State v. Jackson*, 87 *S. C.* 407, 69 *S. E.* 883. *Tex.*—*King v. State*, 66

Tex. Crim. 397, 146 *S. W.* 543; *Robinson v. State*, 63 *Tex. Crim.* 212, 139 *S. W.* 978.

[a] See also *Rand v. Com.*, 176 *Ky.* 343, 195 *S. W.* 802, under indictment alleging the obtaining of money, it is not a fatal variance where the evidence shows that defendant obtained an order from the county court to the county treasurer to pay him the money which he assigned to a bank which obtained the money. To same effect, *State v. Stewart*, 9 *N. D.* 409, 83 *N. W.* 869. *Contra*, *People v. Cronkrite*, 266 *Ill.* 438, 107 *N. E.* 703; *Lory v. People*, 229 *Ill.* 268, 82 *N. E.* 261.

[b] Allegation that defendant obtained current money of the United States in a specified sum not sustained by proof that check for that amount was obtained. *Lieske v. State*, 60 *Tex. Crim.* 276, 131 *S. W.* 1126.

70. *Jamison v. State*, 37 *Ark.* 445, 40 *Am. Rep.* 103; *State v. Daniel*, 83 *S. C.* 309, 65 *S. E.* 236.

71. *State v. Mc Nerney*, 118 *Mo. App.* 60, 94 *S. W.* 740; *State v. Gibson*, 169 *N. C.* 318, 85 *S. E.* 7.

72. See generally the title "Province of Judge and Jury," and *infra*, this note.

[a] Thus, (1) whether the false pretenses were such as ought to mislead a man of ordinary prudence (*State v. Switzer*, 63 *Vt.* 604, 22 *Atl.* 724, 25 *Am. St. Rep.* 759. See also *Bowen v. State*, 9 *Baxt.* [Tenn.] 45, 40 *Am. Rep.* 71), (2) whether false pretense tended to deceive (*Gordon v. Com.*, 146 *Ky.* 61, 141 *S. W.* 1186. But see *State v. Starr*, 244 *Mo.* 161, 148 *S. W.* 862), (3) or were calculated to deceive the person to whom they were made (*U. S. Griggs v. United States*, 158 *Fed.* 572, 85 *C. C. A.* 596. *Ky.*—*Com. v. Beckett*, 119 *Ky.* 817, 27 *Ky. L. Rep.* 265, 84 *S. W.* 758, 115 *Am. St. Rep.* 285, 68 *L. R. A.* 638. *N. D.*—*State v. Stewart*, 9 *N. D.* 409, 83 *N. W.* 869, unless they are so absurd and incredible as not to

C. INSTRUCTIONS.—The court should properly instruct the jury on the law affecting the case in accordance with the general rules as to instructions.⁷³

D. VERDICT.—The verdict in a prosecution for obtaining property by false pretenses is governed in the main by the general rules.⁷⁴ Where the jury in their verdict specify one element of the crime and omit other essential elements, it is insufficient to sustain a conviction.⁷⁵ That the jury in their verdict undertook to name the offense and styled it "obtaining money by false pretenses," instead of "false pretenses,"⁷⁶ or to state the value of the property obtained,⁷⁷ is immaterial.

sustain a judgment of conviction), (4) whether the defendant made the representations charged (*Wilson v. State* [Tex. Crim.], 193 S. W. 669), (5) or obtained the property (*Wilson v. State* [Tex. Crim.], 193 S. W. 669), (6) whether the pretenses were made with intent to defraud (*Ala.—Bonner v. State*, 8 Ala. App. 236, 62 So. 337. **D. C.**—*Robinson v. United States*, 42 App. Cas. 186. **Mass.**—*Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150. **Mich.** *People v. Bird*, 126 Mich. 631, 86 N. W. 127. **Mo.**—*State v. Starr*, 244 Mo. 161, 148 S. W. 862; *State v. Scott*, 48 Mo. 422. **N. C.**—*State v. Marsh*, 162 N. C. 603, 77 S. E. 839. **S. C.**—*State v. Hicks*, 77 S. C. 289, 57 S. E. 842, error for court to draw inference of fraudulent intent), (7) whether the pretenses were false (*Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150; *People v. Andre*, 157 Mich. 362, 122 N. W. 98), (8) whether defendant knew them to be false (*Com. v. Farmer*, 218 Mass. 507, 106 N. E. 150; *Williams v. State*, 77 Ohio St. 468, 83 N. E. 802, 14 L. R. A. [N. S.] 1197), (9) whether a conspiracy to obtain property by false pretenses existed (*State v. Shout*, 263 Mo. 360, 172 S. W. 607), (10) whether defendant's statement was an expression of opinion or a statement of fact (*Com. v. Quinn*, 222 Mass. 504, 111 N. E. 405; *Williams v. State*, 77 Ohio St. 468, 83 N. E. 802, 14 L. R. A. [N. S.] 1197), (11) whether the pretenses were material (*People v. Cerrato*, 99 Misc. 256, 165 N. Y. Supp. 694, unless on face of indictment they appear to be immaterial), (12) whether the pretenses induced the victim to part with his property (*Ala.*—*Clark v. State*, 14 Ala. App. 633, 72 So. 291. **Ia.**—*State v. Carter*, 112 Iowa 15, 83 N. W. 715. **Ky.**—*Gordon v. Com.*, 146

Ky. 61, 141 S. W. 1186. **Mich.**—*People v. Andre*, 153 Mich. 531, 117 N. W. 55. **Mo.**—*State v. Donaldson*, 243 Mo. 460, 148 S. W. 79. **N. Y.**—*People v. Cerrato*, 99 Misc. 256, 165 N. Y. Supp. 694), (13) the place of delivery of the property (*State v. Donaldson*, 243 Mo. 460, 148 S. W. 79) are questions for the jury to determine. (14) And where the defendant is charged with obtaining property by inducing the prosecutor through false pretenses to take a check, whether the prosecutor's delay in presenting the check caused the loss is one for the jury. *Com. v. May*, 63 Pa. Super. 521.

[b] Whether the pretenses made constitute an offense is a question for the court. *State v. Keyes*, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369.

73. See generally the title "Instructions."

[a] Refusal to charge that intent to defraud is necessary held error. *Hope v. State*, 5 Ala. App. 123, 59 So. 326.

[b] Where some of the pretenses charged are immaterial, it is error to instruct that the jury should convict if one or all of the pretenses was false. *State v. Seymour* (Utah), 163 Pac. 789.

74. See generally the title "Verdict."

75. *Kimball v. Territory*, 13 Ariz. 310, 115 Pac. 70; *People v. Cummings*, 117 Cal. 497, 49 Pac. 576; *People v. Small*, 1 Cal. App. 320, 82 Pac. 87.

76. *Shemwell v. People* (Colo.), 161 Pac. 157.

77. *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858.

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CROSS-REFERENCES:

Judicial Officers;	Mandamus;
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Sheriffs, Constables and Marshals.	

Costs in mandamus proceedings against officers, see 5 STANDARD PROC. 825.

For forms, see 9 STANDARD PROC. 895, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ACTIONS AND PROCEEDINGS GENERALLY.—A. **RIGHT OF OFFICER TO SUE.**—The right of a public officer to maintain suits and actions is incidental to his official duties;¹ and sometimes by statute the officer is given exclusive authority to sue.²

B. **RIGHT TO SUE OFFICER.**³—The public authorities may maintain actions against public officials for misconduct in office.⁴ Likewise a private individual may sue an officer to redress an injury resulting from the wrongful acts of such officer in the exercise of his ministerial duties,⁵ or from acts done by him in excess of his power.⁶ But no

1. **Ark.**—Haynes *v.* Butler, 30 Ark. 69. **Mich.**—Auditor *v.* Lake George & M. R. R. Co., 82 Mich. 426, 46 N. W. 730. **N. Y.**—Rouse *v.* Moore, 18 Johns. 407; Galway *v.* Stimson, 4 Hill 136. **Ore.**—Pennoyer *v.* Willis, 26 Ore. 1, 36 Pac. 568, 46 Am. St. Rep. 594.
2. See the statutes and **Mich.**—Denver *v.* White River Log, etc. Co., 51 Mich. 472, 16 N. W. 817; Berrien County Treasurer *v.* Bunbury, 45 Mich. 79, 7 N. W. 704; Smith *v.* Adrian, 1 Mich. 495. **N. J.**—Bamford *v.* Hollinshead, 47 N. J. L. 439, 2 Atl. 244. **N. Y.**—Bidelman *v.* State, 110 N. Y. 232, 18 N. E. 115.
3. **Actions against judicial officers**, see 16 STANDARD PROC. 644, et seq.
4. **Morgan v. Monmouth Plank Road Co.**, 26 N. J. L. 99.
5. **Ala.**—Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65. **Conn.**—Bank of Hartford County *v.* Waterman, 26 Conn. 324. **Ga.**—Stewart Co. *v.* Sholl, 99 Ga. 534, 26 S. E. 757; Collins *v.* McDaniel, 66 Ga. 203. **Idaho.**—State *v.* Title Guaranty & S. Co., 27 Idaho 752, 152 Pac. 189. **Ill.**—Gage *v.* Springer, 211 Ill. 200, 71 N. E. 860; Schoden *v.* Schaefer, 184 Ill. App. 456. **Ind.**—State *v.* Lane, 184 Ind. 523, 111 N. E. 616. **Ia.**—Gutschenritter *v.* Whitmore, 158 Iowa 252, 139 N. W. 567. **Ky.**—Kinnison *v.* Carpenter, 9 Bush 599. **Me.**—Hayes *v.* Porter, 22 Me. 371. **Mass.**—Gates *v.* Neal, 23 Pick. 308. **Mich.**—Raynsford *v.* Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189. **Minn.**—Tholkes *v.* Decock, 125 Minn. 507, 147 N. W. 648, 52 L. R. A. (N. S.) 142; Selover *v.* Sheardown, 73 Minn. 393, 76 N. W. 50, 72 Am. St. Rep. 627. **Miss.**—Brown *v.* Lester, 13 Smed. & M. 392. **Mo.**—Steadley *v.* Stuckey, 113 Mo. App. 582, 87 S. W. 1014. **N. J.**—Taylor *v.* Doremus, 16 N. J. L. 473. **N. Y.**—Bennett *v.* Whitney, 94 N. Y. 302; Butler *v.* Kent, 19 Johns. 223, 10 Am. Dec. 219. **Okla.**—Mott *v.* Hull, 51 Okla. 602, 152 Pac. 92; McGuire *v.* Skelton, 36 Okla. 500, 129 Pac. 739. **S. D.**—State *v.* Ruth, 9 S. D. 84, 68 N. W. 189. **Va.**—Austin *v.* Richardson, 1 Gratt. (42 Va.) 310.
- [a] **The right to a writ of mandate to compel an officer to perform the duty which he omitted to do thereby causing plaintiff's damage does not affect the right to maintain an action against the officer.** Collins *v.* McDaniel, 66 Ga. 203. As to mandamus to officers, see *infra*, V.
6. **Ark.**—Vanderpool *v.* State, 34 Ark. 174. **Mass.**—Kelly *v.* Bemis, 4 Gray 83, 64 Am. Dec. 50. **S. C.**—Miller

action can ordinarily be maintained against an officer for an improper exercise of discretion involved in the performance of a public duty.⁷

C. CONDITIONS PRECEDENT. — Where the statute requires notice to the officer prior to suit, it must be given;⁸ otherwise notice is not necessary.⁹

D. VENUE.¹⁰ — Statutes sometimes provide that an action against a public officer, for any act done by him in virtue of his office, must be tried in the county where the cause of action, or some part thereof, arose.¹¹

E. PARTIES.¹² — In the absence of an express statute, an officer cannot sue in his own name in his official capacity, but actions must be instituted by him either in the name of the corporate body which he represents,¹³ or in his name, with the title of his office added thereto.¹⁴

Proceedings against officers on official bonds are properly instituted in the name of the state.¹⁵

Where the damage is caused by the joint act of several officers, they may be sued jointly.¹⁶

F. PLEADING. — In a declaration or complaint against an officer for some act arising out of a breach of duty, the duty on the part of the officer must be averred,¹⁷ together with facts showing a breach of such

v. Grice, 2 Rich. L. 27, 44 Am. Dec. 271.

7. **Ga.**—*Paulding v. Scoggins*, 97 Ga. 253, 23 S. E. 845. **Ill.**—*McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163. **Ia.** *Jones v. Brown*, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185. **Ky.**—*Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735. **Me.**—*Waterville v. Barton*, 64 Me. 321. **Mich.**—*Amperse v. Winslow*, 75 Mich. 234, 42 N. W. 823. **N. H.**—*Faweett v. Dole*, 67 N. H. 168, 29 Atl. 693. **N. Y.**—*Nuttall v. Simis*, 22 Misc. 19, 47 N. Y. Supp. 1097. **N. C.**—*Hannon v. Grizzard*, 99 N. C. 161, 6 S. E. 93. **Tex.**—*Gaines v. Newbrough*, 12 Tex. Civ. App. 466, 34 S. W. 1048. **W. Va.**—*Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431. **Wis.** *Druecker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571.

8. See the following: *McGuire v. Skelton*, 36 Okla. 500, 129 Pac. 739; *Lake v. Shaw*, 5 Serg. & R. (Pa.) 517, and generally the title "Suits and Actions."

9. *Boothe v. Upchurch*, 110 N. C. 62, 14 S. E. 642.

10. See generally the title "Venue."

11. See the statutes, and *Tullis v. Brawley*, 3 Minn. 277; *Fishburne v. Minott*, 72 S. C. 572, 52 S. E. 646, this provision of Code is imperative.

[a] That co-defendants live in another county does not give right to

bring action against officer in such county. *Fishburne v. Minott*, 72 S. C. 572, 52 S. E. 646.

[b] Objection that action not brought in county where officer resides too late after trial. *Tullis v. Brawley*, 3 Minn. 277, regarding statute as conferring a personal privilege only on the officer, which he may waive.

12. See the title "Parties."

13. *Balcombe v. Northup*, 9 Minn. 172.

[a] An officer de facto cannot sue in his own right as a public officer; but to do so he must be an officer de jure. *People v. Weber*, 89 Ill. 347.

14. *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Galway v. Stimson*, 4 Hill (N. Y.) 136.

15. *Meyer v. State*, 125 Ind. 335, 25 N. E. 351, state may be substituted as party plaintiff in such cases.

16. *Schoden v. Schaefer*, 184 Ill. App. 456.

17. *Smith v. Wright*, 27 Barb. (N. Y.) 621.

[a] A general allegation thereof (1) is usually sufficient if the duty is a statutory one (*Burns v. Moragne*, 128 Ala. 493, 29 So. 460; *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091), but (2) where the duty rests upon an officer only under certain conditions, the existence of such conditions must

duty.¹⁸ If malice,¹⁹ or fraud,²⁰ are relied on, they must be set out in accordance with the rules governing the pleading of such matters.

G. COSTS.—This subject is fully treated elsewhere in this work.²¹

II. ACTIONS FOR RECOVERY OF STATUTORY PENALTY.²²

Under some statutes, parties injured by the acts of an officer may recover in an action for a penalty.²³

The complaint in such an action must show every fact necessary to inform the court that the action comes within the purview of the statute.²⁴

III. ACTIONS AND PROCEEDINGS ON OFFICER'S BONDS.²⁵

A. GENERALLY.—Injuries resulting from improper performance of official duties may be remedied by an action against the officer and his sureties on the official bond;²⁶ and successive actions may be brought on the bond until the damages for the various breaches aggregate the amount of the penalty thereof.²⁷

be averred. *Smith v. Wright*, 27 Barb. (N. Y.) 621.

[b] Possession of the means to perform the duty (1) need not be averred (*Merritt v. McNally*, 14 Mont. 228, 36 Pac. 44), unless (2) the want thereof relieves defendant from the performance of the public duty involved in the action. *Smith v. Wright*, 27 Barb. (N. Y.) 621.

18. *Hammaraskold v. Bull*, 11 Rich. L. (S. C.) 493.

[a] Clerk of Court.—The breach of duty of a clerk must be alleged by stating specifically in what particular the breach occurred and how the plaintiff was injured thereby. *Brown v. Lester*, 13 Smed. & M. (Miss.) 392.

[b] Where he is sought to be held individually liable, it must appear that the circumstances of the case are such as to render him so liable. *Hammaraskold v. Bull*, 11 Rich. L. (S. C.) 493.

19. III.—*Billings v. Lafferty*, 31 Ill. 318. Ia.—*Scotten v. Fegan*, 62 Iowa 236, 17 N. W. 491. W. Va.—*Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139.

[a] An allegation that the officer wilfully committed a certain act is insufficient. *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530.

20. *Putnam County v. Johnson*, 259 Mo. 73, 167 S. W. 1039.

[a] The facts constituting the alleged fraud must be pleaded. *Putnam County v. Johnson*, 259 Mo. 73, 167 S. W. 1039.

21. See 5 STANDARD PROC. 824, et seq.

22. See generally the title "Penalties, Forfeitures and Fines."

23. See the statutes, and Ala.—*Foster v. Blount*, 18 Ala. 687, for taking excessive fees. Neb.—*Lydieck v. Palmquist*, 31 Neb. 300, 47 N. W. 918. N. C.—*Williamson v. Kerr*, 88 N. C. 10, belated issuance of execution. *King v. Wooten*, 52 N. C. 533, failure to require bond before issuing process.

[a] Such remedy is cumulative and (1) does not affect the right to maintain an action for the recovery of moneys due from the officer (*State v. Orr*, 16 Ohio St. 522), (2) or to recover from the sureties on his bond the damages sustained by the injured party. *State v. Baker*, 47 Miss. 88. As to actions on officer's bond, see *infra*, III.

[b] Actions against sheriffs for recovery of the statutory penalty, see the title, "Sheriffs, Constables and Marshals."

24. *Wright v. Wheeler*, 30 N. C. 184.

25. Actions on bonds generally, see the title "Bonds."

26. Ala.—*Sprowl v. Lawrence*, 33 Ala. 674. Cal.—*Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51. Ga.—*Bailey v. McAlpin*, 122 Ga. 616, 50 S. E. 388. Pa.—*Clement v. Com.*, 95 Pa. 107.

27. Ala.—*Sprowl v. Lawrence*, 33 Ala. 674. Ga.—*Bailey v. McAlpin*, 122 Ga. 616, 50 S. E. 388. Pa.—*Clement v. Com.*, 95 Pa. 107. Va.—*Sangster v. Com.*, 17 Gratt. (58 Va.) 124.

[a] Judgment against some of the sureties does not prevent plaintiff from suing the other sureties. *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51.

Prerequisites to Action. — Prior demand upon the officer before bringing an action on his bond is sometimes,²⁸ but not always,²⁹ necessary.³⁰ Leave of court to sue need not be obtained;³¹ nor is it necessary to establish by suit the liability of the principal before an action against the sureties on the bond may be brought.³²

B. JURISDICTION AND VENUE.³³ — If the action on the bond is penal in its nature and concerns only the internal policy of the state, it cannot be brought in another state.³⁴

C. PARTIES.³⁵ — **1. Generally.** — An action on the officer's bond may be brought in the name of the party aggrieved,³⁶ unless the statute requires it to be instituted in the name of the people for the use of the party,³⁷ or by an officer designated to bring such suits in his official capacity.³⁸

2. Joinder of Parties. — The principal and sureties on the bond may be sued either jointly,³⁹ or severally.⁴⁰

28. *Jenks v. School Dist.*, 18 Kan. 356; *Fall River v. Riley*, 138 Mass. 336.

[a] Demand is excused where it is impossible under the circumstances to make it. *Jenks v. School Dist.*, 18 Kan. 356.

29. *Foster v. State*, 22 Ind. App. 471, 53 N. E. 1095; *Boothe v. Upchurch*, 110 N. C. 62, 14 S. E. 342.

[a] Where it is the duty of the clerk to pay over moneys collected by him at a certain time, no demand therefor need be made prior to the commencement of an action against him. *Moore v. State ex rel. Denny*, 55 Ind. 360.

30. See generally the title "Suits and Actions."

31. *Boothe v. Upchurch*, 110 N. C. 62, 14 S. E. 642.

32. *Neb.*—*Kane v. Union Pac. R. R.*, 5 Neb. 105. *Tenn.*—*Ferrell v. Grigsby*, 51 S. W. 114. *Tex.*—*Wilson v. County of Wichita*, 67 Tex. 647, 4 S. W. 67.

33. See generally the titles "Jurisdiction;" "Venue."

34. *State v. Jehn*, 5 Ohio 217; *Pickering v. Fisk*, 6 Vt. 102.

35. See the title "Parties."

36. **U. S.**—*Howard v. United States*, 102 Fed. 77, 42 C. C. A. 169. *Ala.*—*Somerville v. Wood*, 129 Ala. 369, 30 So. 280; *American Bonding Co. v. New York, etc. Co.*, 11 Ala. App. 578, 66 So. 847. *Ky.*—*Howard v. Brown*, 13 Ky. L. Rep. 271. *Neb.*—*Barker v. Glendore*, 71 Neb. 740, 99 N. W. 548. *N. C.*—*Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917. *Ohio.*—*Place v. Taylor*, 22 Ohio St. 317. *Okla.*—*Ashmuhs v. Bowyer*, 39 Okla. 376, 135 Pac.

413, 50 L. R. A. (N. S.) 1060. *Tex.*—*Crews v. Taylor*, 56 Tex. 461.

[a] Leave of court necessary to enable party to sue in his own name. *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528. Compare *supra*, III, A, note 31.

37. *Ala.*—*Bagby v. Baker*, 18 Ala. 653. *Colo.*—*Cooper v. People*, 28 Colo. 87, 63 Pac. 314. *Idaho.*—*State v. American Surety Co.*, 26 Idaho 652, 145 Pac. 1097, Ann. Cas. 1916E, 209. *Ill.*—*People v. Harper*, 91 Ill. 357. *Ky.*—*Com. v. Shepperd*, 5 Ky. L. Rep. 767. *Md.*—*State v. Norwood*, 12 Md. 177. *Mass.*—*Skinner v. Phillips*, 4 Mass. 68. *N. C.*—*Carmichael v. Moore*, 88 N. C. 29. *Pa.*—*Ellis v. Freeze*, 27 Pa. Co. Ct. 153. *Tex.*—*Clough v. Worsham*, 32 Tex. Civ. App. 187, 74 S. W. 350. *W. Va.*—*Moore v. Henry*, 76 W. Va. 271, 85 S. E. 527.

[a] The state is only a nominal party in such case. *Neal v. State*, 49 Ind. 51.

[b] Where Bond Payable to Municipality.—*United States Fidelity & G. Co. v. Crittenden*, 62 Tex. Civ. App. 283, 131 S. W. 232.

38. *Pickering v. Pearson*, 6 N. H. 559; *Polk v. Plummer*, 2 Humph. 500.

[a] A successor in office may maintain an action on the bond of a clerk to recover moneys which he failed to turn over to the plaintiff. *Mulholland v. Gerry's Estate*, 81 Wis. 647, 51 N. W. 960.

39. *Stark County v. Mischel*, 33 N. D. 432, 156 N. W. 931; *Hixon v. Cupp*, 5 Okla. 545, 49 Pac. 927. See generally the title "Principal and Surety."

40. *Ga.*—*State v. Henderson*, 120

D. PLEADINGS.—1. In General.—The declaration or complaint should set out facts showing the due execution of the bond by the defendant;⁴¹ the conditions thereof;⁴² the fact that defendant was in the exercise of his official duties;⁴³ and the breach of some condition of the bond,⁴⁴ resulting in injury to the complaining party.⁴⁵ Defects in the bond not invalidating it need not be noticed in the pleading.⁴⁶

2. Objections to Complaint or Declaration.—Objections to the suffi-

Ga. 780, 48 S. E. 334. **Idaho.**—State v. American Surety Co., 26 Idaho 652, 145 Pac. 1097, Ann. Cas. 1916E, 209. **Neb.**—Barker v. Glendore, 71 Neb. 740, 99 N. W. 548.

41. *Adams v. Conner*, 73 Miss. 425, 19 So. 198.

[a] **A general allegation thereof is sufficient.** *Fire Assn. v. Ruby*, 60 Neb. 216, 82 N. W. 629.

[b] **That the bond was delivered** and that the officer acted upon it must be alleged where it appears from the complaint that the bond was not filed in time. *Sprowl v. Lawrence*, 33 Ala. 674.

[c] **Approval of the bond need not be alleged.** **Ind.**—State v. Cromwell, 7 Blackf. 70. **Ia.**—State v. Fredericks, 8 Iowa 553. **Neb.**—Fire Assn. v. Ruby, 60 Neb. 216, 82 N. W. 629.

42. **Ala.**—Tuskaloosa v. Lacy, 3 Ala. 618. **Ky.**—Howard v. Brown, 13 Ky. L. Rep. 271. **Ohio.**—Bisack v. Pape, 7 Ohio Dec. (Reprint) 115. **Tenn.** Wiley v. Cannon, 8 Humph. 10.

[a] **A copy of the bond (1) is sometimes required by statute to be attached to the complaint or else the bond must be set out in *baec verba*.** *Prince v. State*, 42 Ind. 315. Where (2) a copy of the instrument, sued upon must be attached to the complaint, an allegation that the bond has been lost is sufficient to dispense with such requirement. *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

43. *People v. Jamison*, 157 Ill. App. 546; *Mowbray v. State*, 88 Ind. 324.

44. **Ga.**—Neal-Blun Co. v. Rogers, 141 Ga. 808, 82 S. E. 280. **Ill.**—Governor v. Ridgway, 12 Ill. 14; *People v. Dieckmann*, 84 Ill. App. 244. **Ky.**—Howard v. Brown, 13 Ky. L. Rep. 271. **Ohio.**—State v. Platt, 15 Ohio 15. **Wis.**—Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751.

[a] **The various items unlawfully**

appropriated (1) by an officer for his own use need not be set out in the complaint. *State v. McDonald*, 4 Idaho 468, 40 Pac. 312, 95 Am. St. Rep. 137. But (2) an allegation that the clerk failed to account for certain fines without alleging that they were paid to and received by the clerk is insufficient. *Governor v. Ridgway*, 12 Ill. 14.

[b] **Where a copy of the bond is attached to the complaint it is sufficient to show the breach by negating the language of the condition.** *Connole v. People*, 46 Ill. App. 72; *Hadley v. Garner*, 116 App. Div. 68, 101 N. Y. Supp. 777.

[c] **An averment of a judgment recovered against the principal on the bond is not sufficient to show the breach, but is merely evidence thereof.** *United States v. Meade*, 9 Ariz. 209, 80 Pac. 326.

45. **Ala.**—Brooks v. Governor, 177 Ala. 806. **Ind.**—State v. Fleming, 124 Ind. 97, 24 N. E. 664; *State v. Hughes*, 19 Ind. App. 266, 49 N. E. 393. **Kan.** *Symms v. Cutter*, 9 Kan. App. 210, 59 Pac. 671. **Ky.**—Todd v. McClenahan, Ky. Dec. 304. **S. C.**—Chester v. Hemphill, 29 S. C. 584, 8 S. E. 195.

[a] **Where the action on a clerk's bond is based upon the ground that plaintiff lost his right to appeal from a certain judgment by reason of the fact that the defendant failed to furnish the plaintiff for the court of appeals a certified copy of the bill of exceptions, the complaint is fatally defective unless it sets forth facts tending to show that the judgment was erroneous, and an averment that plaintiff believes that the cause would be reversed is not sufficient to show that plaintiff sustained any damages.** *Houston v. Wandelohr*, 12 Ky. L. Rep. 345, 14 S. W. 345.

46. *United States Fidelity & G. Co. v. Poetker*, 180 Ind. 255, 102 N. E. 372.

ciency of the complaint or declaration may be urged by demurrer,⁴⁷ or by motion to make more definite and certain.⁴⁸

E. JUDGMENT.⁴⁹—The judgment usually is for the penalty of the bond, to be discharged upon payment of the amount found due from the principal on the bond.⁵⁰ Where the statute provides that persons severally liable on an obligation may be sued jointly or severally, the fact that an action is brought against the principal and sureties on a bond does not prevent the rendition of a judgment against the defendants severally.⁵¹ In the absence of a statute authorizing a several judgment on a joint obligation, no judgment can be rendered for the plaintiff if any one of the defendants is not liable on the bond.⁵²

Interest may be allowed from the time of defalcation where the action against the officer is brought upon that ground.⁵³ And where an officer failed to account for and pay over moneys interest may be allowed from the time when his obligation matured.⁵⁴

F. SUMMARY PROCEEDINGS.—In some jurisdictions, a judgment against the principal will authorize a summary judgment against the sureties,⁵⁵ and the statutes sometimes provide for a summary judgment on motion against a delinquent official and his sureties,⁵⁶ regardless of

47. *Hamilton v. Cook*, 5 Ill. 519.

[a] **Incapacity To Sue.**—*Cooper v. People*, 28 Colo. 87, 63 Pac. 314.

[b] **Failure to attach a copy of the bond** to the complaint as required by the statute cannot be taken advantage of by demurrer, but can be reached only by motion. *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

[c] **A mistake in the designation of a formal plaintiff** in an action on a bond does not render a complaint bad as against a general demurrer. *Governor v. Davis*, 9 Ala. 917.

[d] **Where several breaches of the conditions of a bond** are set forth in a single count of the complaint an insufficient averment of one of the breaches does not render the entire complaint demurrable. *Williamson v. Woolf*, 37 Ala. 298; *Governor v. Wiley*, 14 Ala. 172; *Governor v. Ridgway*, 12 Ill. 14.

[e] **That the bond was given without consideration** cannot be raised by demurrer. *Ahsmuhs v. Bowyer*, 39 Okla. 376, 135 Pac. 413, 50 L. R. A. (N. S.) 1060.

48. *Hadley v. Garner*, 116 App. Div. 68, 101 N. Y. Supp. 777.

49. See generally the title "Judgments."

50. *Wall v. Covington*, 83 N. C. 144; *State v. Moses*, 18 S. C. 366. See generally 4 STANDARD PROC. 532, et seq.

[a] **Where several bonds** are sued

on, judgment must be rendered separately for the penalty of each bond. *Cassady v. Board of Trustees*, 93 Ill. 394.

51. *State v. Roberts*, 40 Ind. 451.

[a] **Plaintiff may join as defendants** one or more of the persons liable and recover judgment against each of them for the whole amount. *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833; *People v. Rooney*, 29 Cal. 642.

52. *Detroit v. Houghton*, 42 Mich. 459, 4 N. W. 171, but a judgment in favor of defendants in such case is no bar to another action against some of the defendants on the same cause of action.

53. *People v. Breyfogle*, 17 Cal. 504.

54. *Monroe v. Clark*, 92 N. Y. 391.

55. *McClure v. Colelough*, 5 Ala. 65.

[a] **An opportunity to defend** against plaintiff's claim must be given the sureties. *Bitting v. Moore*, 53 Iowa 593, 5 N. W. 1101.

[b] **The question of liability** cannot be contested in such proceeding except upon the ground of legal insufficiency of the bond. *McClure v. Colelough*, 5 Ala. 65.

56. *Ex parte Curtis' Heirs*, 82 N. C. 435; *Summey v. Johnston*, 60 N. C. 98; *Donelson v. State*, 3 Lea (Tenn.) 692; *Young v. Hare*, 11 Humph. (Tenn.) 203.

[a] **Summary Judgment Against Clerk of Court.**—*Young v. Hare*, 11

the fact that an action may be maintained on the bond.⁵⁷ Such summary remedy, being in derogation of the common law, must be strictly pursued.⁵⁸ Such judgment must recite all the facts that are necessary in order to give the court jurisdiction in the case and to authorize the court to pronounce judgment.⁵⁹

A warrant of distress may, under some statutes, be issued against a delinquent officer and his sureties.⁶⁰

IV. PROCEEDINGS TO TRY TITLE TO OFFICE. — A. **GENERALLY.** — Title to office cannot be tested in a collateral proceeding;⁶¹ resort must be had to the direct remedy provided by statute for that purpose.⁶² Moreover, it is a matter for the law courts;⁶³ a bill in equity will not lie to have the election declared invalid;⁶⁴ nor will equity determine the title to office in an injunction proceeding.⁶⁵ Mandamus as a remedy is treated elsewhere in this title.⁶⁶

B. **PARTIES.**⁶⁷ — Statutory actions to determine the title to a public office are ordinarily brought in the name of the state, upon the relation of one who claims a right to the office against the incumbent.⁶⁸ But in the absence of an adverse claimant, the action may be brought by the

Humph. (Tenn.) 303; *Donelson v. State*, 3 Lea (Tenn.) 692.

[b] A judgment against sureties alone cannot be entered. *Houston v. Dougherty's Sureties*, 4 Humph. (Tenn.) 505.

57. *Broughton v. Haywood*, 61 N. C. 380.

58. *Powell v. Fowlkes*, 5 Baxt. (Tenn.) 649.

[a] It is given only to the parties in an action, and (1) does not apply to witnesses seeking to recover their fees. *Tucker v. Gillespie*, 169 Ala. 491, 53 So. 909. It (2) cannot be extended to apply to an officer who has gone out of office (*Ray County v. Barr*, 57 Mo. 290), or (3) to his personal representatives. *Powell v. Fowlkes*, 5 Baxt. (Tenn.) 649.

59. *Garner v. Carroll*, 7 Yerg. (Tenn.) 365.

60. *Grove v. Little*, 11 Leigh (38 Va.) 180.

61. *Walden v. Headland*, 156 Ala. 562, 47 So. 79; *State v. Moores*, 70 Neb. 56, 99 N. W. 504. See also the cases cited *infra* this note.

[a] Cannot be tried (1) in an action for the salary of the office (*Ala. Walden v. Headland*, 156 Ala. 562, 47 So. 79. *Mich.*—*North v. Battle Creek*, 185 Mich. 592, 152 N. W. 194. *Neb.* *State v. Moores*, 70 Neb. 56, 99 N. W. 504), nor (2) in a summary proceeding for the delivery of the books and papers of the office. *Ala.*—*Ex parte Scott*, 47 Ala. 609. *Ind.*—*McGee v.*

State, 103 Ind. 444, 3 N. E. 139. *Mich.* *Murta v. Carr*, 140 Mich. 606, 104 N. W. 27. *N. Y.*—*In re Board of Health of Lansingburgh*, 43 App. Div. 236, 60 N. Y. Supp. 27. *S. C.*—*Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860. (3) But in some cases it is held that the title to an office may be determined in an action for money had and received to recover the fees from a wrongful intruder. *Wenner v. Smith*, 4 Utah 238, 9 Pac. 293.

62. See the statutes, and *La.*—*State ex rel. Duffy v. Goff*, 135 La. 335, 65 So. 481. *N. Y.*—*Seneca Nation v. Jameson*, 62 Misc. 91, 114 N. Y. Supp. 401. *Wis.*—*Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

[a] No prior demand upon defendant is necessary. *Shennonhouse v. Withers*, 121 N. C. 376, 28 S. E. 522.

63. *McKay-Smith v. Philadelphia*, 54 Pa. Super. 257; *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

64. *McKay-Smith v. Philadelphia*, 54 Pa. Super. 257.

65. See *infra*, VI, C.

66. See *infra*, V, C.

67. See generally the title "Parties."²²

68. *State ex rel. Freeman v. Carvey* (Iowa), 154 N. W. 931; *People ex rel. Hawes v. Walker*, 23 Barb. (N. Y.) 304; *Jewell v. Mohr*, 136 N. Y. Supp. 273.

attorney-general in behalf of the people.⁶⁹ Some statutes provide for an action by a claimant for the recovery of a public office.⁷⁰

C. PLEADING. — The general rules regulating pleading in civil actions apply to actions to try title to office.⁷¹

D. TRIAL. — Actions to try title to a public office are subject to the general rules obtaining in the trial of other civil actions.⁷²

V. MANDAMUS AGAINST OFFICERS.⁷³ — A. TO COMPEL PERFORMANCE OF DUTIES. — 1. Generally. — Mandamus is an appropriate remedy to compel the performance of a ministerial duty devolving upon an officer.⁷⁴ To authorize it there must be some officer or officers in being having the power and the duty to perform the act sought to be compelled;⁷⁵ and there must be a duty which the officer is obligated

69. *State v. Grandjean*, 51 La. Ann. 1099, 25 So. 940.

70. See the statutes, and *Ark.*—Lucas v. Futrall, 84 Ark. 540, 106 S. W. 667. *Ky.*—Powell v. Hambrick, 164 Ky. 340, 175 S. W. 633. *La.*—State ex rel. Duffy v. Goff, 135 La. 335, 65 So. 481. *N. Y.*—Palmer v. Foley, 45 How. Pr. 110, 4 Jones & S. 14; Jewell v. Mohr, 136 N. Y. Supp. 273. *N. D.*—Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675.

71. See *infra*. this note; and generally the titles "Declaration and Complaint": "Pleading."

[a] Where the action is brought in the name of the state the complaint should be (1) signed by the prosecuting attorney in his official capacity (*State v. Cook*, 39 Ore. 377, 65 Pac. 89), and (2) verified by the relator. *State v. Cook*, 39 Ore. 377, 65 Pac. 89.

[b] The claimant (1) must show title to the office in himself (*Dorain v. Walters*, 132 Ky. 54, 116 S. W. 313; *State v. Moores*, 52 Neb. 634, 72 N. W. 1056), although (2) he need not specifically plead his qualifications thereto; a general averment of his eligibility is sufficient. *State v. Crowe*, 150 Ind. 455, 50 N. E. 471.

72. See *State ex rel. Freeman v. Carvey* (Iowa), 154 N. W. 931, and generally the title "Trial."

73. Mandamus against judicial officers, see the title "Mandamus."

74. See the following: *Colo.*—Chapman v. People ex rel. Beard, 9 Colo. App. 268, 48 Pac. 153. *Haw.*—Widemann v. Thurston, 7 Haw. 470. *N. Y.*—McCullough v. Brooklyn, 23 Wend. 458. *Okla.*—*State ex rel. Wells v. Cline*, 29 Okla. 157, 116 Pac. 767, Ann. Cas. 1913A, 481. 35 L. R. A. (N. S.) 527, and generally the title, "Mandamus."

Mandamus to compel performance of discretionary acts, see the title, "Mandamus."

[a] Performance of acts prohibited by injunction will not be compelled. *State ex rel. Mills v. Kispert*, 21 Wis. 387.

[b] Where the duties are being performed by the de facto officer, a mandamus will not issue to compel performance by the de jure officer. *Hamilton v. Mallard*, 33 Cal. App. 470, 165 Pac. 725; *Fowler v. Brooks*, 188 Mass. 64, 74 N. E. 291.

[c] Issues.—Nothing can be inquired into but the question of duty on the face of the statute. *State ex rel. Banking Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512.

[d] If there is a duty resting on an officer to perform the duties of another office during its vacancy, the question whether there is such a vacancy may be determined in the mandamus proceeding. *Attorney General v. Taggart*, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613.

75. *State ex rel. Board of Co. Commrs. v. Kirman*, 17 Nev. 380, 30 Pac. 1075; *State ex rel. Carpenter v. Suprs. of Beloit*, 21 Wis. 280, 91 Am. Dec. 474.

[a] If the office is abolished, the writ will not issue. *State v. Steen*, 43 N. J. L. 542.

[b] If two persons are claiming the same duty adversely to each other against a third party, the writ does not lie. *Ellison v. Raleigh*, 89 N. C. 125; *Brown v. Turner*, 70 N. C. 93; *State ex rel. Shepard v. Crouch*, 31 Okla. 206, 120 Pac. 915.

[c] Where officers elected fail to qualify and to assume the performance of their functions, the writ will not

to perform in the discharge of the functions of his office.⁷⁶

2. Where Statute Is Unconstitutional.—Ordinarily the question as to the constitutionality of the statute directing the act and prescribing the duty cannot be inquired into,⁷⁷ although sometimes the courts decline to direct the performance of acts prescribed by unconstitutional statutes.⁷⁸

3. After Resignation or Expiration of Term.—One whose term of office has expired may be required by mandamus to perform a duty personal to himself, which he should have performed while in office, whenever it is in its nature capable of such subsequent performance, and a public purpose is to be served thereby.⁷⁹ A continuing duty irrespec-

lie. *State ex rel. Carpenter v. Suprs.* of Beloit, 21 Wis. 280, 91 Am. Dec. 474.

76. Cal.—*Napa v. Rainey*, 59 Cal. 275. **Colo.**—*Chapman v. People ex rel. Beard*, 9 Colo. App. 268, 48 Pac. 153. **Conn.**—*Pond v. Parrott*, 42 Conn. 13. **Mich.**—*People ex rel. Austin v. Curtis*, 41 Mich. 723, 49 N. W. 923. **Okla.** *State ex rel. Wells v. Cline*, 29 Okla. 157, 116 Pac. 767, Ann. Cas. 1913A, 481, 35 L. R. A. (N. S.) 527; *Eberle v. King*, 20 Okla. 49, 93 Pac. 748.

[a] **Private and unofficial undertakings** cannot be enforced. *Pond v. Parrott*, 42 Conn. 13; *People ex rel. Austin v. Curtis*, 41 Mich. 723, 49 N. W. 923.

Mandamus against a private individual, see the title "Mandamus."

Compelling private person to deliver books, see *infra*. V, Q.

77. Fla.—*Franklin v. State*, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183. *People ex rel. Attorney-General v. Salomon*, 54 Ill. 39. **Ind.**—*State ex rel. Spindler v. Scheiman*, 179 Ind. 502, 101 N. E. 713; *State ex rel. Hunter v. Winterrowd*, 174 Ind. 592, 91 N. E. 956, 92 N. E. 650, 30 L. R. A. (N. S.) 886. **La.**—*State ex rel. Banking Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512. **Me.**—*Smyth v. Titcomb*, 31 Me. 272. **Mich.**—*Maynard v. First Representative Dist.*, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332. **Mo.**—*State ex rel. Wiles v. Williams*, 232 Mo. 56, 133 S. W. 1, 34 L. R. A. (N. S.) 1060. **Neb.**—*State v. Stevenson*, 18 Neb. 416, 25 N. W. 585. **Pa.**—*Com. ex rel. School District v. James*, 135 Pa. 480, 19 Atl. 950. **S. C.**—*State ex rel. Fooshe v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266. **Tex.** *Johnson v. Campbell*, 39 Tex. 83. **Utah.** *Thoreson v. State Board of Examiners*, 19 Utah 18, 57 Pac. 175.

78. San Buenaventura v. McGuire, 8 Cal. App. 497, 97 Pac. 526, 528.

[a] **Where invalidity appears on face of statute.** *Patty v. Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744.

[b] **Where personal and property rights are involved** and great inconvenience and damage would result if prompt action is not taken. *Maynard v. First Representative Dist.*, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332.

[c] **Where Refusal to Act Is on Advice of Attorney-General.**—*State ex rel. Wiles v. Williams*, 232 Mo. 56, 133 S. W. 1, 34 L. R. A. (N. S.) 1060.

79. Ark.—*Lamar v. Wilkins*, 28 Ark. 34. **Ia.**—*Keokuk v. Merriam*, 44 Iowa 432. **Kan.**—*State ex rel. Jackson v. Prather*, 84 Kan. 169, 112 Pac. 829, 36 L. R. A. (N. S.) 1084. **Neb.**—*State ex rel. Cuming Co. v. Sheater*, 29 Neb. 477, 45 N. W. 784.

[a] **Unless Remedy Would Be Fruitless.**—**Nev.**—*State ex rel. McGuire v. Waterman*, 5 Nev. 323. **Ohio.**—*State ex rel. Rider v. Lynch*, 8 Ohio 347. **Vt.** See *Mason v. School Dist. No. 14*, 20 Vt. 487, holding that where officer ceased to be such and had removed beyond jurisdiction of court, writ will not lie.

[b] **Duties which can be performed in an official capacity only** cannot be compelled after expiration of office. *Ex parte Trice*, 53 Ala. 546.

[c] **Making of a quarterly statement by treasurer** will not be required by mandamus after expiration of his term. *State ex rel. Board of Comms. v. Kirman*, 17 Nev. 380, 30 Pac. 1075.

Compelling ex-judge to settle bill of exceptions, see 4 STANDARD PROC. 347.

[d] **After acceptance of an officer's resignation** but before qualification of his successor, mandamus will lie to compel performance of duties pertain-

tive of the incumbent of an office may be enforced against the present incumbent, although the mandamus proceedings were instituted against his predecessor.⁸⁰ But where the duty is personal to the officer and does not involve a charge against the corporation, an abatement takes place on the expiration of the term.⁸¹ Where the writ is directed against a board of commissioners, however, the expiration of the term of office of some of the members does not affect the proceedings.⁸²

B. TO DESIST FROM EXERCISING FUNCTIONS.—Quo warranto, not mandamus, is the remedy to compel an officer to desist from exercising his functions after the office is abolished.⁸³

C. TO TRY TITLE TO OFFICE.⁸⁴—While some courts hold that mandamus will lie to try title,⁸⁵ it is a general rule that mandamus will not lie to try title to a public office between adverse claimants.⁸⁶ This rule

ing to the office. *People ex rel. Illinois Midland Ry. Co. v. Supervisor of Barnett Tp.*, 100 Ill. 332. See also *Edwards v. United States*, 103 U. S. 471, 478, 26 L. ed. 314; *Nome v. Rice*, 3 Alaska 602.

As to compelling delivery of books and paraphernalia of office after expiration of term, see *infra*, V. Q.

80. U. S.—*Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521. **Ill.**—*People ex rel. Illinois Midland Ry. Co. v. Supervisor of Barnett Tp.*, 100 Ill. 332. **Neb.**—*State ex rel. Franklin Co. v. Cole*, 25 Neb. 342, 41 N. W. 245. *Contra*, *State ex rel. School Board v. Guthrie*, 17 Neb. 113, 22 N. W. 77. **N. Y.**—*In re Broderick*, 25 Misc. 534, 56 N. Y. Supp. 99. **Wis.**—*State ex rel. Sloan v. Warner*, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; *State ex rel. Bushnell v. Gates*, 22 Wis. 210.

81. U. S.—*Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521; *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721; *Secretary v. McGarahan*, 9 Wall. 298, 19 L. ed. 579. **N. Y.**—*People ex rel. La Chicotte v. Best*, 187 N. Y. 1, 79 N. E. 890, 116 Am. St. Rep. 586; *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231. **W. Va.**—*Holdermann v. Schane*, 56 W. Va. 11, 48 S. E. 512.

[a] The successor in office may be substituted in place of the original defendant who has ceased to hold office on notice under statute. *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231. See *Hardee v. Gibbs*, 50 Miss. 802, suit may be revived against successor.

82. U. S.—*Board of County Commrs.*

v. Sellew, 99 U. S. 624, 25 L. ed. 333. **Ky.**—*Maddox v. Graham*, 2 Mete. 56. **Neb.**—*State ex rel. School Board v. Guthrie*, 17 Neb. 113, 22 N. W. 77. **N. Y.**—*People ex rel. Case v. Collins*, 19 Wend. 56. **N. C.**—*Pegram v. Cleaveland*, 65 N. C. 114.

As to mandamus against boards, see the title, "Mandamus."

83. State v. Steen, 43 N. J. L. 542. See generally the title "Quo Warranto."

84. Mandamus in election cases, see the title, "Mandamus."

85. Hummelshime v. Hirsch, 114 Md. 39, 79 Atl. 38; *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387; *Conlin v. Aldrich*, 98 Mass. 557. See *Luce v. Board of Examiners*, 153 Mass. 103, 26 N. E. 419.

[a] The general rule must be confined to the cases where the person in possession of the office is not a party to the proceeding. *Harwood v. Marshall*, 9 Md. 83.

[b] Where not only the ousting of a respondent from the office but possession of the office also is sought. *Hummelshime v. Hirsch*, 114 Md. 39, 79 Atl. 38; *Hawkins v. State*, 81 Md. 306, 32 Atl. 278; *Harwood v. Marshall*, 9 Md. 83, 100.

86. Ala.—*Ex parte Wiley*, 54 Ala. 226. **Cal.**—*Morton v. Broderick*, 118 Cal. 474, 481, 50 Pac. 644; *Black v. Board of Police Comrs. of San Jose*, 17 Cal. App. 310, 119 Pac. 674. **Del.**—*McCoy v. State ex rel. Allee*, 2 Marv. 543, 559, 36 Atl. 81. **Fla.**—*Sanford v. State ex rel. Preston*, 75 So. 619; *State ex rel. Fleming v. Crawford*, 28 Fla. 441, 485, 10 So. 118, 14 L. R. A. 253. **Ill.**—*Wells v. Robertson*, 277 Ill. 534, 115 N. E. 654. **Ind.**—*Mannix v. State*

applies to those cases where the respondent is at least a *de facto* officer, and the action is brought to establish a superior legal title in the relator.⁸⁷ If, therefore, the office is vacant,⁸⁸ or if it is filled by an incumbent without color or pretense of it,⁸⁹ mandamus will lie. A determination, as a preliminary question, whether or not a person has been declared elected by a competent tribunal is distinct from trying title to office,⁹⁰ as is the determination whether or not a particular person is an officer *de facto*,⁹¹ or whether or not he is in actual possession of an office or is exercising its functions.⁹²

Where Title Is Incidentally Involved. — When mandamus is invoked to enforce a specific duty, aid will not be refused merely because occu-

ex rel. Mitchell, 115 Ind. 245, 17 N. E. 565. **Kan.**—Reeves *v.* Ryder, 91 Kan. 639, 138 Pac. 592. **La.**—State *ex rel.* Hero *v.* Pitot, 21 La. Ann. 336. **Me.** French *v.* Cowan, 79 Me. 426, 10 Atl. 325. **Mich.**—Lachance *v.* Mackinac County, 157 Mich. 679, 122 N. W. 271; Lawrence *v.* Hanley, 84 Mich. 399, 47 N. W. 753. **Minn.**—Burke *v.* Leland, 51 Minn. 355, 53 N. W. 716. **Mo.** State *ex rel.* Guion *v.* Miles, 210 Mo. 127, 190 S. W. 595. **Neb.**—State *ex rel.* Voss *v.* Quinn, 86 Neb. 758, 126 N. W. 388; State *ex rel.* Connolly *v.* Haverly, 62 Neb. 767, 87 N. W. 959. **N. Y.**—People *ex rel.* McLaughlin *v.* Board of Police Comrs., 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596, reviewing early cases and holding the statement, that only where there is a serious question in regard to title mandamus should not issue, made in a number of New York cases dictum. **N. C.** Britt *v.* Board of Canvassers, 172 N. C. 797, 90 S. E. 1005; Johnston *v.* Board of Elections, 172 N. C. 162, 90 S. E. 143; Rhodes *v.* Love, 153 N. C. 468, 69 S. E. 436; Burke *v.* Comrs. of Bessemer, 148 N. C. 46, 61 S. E. 609. **N. D.** Butler *v.* Callahan, 4 N. D. 481, 492, 61 N. W. 1025. **Okla.**—State *ex rel.* Shepard *v.* Crouch, 31 Okla. 206, 120 Pac. 915; Matney *v.* King, 20 Okla. 22, 93 Pac. 737. **Ore.**—Stevens *v.* Carter, 27 Ore. 553, 40 Pac. 1074, 31 L. R. A. 342, note. **Pa.**—Com. *ex rel.* Gaul *v.* Commrs. of Philadelphia, 2 Pars. Eq. Cas. 220. **S. C.**—McDowell *v.* Burnett, 90 S. C. 400, 73 S. E. 782. **S. D.** State *ex rel.* Rearick *v.* Board of Comrs. of Lyman Co., 34 S. D. 256, 145 N. W. 548; Driscoll *v.* Jones, 1 S. D. 8, 44 N. W. 726. **Utah.**—Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398. **Wash.** Lynde *v.* Dibble, 19 Wash. 328, 53 Pac. 370. **Wyo.**—State *ex rel.* Hamilton *v.* Grant, 14 Wyo. 41, 81 Pac. 795, 82

Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588. **Wis.**—State *ex rel.* Mercer *v.* Sullivan, 83 Wis. 416, 53 N. W. 677; State *ex rel.* McDill *v.* State Canvassers, 36 Wis. 498.

[a] **Rule of Procedure.**—McKannay *v.* Horton, 151 Cal. 711, 91 Pac. 598, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661.

[b] **As against one actually in possession** of an office under color of law, mandamus is not an appropriate remedy to try title. French *v.* Cowan, 79 Me. 426, 435, 10 Atl. 335.

As to remedy by quo warranto, see the title, "**Quo Warranto.**"

87. **Cal.**—Bannerman *v.* Boyle, 160 Cal. 197, 116 Pac. 732; Morton *v.* Broderick, 118 Cal. 474, 50 Pac. 644. **N. C.** Johnston *v.* Board of Elections, 172 N. C. 162, 90 S. E. 143; Rhodes *v.* Love, 153 N. C. 468, 69 S. E. 436. **W. Va.** Booten *v.* Pinson, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

[a] **Such trial of title, which requires resort to quo warranto**, means the right to the possession of the office when such possession is held by another and the purpose of the action is to oust the occupant. Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398; State *ex rel.* Dudley *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

88. Johnston *v.* Board of Elections, 172 N. C. 162, 90 S. E. 143; State *ex rel.* Dudley *v.* Daggett, 28 Wash. 1, 68 Pac. 340. See *infra*, V, J, 3.

89. **N. J.**—Leeds *v.* Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697. **N. C.**—Johnston *v.* Board of Elections, 172 N. C. 162, 90 S. E. 143. **Okla.** Matney *v.* King, 20 Okla. 22, 93 Pac. 737. See *infra*, V, J, 4.

90. Warner *v.* Myers, 3 Ore. 218.

91. Warner *v.* Myers, 3 Ore. 218.

92. Warner *v.* Myers, 3 Ore. 218.

pancy, incumbency or title of an office is incidentally involved.⁹³

D. To COMPEL APPOINTMENT.⁹⁴ — Mandamus will lie to enforce a ministerial duty to make an appointment to an office,⁹⁵ and to pass upon a proposed appointee.⁹⁶ But a discretion as to appointments will not be controlled,⁹⁷ unless same is abused.⁹⁸

93. **U. S.**—*In re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578. **Cal.**—*Morton v. Broderick*, 118 Cal. 474, 481, 50 Pac. 644. **N. M.**—*Delgado v. Chavez*, 5 N. M. 646, 25 Pac. 948. **Wyo.**—*State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588.

[a] Where an officer refuses to perform a duty because he is ignorant of which of two conflicting officers or boards he should obey, mandamus will lie. **U. S.**—*In re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578. **Cal.**—*Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732; *McKannay v. Horton*, 151 Cal. 711, 91 Pac. 598, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661; *Morton v. Broderick*, 118 Cal. 474, 482, 50 Pac. 644. **N. M.**—*Delgado v. Chavez*, 5 N. M. 646, 25 Pac. 948.

Where it is sought to enforce a right to possession of the office or its property, see *infra*, V, J.

Where it is sought to enforce a claim for salary, see *infra*, V, R, 3, b.

94. Compelling holding of an election, see the title, "Mandamus."

Compelling appointment of election officials, see the title, "Mandamus."

95. **Ky.**—*Com. ex rel. Steller v. Livingston*, 171 Ky. 52, 186 S. W. 916 (taxpayers may institute proceedings); *Morgan v. Champion*, 150 S. W. 517. **Md.**—*Board of School Comrs. v. Henkel*, 117 Md. 97, 83 Atl. 89. **N. J.**—*Fort v. Howell*, 58 N. J. L. 541, 34 Atl. 751. **N. Y.**—*People ex rel. Hoffman v. Rupp*, 90 Hun 145, 35 N. Y. Supp. 349, 749, 69 N. Y. St. 736. **Tex.**—*Crow v. Fails*, 57 Tex. Civ. App. 331, 122 S. W. 933; *Caven v. Coleman* (Tex. Civ. App.), 96 S. W. 774, reversed in 100 Tex. 467, 101 S. W. 199, on the ground the statute confers discretionary powers. **Vt.**—*Rugg v. Clapp*, 84 Vt. 451, 79 Atl. 858.

See also *Rose v. County Comrs. of Knox County*, 50 Me. 243, holding there was no vacancy.

[a] Unless (1) the appointment would be ineffectual (*Board of Comrs. of Shawnee County v. State*, 42 Kan. 327, 22 Pac. 326), as (2) where the

term of office has expired. *People ex rel. Geer v. Troy*, 82 N. Y. 575.

[b] But one of a class of preferred persons cannot (1) compel his appointment after appointment of another (**Minn.**—*State ex rel. Mortensen v. Copeland*, 74 Minn. 371, 77 N. W. 221. **Ohio.**—*State ex rel. Keyser v. Comms. of Wayne Co.*, 57 Ohio St. 86, 48 N. E. 136. **S. D.**—*Phelps v. Byrne*, 36 S. D. 369, 154 N. W. 825), unless (2) the statute so provides. See the statutes, and *People ex rel. Mesick v. Scannell*, 63 App. Div. 243, 71 N. Y. Supp. 383; *In re Brown*, 14 N. Y. Supp. 450. But see *People ex rel. Wagner v. Board of Trustees of Cohocton*, 17 Misc. 652, 41 N. Y. Supp. 449; *People ex rel. Hoffman v. Rupp*, 90 Hun 145, 35 N. Y. Supp. 349, 749, 69 N. Y. St. 736, decided before the statute.

[c] Where the council arbitrarily refuse to confirm appointments of preferred persons, mandamus will lie. *Jury v. Adams*, 81 Kan. 207, 106 Pac. 279.

96. *Sullins v. State ex rel. Barnard*, 33 Okla. 526, 126 Pac. 731; *Board of Comrs. of Seminole County v. State ex rel. Cobb*, 31 Okla. 196, 120 Pac. 913, where there is no question as to qualifications.

97. **Cal.**—*Davison v. Solano*, 70 Cal. 612, 11 Pac. 680. **Ia.**—*Arnold v. Wapello County*, 154 Iowa 111, 134 N. W. 546; *Boyer v. Mayor of Creston*, 113 N. W. 474. **Ky.**—*Chaney v. Tartar*, 155 Ky. 617, 159 S. W. 1148; *Com. ex rel. Hawkins v. McCrone*, 153 Ky. 296, 155 S. W. 369. **Okla.**—*Board of Comrs. of Seminole Co. v. State ex rel. Cobb*, 31 Okla. 196, 120 Pac. 913. **Pa.**—*Com. ex rel. Watt v. Perkins*, 7 Pa. 42; *Com. v. Rogers*, 59 Pa. Super. 265. **S. D.**—*Phelps v. Byrne*, 36 S. D. 369, 154 N. W. 825. **Tex.**—*Caven v. Coleman*, 100 Tex. 467, 101 S. W. 199. **Vt.**—*State v. Plumley*, 83 Vt. 491, 76 Atl. 146.

See also *People ex rel. Wagner v. Board of Trustees of Cohocton*, 17 Misc. 652, 41 N. Y. Supp. 449.

98. *Independence League v. Taylor*, 154 Cal. 179, 97 Pac. 303 (where certain political parties were ignored in the appointment of election officials);

F. TO COMPEL ISSUANCE OF COMMISSION.⁹⁹—A ministerial duty to issue a commission may usually be enforced by mandamus.¹ But where the duty of issuing the commission rests upon the governor, mandamus will not lie according to some,² but not all,³ authorities.

F. TO COMPEL ADMINISTERING OF OATH.—On the application of a person showing a prima facie right to an office, mandamus will lie to compel the administration of the proper oath of office.⁴

G. TO CONTROL APPROVAL AND FILING OF OFFICIAL BOND, ETC.—If the approval of the bond of an officer is regarded as a ministerial duty, mandamus will lie to enforce the duty.⁵ So where the approval is regarded as a judicial act, action upon a bond tendered will be compelled.⁶ But the court cannot require the acceptance and approval of

Jury *v. Adams*, 81 Kan. 207, 106 Pac. 279.

99. Compelling issuance of certificate of election, see the title, "Mandamus."

1. Ark.—State *ex rel. Mitchell v. Hodges*, 107 Ark. 401, 155 S. W. 508; State *ex rel. Gray v. Hodges*, 107 Ark. 272, 154 S. W. 506. **Fla.**—State *ex rel. Fleming v. Crawford*, 28 Fla. 441, 10 So. 118, 14 L. R. A. 253. **Ill.**—People *ex rel. Akin v. Matteson*, 17 Ill. 167. **Mo.**—State *ex rel. Ensworth v. Albin*, 44 Mo. 346. **Okla.**—State *ex rel. Freeing v. Lyon*, 165 Pac. 419.

See also 7 STANDARD PROC. 474.

[a] **Issuance of commission in conflict with determination of canvassing board** will not be compelled even though the board considered improper evidence. State *v. Governor*, 25 N. J. L. 331.

[b] **Even though the office is filled by another to whom a commission was erroneously issued.** State *ex rel. Fleming v. Crawford*, 28 Fla. 441, 503, 10 So. 118, 14 L. R. A. 253. **Ill.**—People *ex rel. Akin v. Matteson*, 17 Ill. 167. **La.**—State *ex rel. Bienvenu v. Wrotowski*, 17 La. Ann. 156.

[c] **Unless** (1) the election is illegal or invalid (State *ex rel. Ensworth v. Albin*, 44 Mo. 346), or (2) the relator is ineligible to the office. State *ex rel. Gray v. Hodges*, 107 Ark. 272, 154 S. W. 506; Taylor *v. The Governor*, 1 Ark. 21.

2. Ark.—Hawkins *v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346. **Ga.** State *ex rel. Low v. Towns*, 8 Ga. 360. **Mo.**—State *ex rel. Bartley v. Fletcher*, 39 Mo. 388. **N. J.**—State *v. Governor*, 25 N. J. L. 331, 349.

As to mandamus against a governor, see the title, "Mandamus."

3. McCreary v. Williams, 153 Ky. 49, 154 S. W. 417. See People *ex rel. Akin v. Matteson*, 17 Ill. 167.

4. Ala.—Huey *v. Jones*, 140 Ala. 479, 37 So. 193. **Cal.**—People *v. Olds*, 3 Cal. 167, 58 Am. Dec. 398. **Idaho.** Blake *v. Ada*, 5 Idaho 163, 47 Pac. 734. **Ky.**—Day *v. Justices of Fleming Co. Ct.*, 3 B. Mon. 198. **Md.**—Spitzer *v. Martin*, 130 Md. 428, 100 Atl. 739. **N. Y.**—People *ex rel. Young v. Straight*, 128 N. Y. 545, 28 N. E. 762; *Ex parte Heath*, 3 Hill 42.

[a] **A person ineligible to the office** cannot compel judgment to permit him to qualify. Atchison *v. Lucas*, 83 Ky. 451.

[b] **Where the oath is not filed in time** and another officer is appointed, mandamus to compel filing of the oath will not lie. Com. *v. Comrs. of Philadelphia*, 6 Whart. (Pa.) 476.

5. Ill.—Hertel *v. Boismenuue*, 229 Ill. 474, 82 N. E. 298. **Ind.**—Copeland *v. State ex rel. Davis*, 126 Ind. 51, 25 N. E. 866. **Kan.**—Reeves *v. Ryder*, 91 Kan. 639, 138 Pac. 592. **Utah.**—Brown *v. Atkin*, 1 Utah 277.

[a] **A complaint that the relator tendered a good and sufficient bond is sufficient as against a demurrer**, although a motion to make more specific would lie. Copeland *v. State ex rel. Davis*, 126 Ind. 51, 25 N. E. 866.

[b] **Discretion as to time of approval** will not be interfered with by mandamus. Lucky *v. Short*, 1 Tex. Civ. App. 5, 20 S. W. 723.

6. Ark.—Bosely *v. Woodruff Co. Ct.*, 28 Ark. 306. **Mass.**—Keough *v. Holvake*, 156 Mass. 403, 31 N. E. 387. **Minn.**—State *ex rel. Casmey v. Teall*, 72 Minn. 37, 74 N. W. 1024. **Mo.** State *ex rel. Jackson v. County Court of Howard Co.*, 41 Mo. 247; State *ex*

any particular bond,⁷ unless there is no question as to the sufficiency of the bond, and a refusal to approve is based on the relator's lack of title, or other ground.⁸

The duty of an officer to file a bond for faithful performance of his duties may be enforced by mandamus.⁹

Suit on Bond. — Whether a board shall require the state's attorney to sue on the bond of a defaulting officer is not subject to control by mandamus.¹⁰

H. TO COMPEL ACCEPTANCE OF OFFICE. — Mandamus has been used to compel a person to accept and assume a public office to which he has been elected or appointed.¹¹

rel. Adamson v. Lafayette County Court, 41 Mo. 221. **N. C.**—*Bennett v. Swain*, 125 N. C. 468, 34 S. E. 632. **Ohio**.—*State ex rel. Barnes v. Comrs. of Belmont Co.*, 31 Ohio St. 451.

As to burden of proof, see 9 ENCY. OF EV. 188.

[a] **The former incumbent of the office is not a necessary party to a mandamus proceeding to approve the bond of his successor.** *Hertel v. Boismenu*, 229 Ill. 474, 82 N. E. 298.

[b] **Approval of bond presented after prescribed time not compelled.** *Ex parte Harris*, 52 Ala. 87, 23 Am. Rep. 559; *Lowe v. Phelps*, 14 Bush (Ky.) 642. *Contra*, *Bosely v. Woodruff Co. Ct.*, 28 Ark. 306; *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221.

7. Ala.—*Ex parte Thompson*, 52 Ala. 98; *Ex parte Harris*, 52 Ala. 87, 23 Am. Rep. 559; *Beebe v. Robinson*, 52 Ala. 66. **Mass.**—*Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387. **Minn.** *State ex rel. Casmev v. Teall*, 72 Minn. 37, 74 N. W. 1024. **Miss.**—*Swan v. Gray*, 44 Miss. 393. **N. C.**—*Burke v. Comrs. of Bessemer*, 148 N. C. 46, 61 S. E. 609.

8. Mass.—See *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387. **Mich.** *Speed v. Common Council*, 97 Mich. 198, 56 N. W. 570. **Mo.**—*Beck v. Jackson*, 43 Mo. 117. **Neb.**—*McMillin v. Richards*, 45 Neb. 786, 64 N. W. 242; *State ex rel. Truesdell v. Plambeck*, 36 Neb. 401, 54 N. W. 667. **N. Y.**—*People v. Stout*, 11 Abb. Pr. 17, 19 How. Pr. 171. **Ohio**.—*State ex rel. Lewis v. Comrs. of Marion Co.*, 14 Ohio St. 515. **Tex.** *Nelson v. Edwards*, 55 Tex. 389.

[a] **Compare** *Burke v. Comrs. of Bessemer*, 148 N. C. 46, 61 S. E. 609, holding that unless the title to the office is uncontested or has been adjudged in a quo warranto proceeding,

mandamus cannot issue as to the bond.

Mandamus to try title, see *supra*, V, c.

[b] **Prima facie showing of title entitles relator to writ.** **Kan.**—*Reeves v. Ryder*, 91 Kan. 639, 138 Pac. 592. **Mich.** See *Speed v. Common Council*, 97 Mich. 198, 56 N. W. 570. **Mo.**—*State ex rel. Cameron v. Shannon*, 133 Mo. 139, 33 S. W. 1137; *Beck v. Jackson*, 43 Mo. 117. **Neb.**—*McMillin v. Richards*, 45 Neb. 786, 64 N. W. 242; *State ex rel. Truesdell v. Plambeck*, 36 Neb. 401, 54 N. W. 667. **N. J.**—*State ex rel. Stokes v. Board of Chosen Freeholders of Camden*, 35 N. J. L. 217.

9. State ex rel. La Fayette v. Duncan, 175 Ind. 661, 95 N. E. 127.

10. People ex rel. Dameron v. McCormick, 106 Ill. 184.

11. People ex rel. German Ins. Co. v. Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492; *King v. Bower*, 1 B. & C. 585 8 E. C. L. 247, 2 D. & R. 842, 1 L. J. K. B. O. S. 174, 107 Eng. Reprint 215; *King v. Leyland*, 3 Maule & S. 184, 105 Eng. Reprint 579; *King v. Mayor of Colechester*, 4 Dougl. 14, 26 E. C. L. 311, 99 Eng. Reprint 743. But see *Chapman v. People ex rel. Beard*, 9 Colo. App. 268, 48 Pac. 153; *Reg. v. Parker-Hutchinson*, 32 L. R. Ir. 142.

[a] **Notwithstanding the payment of the penalty imposed for refusal.** *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 585, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492 (the penalty is not in lieu of service); *King v. Bower*, 1 B. & C. 585, 2 D. & R. 842, 1 L. J. K. B. O. S. 174, 8 E. C. L. 247, 107 Eng. Reprint 215.

[b] **A previous demand need not be alleged.** *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 585, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492.

I. TO COMPEL INDUCTION INTO OFFICE. — 1. Where Office Is Full De Facto. — One claiming possession of an office cannot invoke mandamus to admit him thereto against a *de facto* incumbent.¹² But if the incumbent did not enter into possession under a color of title,¹³ or if there is a palpable disregard of the law in regard to the election,¹⁴ or if the title has been adjudicated and finally established by a competent court or tribunal,¹⁵ the reason of the rule fails, and mandamus will lie.

2. Surrender of Office to Successor. — One elected or appointed to an office may enforce his right to the possession of the office, and the

12. Ala.—*Ex parte* Harris, 52 Ala. 87, 23 Am. Rep. 559; *State v. Dunn*, Minor 46, 12 Am. Dec. 25. **Ariz.**—*Territory ex rel. Sherman v. Board of Supers. of Mohave Co.*, 2 Ariz. 248, 12 Pac. 730. **Cal.**—*Kelly v. Edwards*, 69 Cal. 460, 11 Pac. 1; *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398. **Colo.**—*City Council v. People ex rel. Ferguson*, 19 Colo. App. 399, 75 Pac. 603; *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265. **Conn.**—*State ex rel. Comstock v. Hempstead*, 83 Conn. 554, 78 Atl. 442, Ann. Cas. 1916A, 927. **Fla.**—*Sanford v. State ex rel. Preston*, 75 So. 619. See *State ex rel. Lamar v. Johnson*, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357. **Ga.**—*Bonner v. State ex rel. Pitts*, 7 Ga. 473, 479. **Ill.**—*Daugherty v. Fippinger*, 177 Ill. App. 522. **Kan.**—*Swartz v. Large*, 47 Kan. 304, 27 Pac. 993. **Me.**—*French v. Cowan*, 79 Me. 426, 435, 10 Atl. 335. **Mich.**—*Lachance v. Mackinac County*, 157 Mich. 679, 122 N. W. 271; *Pipper v. Wayne Circ. Judges*, 122 Mich. 688, 81 N. W. 962; *Ashwell v. Bullock*, 122 Mich. 620, 81 N. W. 577. **Minn.**—*State ex rel. Atherton v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116. **Mo.**—*State ex rel. Jackson v. Thompson*, 36 Mo. 70; *St. Louis Co. Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355. **N. J.**—*Fort v. Howell*, 58 N. J. L. 541, 34 Atl. 751; *Leeds v. Atlantic City*, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697. **N. Y.**—*People ex rel. Lewis v. Brush*, 146 N. Y. 60, 40 N. E. 502; *People ex rel. Wren v. Goetting*, 133 N. Y. 569, 30 N. E. 968, 4 Silv. 210; *People ex rel. Wagner v. Board of Trustees of Cohocton*, 17 Misc. 652, 41 N. Y. Supp. 449. **N. C.**—*Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436. **N. D.**—*Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025. **Pa.**—*Caffrey v. Caffrey*, 28 Pa. Super. 22. **Eng.**—*King v. Mayor of Colchester*, 2 Term. Rep. 259, 100 Eng. Reprint 141; *Frost v. Mayor of Chester*, 5 El.

& B. 531, 85 E. C. L. 530, 25 L. J. Q. B. 61, 2 Jur. N. S. 114, 119 Eng. Reprint 578.

But see *Conlin v. Aldrich*, 98 Mass. 557.

13. Johnston v. Board of Elections, 172 N. C. 162, 90 S. E. 143; *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436; *Ellison v. Raleigh*, 89 N. C. 125; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

[a] **Where the relator was in office de jure et de facto**, and the defendant, while claiming to be *de facto*, can make no claim to be *de jure*, the office is not *de facto* full against him, unless by his conduct he elect to consider himself out. *Leeds v. Atlantic City*, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697.

14. Leeds v. Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697. See *Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308.

15. Ind.—*Mannix v. State ex rel. Mitchell*, 115 Ind. 245, 17 N. E. 565. **Minn.**—*Allen v. Robinson*, 17 Minn. 113. **N. C.**—*Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436. **W. Va.**—*Martin v. White*, 74 W. Va. 628, 82 S. E. 505, denying writ as action of counsel was void for want of notice.

[a] **When an appeal from the judgment in the contest proceedings suspends the judgment**, mandamus to compel induction of the person in whose favor judgment was rendered is premature if brought pending the appeal. *Hannon v. Halifax*, 89 N. C. 123.

[b] **Where appeal vacates judgment**, see *Swartz v. Large*, 47 Kan. 304, 27 Pac. 993; *Allen v. Robinson*, 17 Minn. 113.

Mandamus to enforce judgment in quo warranto proceedings, see the title "**Quo Warranto.**"

books, buildings, and other paraphernalia pertaining thereto by a mandamus proceeding, against the holdover,¹⁶ unless the action cannot be determined without trying the title of the incumbent, or such is the real object of the proceeding.¹⁷ The use of the writ in this class of

16. **Ala.**—Thompson v. Holt, 52 Ala. 491. **Dak.**—Territory *ex rel.* Eisenmann v. Shearer, 2 Dak. 332, 8 N. W. 135. **Fla.** State *ex rel.* Ellis v. Givens, 48 Fla. 165, 37 So. 308; State *ex rel.* Lamar v. Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357. **Ill.**—People *ex rel.* Cummings v. Head, 25 Ill. 325; People *ex rel.* Brewster v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769. **Ind.**—Mannix v. State *ex rel.* Mitchell, 115 Ind. 245, 17 N. E. 565. **Ia.**—See Keokuk v. Merriam, 44 Iowa 432. **Kan.**—Huffman v. Mills, 39 Kan. 577, 18 Pac. 516. **La.**—State *ex rel.* Board of School Directors v. Romero, 122 La. 885, 48 So. 312. **Md.** Harwood v. Marshall, 10 Md. 451; Harwood v. Marshall, 9 Md. 83, 100. **Mass.** American Railway-Frog Co. v. Haven, 101 Mass. 398, 403. **Minn.**—State *ex rel.* Atherton v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116; Crowell v. Lambert, 10 Minn. 369. **Mo.**—State *ex rel.* Cooper Co. v. Trent, 58 Mo. 571. **Neb.** State *ex rel.* Voss v. Quinn, 86 Neb. 758, 126 N. W. 388; State *ex rel.* Coney v. Hyland, 75 Neb. 767, 107 N. W. 113. **N. H.**—Kimball v. Marshall, 44 N. H. 465; Kimball v. Lamprey, 19 N. H. 215. See also Eaton v. Burke, 66 N. H. 306, 22 Atl. 452. **N. J.**—Clarke v. Trenton, 49 N. J. L. 349, 8 Atl. 509; O'Donnel v. Dusman, 39 N. J. L. 677. **N. M.**—Eldodt v. Terr. *ex rel.* Vaughn, 10 N. M. 141, 61 Pac. 105; Conklin v. Cunningham, 7 N. M. 445, 455, 38 Pac. 170. **N. Y.**—People *ex rel.* Howard v. Erie County, 26 Misc. 233, 56 N. Y. Supp. 318. **N. D.**—Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025. **Okla.** Ross v. Hunter, 157 Pac. 85; State *ex rel.* Wells v. Cline, 29 Okla. 157, 116 Pac. 767, Ann. Cas. 1913A, 481, 35 L. R. A. (N. S.) 527. **Ore.**—Stevens v. Carter, 27 Ore. 553, 40 Pac. 1074, 31 L. R. A. 342; Warner v. Myers, 4 Ore. 72. **S. D.**—State *ex rel.* Rearick v. Board of Comrs. of Lyman Co., 34 S. D. 256, 145 N. W. 548; Driscoll v. Jones, 1 S. D. 8, 44 N. W. 726. **Tex.** See Lindsey v. Luckett, 20 Tex. 516. **W. Va.**—Griffith v. Mercer County Ct., 92 S. E. 676; Kline v. McKelvey, 57 W. Va. 29, 49 S. E. 896. **Wis.**—State

ex rel. Jones v. Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

See also 7 STANDARD PROC. 474.

[a] **Persons holding over until their successors are elected and qualified are not de facto officers in such a sense that mandamus shall not be allowed.** Clarke v. Trenton, 49 N. J. L. 349, 8 Atl. 509.

[b] **Dispute As to Money.**—A delivery of money in hands of prior incumbent will not be compelled where there is a dispute as to title to the money. Bates v. Keith, 66 Vt. 163, 28 Atl. 865.

[c] **A statutory remedy to compel delivery of books and papers is not adequate where the seal of offices and moneys are also desired.** State *ex rel.* Jones v. Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

[d] **Pending an election contest, the right may be enforced.** Fla.—State *ex rel.* Fleming v. Crawford, 28 Fla. 441, 485, 10 So. 118, 14 L. R. A. 253. **Ill.**—People *ex rel.* Cummings v. Head, 25 Ill. 325. **Minn.**—Crowell v. Lambert, 10 Minn. 369. **Ore.**—Warner v. Myers, 3 Ore. 218. **S. D.**—Driscoll v. Jones, 1 S. D. 8, 44 N. W. 726. **W. Va.**—Griffith v. Mercer County Ct., 92 S. E. 676.

[a] **A literal demand is not required where it would be useless.** Clarke v. Trenton, 49 N. J. L. 349, 8 Atl. 509; Conklin v. Cunningham, 7 N. M. 445, 461, 38 Pac. 170.

Form of alternative writ to admit alderman into office, see 9 STANDARD PROC. 812.

17. **La.**—State *ex rel.* Hero v. Pitot, 21 La. Ann. 336. **Minn.**—State *ex rel.* Addison v. Williams, 25 Minn. 340. **N. J.** O'Donnel v. Dusman, 39 N. J. L. 677, 681. **N. Y.**—State *ex rel.* Hodgkinson v. Stevens, 5 Hill 616. **S. D.**—Driscoll v. Jones, 1 S. D. 8, 44 N. W. 726.

[a] **A person appointed to fill an office on election of the incumbent to another office cannot invoke mandamus to compel delivery of possession, because the question of title is involved. The question whether the appointee has any title depends upon whether the election of the incumbent operated to deprive him of the office.** State *ex*

cases does not determine the ultimate right to possession.¹⁸ The court cannot then go behind the canvass and certificate of election or commission of appointment, valid on its face and unimpeached by any admitted fact;¹⁹ but will only inquire if the office is one which can be lawfully filled at such election, or by such appointment,²⁰ whether the relator has received a certificate of election or commission of appointment,²¹ and has qualified.²² The relator's eligibility²³ to the office

rel. Addison v. Williams, 25 Minn. 340. See also *State ex rel. Hero v. Pitot*, 21 La. Ann. 336.

18. **Fla.**—*State ex rel. Lamar v. Johnson*, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357. **Ill.**—*People ex rel. Cummings v. Head*, 25 Ill. 325. **Ind.**—*Kisler v. Cameron*, 39 Ind. 488; *Brower v. O'Brien*, 2 Ind. 423, 431. **Neb.**—*Cruse v. State*, 52 Neb. 831, 73 N. W. 212. **N. M.**—*Eldodt v. Terr. ex rel. Vaughn*, 10 N. M. 141, 61 Pac. 105. **N. D.**—*Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025. **Ore.**—*Warner v. Myers*, 4 Ore. 72. **S. D.**—*Driscoll v. Jones*, 1 S. D. 8, 44 N. W. 726.

19. **Ala.**—*Thompson v. Holt*, 52 Ala. 491. **Fla.**—*State ex rel. Lamar v. Johnson*, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; *State ex rel. Attorney-General v. Johnson*, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410. **Minn.**—*State ex rel. Atherton v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116. **Neb.**—*State ex rel. Franel v. Dodson*, 21 Neb. 218, 31 N. W. 788; *State ex rel. Meckling v. Jaynes*, 19 Neb. 161, 26 N. W. 711. **N. J.**—*O'Donnel v. Dusman*, 39 N. J. L. 677, 685. **N. M.**—*Eldodt v. Terr. ex rel. Vaughn*, 10 N. M. 141, 61 Pac. 105; *Conklin v. Cunningham*, 7 N. M. 445, 455, 38 Pac. 170. **N. D.**—*Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025. **Okla.**—*Ross v. Hunter*, 157 Pac. 85; *State ex rel. Love v. Smith*, 43 Okla. 231, 142 Pac. 408, L. R. A. 1915 A, 832. **Ore.**—*Warner v. Myers*, 4 Ore. 72. **S. D.**—*Driscoll v. Jones*, 1 S. D. 8, 44 N. W. 726.

Compare People ex rel. Lewis v. Brush, 146 N. Y. 60, 40 N. E. 502.

[a] The incumbent cannot defeat the claim of a relator on the ground that the election is illegal and that relator's title is not valid. *State ex rel. Lamar v. Johnson*, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357, 371.

[b] Nor can he allege errors in the decision of the canvassing officers. *Warner v. Myers*, 3 Ore. 218.

[c] It is proper to strike out an al-

legation in the return (1) that the respondent received a majority of the votes cast and that contest proceedings are pending (*Warner v. Myers*, 4 Ore. 72), (2) as well as allegations denying the power of the appointing officer to appoint relator. *Eldodt v. Terr. ex rel. Vaughn*, 10 N. M. 141, 151, 61 Pac. 105.

[d] But where the court can take judicial notice of facts showing that the election was void, the prima facie effect of the certificate is destroyed and the writ will be denied. *Butler v. Callahan*, 4 N. D. 481, 492, 61 N. W. 1025. See *State ex rel. Franel v. Dodson*, 21 Neb. 218, 31 N. W. 788.

As to prima facie evidence of title, see 9 ENCY. OF EV. 189.

20. **Neb.**—*State ex rel. Franel v. Dodson*, 21 Neb. 218, 31 N. W. 788. **N. D.**—See *Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025. **S. D.**—*State ex rel. Rearick v. Board of Comrs. of Lyman Co.*, 34 S. D. 256, 145 N. W. 548.

[a] Power of Removing Officer Conclusively Presumed.—*Conklin v. Cunningham*, 7 N. M. 445, 459, 38 Pac. 170.

21. **Ind.**—*Harwood v. Marshall*, 9 Md. 83, 101. **Neb.**—*State ex rel. Franel v. Dodson*, 21 Neb. 218, 31 N. W. 788. **N. D.**—*Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025.

See *Clarke v. Trenton*, 49 N. J. L. 349, 8 Atl. 509, where charter did not provide for issuance of commission or declare what would be evidence of title.

22. **Md.**—*Harwood v. Marshall*, 9 Md. 83, 103. **Neb.**—*State ex rel. Franel v. Dodson*, 21 Neb. 218, 31 N. W. 788. **N. D.**—*Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025. **S. D.**—*State ex rel. Ayers v. Kipp*, 10 S. D. 495, 74 N. W. 440.

23. **Fla.**—*State ex rel. Lamar v. Johnson*, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357. **Minn.**—*State ex rel. Atherton v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116. **Neb.**—*State ex rel. Voss v.*

in question cannot be inquired into, and therefore need not be alleged.²⁴

3. Where Office Is Vacant.—One having prima facie title to an office, which is not filled, is entitled to mandamus to put him in possession and to require recognition of his position.²⁵

4. Where Term Has Expired or the Office Is Abolished.—The court will generally deny the writ if relator's term of office has expired, or will expire before execution of the writ.²⁶ And if pending the mandamus proceeding the office is abolished, the proceeding will be dismissed.²⁷

J. TO COMPEL RECOGNITION OF DE FACTO OFFICER.—A de facto officer may compel recognition of his official character by mandamus.²⁸

K. RESTRAINING EXERCISE OF DUTIES AND QUALIFICATION FOR OFFICE. Mandamus is not an appropriate remedy to restrain one claiming to be a public officer from exercising the duties of an office,²⁹ or to prevent

Quinn, 86 Neb. 758, 126 N. W. 388; State *ex rel.* Coney v. Hyland, 75 Neb. 767, 107 N. W. 113. **Ore.**—Stevens v. Carter, 27 Ore. 553, 40 Pac. 1074, 31 L. R. A. 342, 354, note.

24. State *ex rel.* Meckling v. Jaynes, 19 Neb. 161, 26 N. W. 711; Butler v. Callahan, 4 N. D. 481, 485, 61 N. W. 1025.

25. Ind.—Swindell v. State *ex rel.* Maxey, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50. **N. J.**—State *ex rel.* McDermott v. Kenny, 45 N. J. L. 251. **N. Y.**—People *ex rel.* Dare v. Howell, 174 App. Div. 118, 160 N. Y. Supp. 959. **N. C.**—Johnston v. Board of Elections, 172 N. C. 162, 90 S. E. 143; Rhodes v. Love, 153 N. C. 468, 69 S. E. 436; Lyon v. Comrs. of Granville, 120 N. C. 237, 26 S. E. 929; Ellison v. Raleigh, 89 N. C. 125. **N. D.**—Chandler v. Starling, 19 N. D. 144, 121 N. W. 198. **Okla.**—Ellis v. Armstrong, 28 Okla. 311, 114 Pac. 327. **W. Va.**—Trunick v. Northview, 91 S. E. 1081.

[a] See Smith v. Eaton County Supervisors, 56 Mich. 217, 22 N. W. 267, holding the right of a city mayor to sit with the county board of supervisors will be enforced by the writ.

To compel reinstatement after improper motion, see *infra*, V, Q.

[b] **Eligibility of Relator Need Not Be Alleged.**—Ellis v. Armstrong, 28 Okla. 311, 114 Pac. 327. Compare People *ex rel.* Gibson v. Sheffield, 47 Hun 481, 14 N. Y. St. 423, denying relief where it was admitted on pleadings that plaintiff was disqualified.

[c] **The legality and validity of the election or appointment may be inquired into in a mandamus proceeding to compel persons to recognize the**

claimant's title to office. Swindell v. State *ex rel.* Maxey, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.

[d] **Action Need Not Be Brought in Name of State.**—Chandler v. Starling, 19 N. D. 144, 121 N. W. 198.

[e] **Prior Incumbent Is Not a Necessary Defendant.**—Chandler v. Starling, 19 N. D. 144, 121 N. W. 198.

26. Me.—Woodbury v. County Comrs. of Piscataquis, 40 Me. 304. **Mass.** Howard v. Gage, 6 Mass. 462. **N. C.** Colvard v. Board of Comrs. of Graham Co., 95 N. C. 515. **Tex.**—Riggins v. Richards, 97 Tex. 526, 80 S. W. 524.

[a] **Unless it should appear that no successor has been elected and qualified and the relator is entitled to hold over until due qualification of his successor.** Harwood v. Marshall, 10 Md. 451.

27. Lynde v. Dibble, 19 Wash. 328, 53 Pac. 370.

28. U. S.—*In re* Delgado, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578, to prevent the office from being practically vacant pending the contest. **N. Y.** People *ex rel.* Donohoe v. Greene, 95 App. Div. 397, 88 N. Y. Supp. 601; People *ex rel.* Wohlfarth v. York, 33 App. Div. 573, 53 N. Y. Supp. 947. **Ohio** But see Davies v. State *ex rel.* Scherer, 11 Ohio Cir. Ct. N. S. 209. **S. C.** McDowell v. Burnett, 90 S. C. 400, 73 S. E. 782.

29. La.—Terry v. Stauffer, 17 La. Ann. 306, where appointee forcibly took possession of office. **N. H.** Maverick Oil Co. v. Hanson, 67 N. H. 203, 29 Atl. 461, where ineligibility of officer was set up. **N. Y.**—People *ex rel.* Faile v. Ferris, 76 N. Y. 326; People *ex rel.* Requa v. Neubrand, 32 App. Div. 49, 52 N. Y. Supp. 280.

him from qualifying.³⁰ But it has been held that an officer who is ineligible may be compelled to vacate by means of this writ.³¹

L. RESTRAINING INTERFERENCE WITH DUTIES.—Mandamus is not an appropriate remedy to prevent illegal or improper interference with the exercise of the powers and duties pertaining to an office.³²

M. REMOVAL OF OFFICERS.³³—Mandamus will lie to compel the performance of ministerial duties with respect to the removal of officers;³⁴ and to compel removing officers to proceed and exercise their discretion,³⁵ but not to control their discretion in this regard.³⁶

N. TO COMPEL REINSTATEMENT.—**1. After Removal or Discharge.**
a. Generally.—A de jure officer or employee of a public corporation wrongfully and illegally ousted therefrom, whether by removal or suspension, will be restored to his former position by mandamus where the office is vacant or is filled by a person without color of title,³⁷ if he ap-

30. *People ex rel. Faile v. Ferris*, 76 N. Y. 326.

31. *Hummelshime v. Hirsch*, 114 Md. 39, 79 Atl. 38; *Kean v. Rizer*, 90 Md. 507, 45 Atl. 468.

Mandamus to try title, see *supra*, V, C, 1.

[a] **The proceeding may be instituted by** (1) the respondent's predecessor in office (*Kean v. Rizer*, 90 Md. 507, 45 Atl. 468), or (2) by a private citizen and taxpayer. *Hummelshime v. Hirsch*, 114 Md. 39, 79 Atl. 38.

32. *Legg v. Annapolis*, 42 Md. 203, 226; *Young v. Dudley* (Tex. Civ. App.), 140 S. W. 802.

Remedy by injunction, see *infra*, VI, E.

33. **Removal of officers generally**, see *infra*, VII.

34. *State ex rel. Smith v. Theus*, 114 La. 1097, 38 So. 870, compelling district attorney to bring suit to have a person decreed to be illegally holding and exercising an office.

[a] **Compelling exercise of power of judging of the election of members of a body.** *Henry v. Camden*, 42 N. J. L. 335.

[b] **Duty to strike a name from the roll of members.** *Wormolts v. Keegan*, 69 N. J. L. 186, 54 Atl. 813.

[c] **The exercise of judgment as to whether a person shall be given a hearing on a petition to remove a public officer will not be controlled by mandamus.** *Nichols v. Dunton*, 113 Me. 282, 93 Atl. 746. See *Goodfellow v. Detroit*, 102 Mich. 343, 60 N. W. 760.

[d] **To compel a municipal body having supervision over recall petitions** (1) to order an election upon presentation of a sufficient petition

(*Good v. San Diego*, 5 Cal. App. 265, 90 Pac. 44), and (2) to appoint an election board in conformity with the statute. *Vincent v. Mott*, 163 Cal. 342, 125 Pac. 346. (3) Any qualified elector may apply for the writ. *Conn v. Richmond*, 17 Cal. App. 705, 127 Pac. 714. See generally the title "**Mandamus.**"

35. **Minn.**—*State ex rel. Schwartzkopf v. Brainerd*, 121 Minn. 182, 141 N. W. 97, 46 L. R. A. (N. S.) 9. **Neb.** *State ex rel. Castor v. Board of Suprs. of Saline Co.*, 18 Neb. 422, 25 N. W. 587. **Wis.**—*State ex rel. Davern v. Rose*, 140 Wis. 360, 122 N. W. 751, 28 L. R. A. (N. S.) 194.

36. **Mich.**—*McLaughlin v. Burroughs*, 90 Mich. 311, 51 N. W. 283. **Neb.**—*State ex rel. Castor v. Board of Suprs. of Saline Co.*, 18 Neb. 422, 25 N. W. 587. **N. H.**—See *Maverick Oil Co. v. Hanson*, 67 N. H. 203, 29 Atl. 461. **Wis.**—*State ex rel. Davern v. Rose*, 140 Wis. 360, 122 N. W. 751, 28 L. R. A. (N. S.) 194.

[a] **Unless Abused.**—*State ex rel. Kelleher v. Board of President & Directors*, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503.

37. **Ala.**—*Ex parte Lusk*, 82 Ala. 519, 2 So. 140; *Ex parte Wiley*, 54 Ala. 226. **Cal.**—*Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684, where recall proceedings were illegal because petitioners were not upon great register. **Conn.**—*State ex rel. Comstock v. Hempstead*, 83 Conn. 554, 78 Atl. 442, Ann. Cas. 1916A, 927. **Fla.**—*Etzler v. Brown*, 58 Fla. 221, 50 So. 416, 138 Am. St. Rep. 113; *Howell v. State ex rel. Edwards*, 54 Fla. 199, 45 So. 453. **Ga.** *Akerman v. Board of School Comrs.*,

118 Ga. 334, 45 S. E. 312. **Idaho.** Prichard v. McBride, 28 Idaho 346, 154 Pac. 624. **Ill.**—People *ex rel.* Blachly v. Coffin, 279 Ill. 401, 117 N. E. 85. **Ind.**—State *ex rel.* Julian v. Board of Metropolitan P. Comrs., 170 Ind. 133, 83 N. E. 83; Muhler v. Hedekin, 119 Ind. 481, 20 N. E. 700. **Kan.**—Eastman v. Householder, 54 Kan. 63, 37 Pac. 989; Metsker v. Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269. **La.** State *ex rel.* Aucoin v. Board of Police Comrs., 113 La. 424, 37 So. 16 (after right to new trial exhausted); State *ex rel.* Tanner v. Police Board, 51 La. Ann. 941, 25 So. 935; State *ex rel.* Denis v. Mayor, 43 La. Ann. 92, 8 So. 893. **Mass.**—Lattime v. Hunt, 196 Mass. 261, 81 N. E. 1001; Ransom v. Boston, 193 Mass. 537, 79 N. E. 823. **Mich.**—Doran v. De Long, 48 Mich. 552, 12 N. W. 848. **Mo.**—State *ex rel.* Guion v. Miles, 210 Mo. 127, 109 S. W. 595; State *ex rel.* Case v. Wilson, 151 Mo. App. 723, 132 S. W. 625. **Mont.**—State *ex rel.* Drifill v. Anaconda, 41 Mont. 577, 111 Pac. 345. See Bailey v. Examining & Trial Board of Police Dept., 42 Mont. 216, 112 Pac. 69, refusing writ of supervisory control. As to writ of supervisory control generally, see the title “Jurisdiction.” **N. J.** Lewis v. Board of Public Works, 51 N. J. L. 240, 17 Atl. 112; Clarke v. Board of Health of Trenton, 49 N. J. L. 349, 8 Atl. 509. **N. Y.**—People *ex rel.* Coveney v. Kearney, 161 N. Y. 648, 57 N. E. 1121; People *ex rel.* O’Toole v. Hamilton, 98 App. Div. 59, 90 N. Y. Supp. 547. **N. C.**—Doyle v. Raleigh, 89 N. C. 133, 45 Am. Rep. 677. **Ohio.**—State *ex rel.* Clen Dening v. Rose, 93 Ohio St. 284, 112 N. E. 1034; State *ex rel.* Moyer v. Baldwin, 77 Ohio St. 532, 83 N. E. 907, 19 L. R. A. (N. S.) 49. **Okla.**—Howe v. Dunlap, 12 Okla. 467, 72 Pac. 365. **Pa.** Com. *ex rel.* O’Brien v. Gibbons, 196 Pa. 97, 46 Atl. 313. **R. I.**—Chace v. City Council of Providence, 36 R. I. 331, 89 Atl. 1066, Ann. Cas. 1916C, 1257. **S. D.**—Gray v. Beadle, 21 S. D. 97, 110 N. W. 36, whether or not the plaintiff might have appealed from decision of board declaring his office vacant. **Tenn.**—Hardin County Court v. Hardin, Peck 291. **Tex.**—Nelson v. Edwards, 55 Tex. 389; Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629. **Utah.**—Pratt v. Board of Police & Fire Comrs., 15 Utah 1, 49 Pac. 747. **Va.**—Lewis v. Whittle, 77 Va. 415.

Wash.—Kimball v. Olmsted, 20 Wash. 629, 56 Pac. 377. **W. Va.**—Schmulbach v. Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922. **Wis.**—State *ex rel.* Hayden v. Arnold, 151 Wis. 19, 138 N. W. 78; State *ex rel.* Gill v. Watertown, 9 Wis. 254.

That relator must be de jure officer, see *infra*, V, O, 1, b.

Where person discharged in violation of civil service laws, see *infra*, V, R, 4.

As to reinstatement of teachers, see the title, “Schools and School Districts.”

[a] An officer who has not relinquished possession of the office may resort to mandamus where an order removing him and appointing another is made without authority. People *ex rel.* Lockwood v. Scrugham, 20 Barb. (N. Y.) 302, 12 How. Pr. 125.

[b] An alderman entitled to hold over until qualification of his successor may enforce his right to a seat on the board of aldermen by mandamus. State *ex rel.* Kelly v. Paterson, 35 N. J. L. 196.

[c] The eligibility of the removed officer cannot be considered in the mandamus proceeding. Prichard v. McBride, 28 Idaho 346, 154 Pac. 624.

[d] Where the council is made final judges of election of its members, its action cannot be reviewed on mandamus, even though the relator was not given an opportunity to be heard. People *ex rel.* Cooley v. Fitzgerald, 41 Mich. 2, 2 N. W. 179.

[e] One who has no power of appointment, removal or reinstatement will not be compelled to reinstate a person removed by him without authority. People *ex rel.* Tate v. Dalton, 158 N. Y. 204, 52 N. E. 1119. See also Civil Service Commission v. Kenyon, 86 Ill. App. 547.

[f] Parties.—Where persons holding several offices are removed, they should not join in one writ but should have several writs. King v. Mayor of Chester, 3 Salk. 230, 91 Eng. Reprint 794.

[g] Petition Bringing Relator Without Exceptions to Power of Removal. An officer claiming his removal was in violation of limitations upon a general power of removal must allege facts showing he is within the limitation. People *ex rel.* Fogarty v. Cassidy, 118 App. Div. 693, 103 N. Y. Supp. 671, where limitation was made in favor of veteran fireman.

plies for relief promptly.³⁸ If the removal rests in the discretion of the removing officer, mandamus is not appropriate,³⁹ unless the removal is arbitrary, for an insufficient cause, or for a cause not specified in the statute.⁴⁰ Power to remove and legal cause therefor existing, mere ir-

[h] **Return.**—The cause (1) for which the relator was removed should be stated in the return in ordinary cases. *Lunt v. Davison*, 104 Mass. 498. But (2) a motion to require the respondent to state how, when and where he neglected his duties and to set out a copy of the proceedings on removal is improper. *State ex rel. Julian v. Board of Metropolitan P. Comrs.*, 170 Ind. 133, 83 N. E. 83. That (3) the council was assembled "as a common council" when they removed an alderman should be alleged. *King v. Taylor*, 3 Salk. 231, 91 Eng. Reprint 795.

[i] **Attaching condition to alternative writ** that relator waive all claim to back salary is erroneous. *People ex rel. Collins v. Ahearn*, 115 App. Div. 171, 100 N. Y. Supp. 716.

[j] **The court will consider** (1) the entire proceeding of the removing officers, including the issues in effect made and the testimony taken before them as shown by the alternative writ. *Etzler v. Brown*, 58 Fla. 221, 50 So. 416, 138 Am. St. Rep. 113; *State ex rel. Donnelly v. Teasdale*, 21 Fla. 652. Whether (2) a charge is sufficient, if proved, is a question for the ultimate determination for the courts; but the courts will not ordinarily go behind the judgment to inquire into the amount or the balance of the evidence. *State ex rel. McMahon v. New Orleans*, 107 La. 632, 32 So. 22.

38. **Ill.**—*Kenneally v. Chicago*, 220 Ill. 485, 77 N. E. 155. **Kan.**—*Eastman v. Householder*, 54 Kan. 63, 37 Pac. 989. **Mass.**—*Streeter v. Worcester*, 177 Mass. 29, 58 N. E. 277. **N. Y.**—*People ex rel. Croft v. Keating*, 49 App. Div. 123, 63 N. Y. Supp. 71.

39. **U. S.**—*Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. 574, 44 L. ed. 774, 35 Ct. Cl. 628; *United States ex rel. Palmer v. Lapp*, 244 Fed. 377, 157 C. C. A. 3. **Cal.**—*Brown v. Dwyer*, 26 Cal. App. 369, 146 Pac. 1047. **Conn.**—*State ex rel. Pinkerman v. Rusling*, 64 Conn. 517, 30 Atl. 758. **Ill.**—*People v. Chicago*, 104 Ill. App. 250. **Kan.**—*Householder v. Morrill*, 55 Kan. 317, 40 Pac. 664. **La.**—*State ex rel. Tanner v. Police Board*, 51 La. Ann. 941, 25

So. 935. **Md.**—*Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646; *State ex rel. O'Neill v. Register*, 59 Md. 283. **Mass.**—*Sims v. Police Comrs.*, etc., 193 Mass. 547, 79 N. E. 824. **N. J.**—*Gleistan v. West New York*, 74 N. J. L. 74, 64 Atl. 1084; *Henry v. Camden*, 42 N. J. L. 335. **N. Y.**—*People ex rel. Holden v. Woodbury*, 88 App. Div. 593, 85 N. Y. Supp. 161. **Tex.**—*Johnson v. Galveston*, 11 Tex. Civ. App. 469, 33 S. W. 150. **W. Va.**—*State ex rel. Thompson v. McAllister*, 38 W. Va. 485, 496, 18 S. E. 770, 24 L. R. A. 343. **Wis.**—*State ex rel. Gill v. Watertown*, 9 Wis. 254, 259. *Eng.*—*King v. Mayor of Andover*, 3 Salk. 229, 91 Eng. Reprint 794.

[a] **Where Relator Holds Office at the Pleasure of the Defendant.**—**U. S.** *Ex parte Hennen*, 13 Pet. 230, 10 L. ed. 138; *United States ex rel. Palmer v. Lapp*, 244 Fed. 377, 157 C. C. A. 3. **Mich.**—*Trainor v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; *Portman v. State Fish Comrs.' Board*, 50 Mich. 258, 12 N. W. 106. **N. Y.**—*People ex rel. Lahey v. Partridge*, 78 App. Div. 199, 79 N. Y. Supp. 724. **S. C.**—*State ex rel. Gruber v. Champlin*, 2 Bailey L. 220.

[b] **Where office is abolished in good faith**, mandamus to compel reinstatement will not lie. *People ex rel. Corrigan v. Mayor of Brooklyn*, 149 N. Y. 215, 43 N. E. 554; *People ex rel. O'Donnell v. Bermel*, 51 Misc. 75, 100 N. Y. Supp. 728; *Porter v. Howland*, 24 Misc. 434, 53 N. Y. Supp. 683. See *People ex rel. Levenson v. Wells*, 78 App. Div. 373, 79 N. Y. Supp. 728.

40. **Colo.**—*Board of Trustees of Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72. **La.**—*State ex rel. McMahon v. New Orleans*, 107 La. 632, 32 So. 22; *State v. Mayor*, 43 La. Ann. 92, 106, 8 So. 893. **Md.**—*Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646, where relator was removed without notice for a cause not specified in the statute. **S. D.**—*Howard v. Burns*, 14 S. D. 382, 85 N. W. 920. **Tex.**—*Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629; *Johnson v. Galveston*, 11 Tex. Civ. App. 469, 33 S. W. 150. **Wis.**—*State ex rel. Gill v. Watertown*, 9 Wis. 254.

regularities in the removal will not authorize mandamus to compel reinstatement.⁴¹ But if the proceedings were illegal or fatally defective,⁴² or if the testimony wholly fails to support the charges made,⁴³ a reinstatement will be compelled.

If the officer unlawfully removed voluntarily abandons the office,⁴⁴ or waives the right to restoration,⁴⁵ the writ will be denied. So also, if subsequently charges are preferred against the relator, upon which he is lawfully removed, the writ will not be issued.⁴⁶

If the term of office for which a person is elected has expired,⁴⁷ or if the office has been abolished subsequent to the removal,⁴⁸ a mandamus to compel reinstatement of an officer illegally removed will be refused.

Where the writ cannot issue against the governor,⁴⁹ he cannot be compelled to reinstate officers whom he has removed.⁵⁰

b. *Relator Must Be De Jure Officer.*—To obtain relief, it is necessary that the relator be an officer de jure entitled to hold and exercise the office.⁵¹

[a] Where statute gives the right to remove for "due cause," what is "due cause" is a question of law. But in deciding on a charge which if true would constitute "due cause," the officer exercises a discretion which will not be interfered with by mandamus. *State ex rel. Gill v. Watertown*, 9 Wis. 254.

[b] *Allegations.*—Why and wherefore the board attempted to remove relator need not be alleged, as this is a matter of defense. All he could allege was the unlawful removal and refusal to acknowledge him. *Board of Trustees of Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72.

41. Ala.—*Ex parte Wiley*, 54 Ala. 226. Ill.—*People v. Chicago*, 99 Ill. App. 489. Mich.—See *People ex rel. Cooley v. Fitzgerald*, 41 Mich. 2, 2 N. W. 179. N. J.—*Clarke v. Trenton*, 49 N. J. L. 349, 8 Atl. 509. Eng. *Rex v. Griffiths*, 5 Barn. & Ald. 731, 7 E. C. L. 398, 106 Eng. Reprint 1358. *Contra*, *Truitt v. Philadelphia*, 221 Pa. 331, 70 Atl. 757.

42. *Etzler v. Brown*, 58 Fla. 221, 50 So. 416, 138 Am. St. Rep. 113; *State ex rel. Donnelly v. Teasdale*, 21 Fla. 652.

[a] *Removal Must Be Clearly Illegal.*—*People ex rel. Wren v. Goetting*, 133 N. Y. 569, 30 N. E. 968, 4 Silv. 210. But see *People ex rel. McLaughlin v. Board of Police Comrs.*, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596; *Kimball v. Olmsted*, 20 Wash. 629, 56 Pac. 377.

43. *Etzler v. Brown*, 58 Fla. 221, 50

So. 416, 138 Am. St. Rep. 113; *State ex rel. Donnelly v. Teasdale*, 21 Fla. 652. See *State ex rel. McMahon v. New Orleans*, 107 La. 632, 32 So. 22.

44. *Eastman v. Householder*, 54 Kan. 63, 37 Pac. 989.

45. *State ex rel. Higdon v. Jelks*, 138 Ala. 115, 35 So. 60.

46. In the Matter of *Crocker v. Sturgis*, 175 N. Y. 158, 67 N. E. 307.

47. *Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684; *State ex rel. Goodnow v. Police Comrs.*, 80 Mo. App. 206, 220. See also *Hartwig v. Watertown*, 132 Wis. 83, 112 N. W. 21.

48. *People ex rel. Linnekin v. Ennis*, 18 App. Div. 412, 46 N. Y. Supp. 444.

49. See the title "Mandamus."

50. *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231.

[a] Where the governor exercises a discretion as to removal, the writ will not lie to compel reinstatement. *Householder v. Morrill*, 55 Kan. 317, 40 Pac. 664.

51. Ill.—*Kenneally v. Chicago*, 220 Ill. 485, 77 N. E. 155; *Moon v. Mayor*, 214 Ill. 40, 73 N. E. 408 (legal existence of office must be shown in petition); *Stott v. Chicago*, 205 Ill. 281, 68 N. E. 736. Ky.—*Justices of Spencer Co. Ct. v. Harcourt*, 4 B. Mon. 499; *Justices of Jefferson Co. v. Clark*, 1 Mon. 82. N. J.—*Clarke v. Trenton*, 49 N. J. L. 349, 8 Atl. 509. N. Y. *People ex rel. Nicholl v. New York Infant Asylum*, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381. Pa.—Com-

c. *Where Office Is in Possession of Another.*—The ousted official cannot resort to mandamus, if his office has been filled by an appointment or election apparently valid, at least until the title has been settled by appropriate proceedings.⁵² But it is otherwise if the ouster was absolutely void or in bad faith.⁵³

d. *Civil Service Employee.*⁵⁴—An employee who is discharged in violation of the civil service laws may compel his reinstatement by writ of mandamus.⁵⁵

ex rel. O'Brien v. Gibbons, 196 Pa. 97, 46 Atl. 313. **Utah.**—*Pratt v. Board of Police & Fire Comrs.*, 15 Utah 1, 49 Pac. 747. **Wis.**—*State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78.

[a] But where a board without authority to pass upon the eligibility of its members does so and ousts the plaintiff, he is at least a de facto officer and may compel recognition of him as an officer. *Hawke v. McAllister*, 4 Ariz. 150, 36 Pac. 170; *Blair v. Johnson*, 215 Ill. 552, 74 N. E. 747.

52. **Colo.**—*City Council of Cripple Creek v. People ex rel. Ferguson*, 19 Colo. App. 399, 75 Pac. 603. **Conn.**—*State ex rel. Comstock v. Hempstead*, 83 Conn. 554, 78 Atl. 442, Ann. Cas. 1916A, 927. **Me.**—*French v. Cowan*, 79 Me. 426, 436, 10 Atl. 335. **N. Y.**—*People ex rel. McLaughlin v. Board of Police Comrs.*, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596; *People ex rel. Wren v. Goetting*, 133 N. Y. 569, 30 N. E. 965, 4 Silv. 210; *In the Matter of Hardy*, 17 Misc. 667, 41 N. Y. Supp. 469, especially where the question of title turns upon the construction of statutes not entirely clear. But see *People ex rel. Lazarus v. Sheehan*, 128 App. Div. 743, 113 N. Y. Supp. 230 (denying writ although relator was discharged on mere pretext office was abolished); *People ex rel. Michales v. Ahearn*, 111 App. Div. 741, 98 N. Y. Supp. 492. **N. C.**—*Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677; *Ellison v. Raleigh*, 89 N. C. 125. **Eng.**—*King v. Oxford*, 6 Ad. & El. 349, 33 E. C. L. 198, 112 Eng. Reprint 133.

[a] Compare *Pratt v. Board of Police & Fire Comrs.*, 15 Utah 1, 49 Pac. 747, quoting *Spelling on Extraordinary Relief* to the effect that restoration will be compelled "even though such appointee be in possession de facto."

[b] Rule does not apply to clerks and employees, as quo warranto will not lie to try the right to a clerkship.

People ex rel. Drake v. Sutton, 88 Hun 173, 34 N. Y. Supp. 487, 68 N. Y. St. 494.

Mandamus to try title to office, see *supra*, V, C.

53. **Cal.**—*Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684. **Conn.**—*State ex rel. Comstock v. Hempstead*, 83 Conn. 554, 78 Atl. 442, Ann. Cas. 1916A, 927. **Mo.**—*State ex rel. Guion v. Miles*, 210 Mo. 127, 109 S. W. 595. **N. J.**—*State ex rel. Mason v. Paterson*, 35 N. J. L. 190. **Ohio.**—*State ex rel. Moyer v. Baldwin*, 77 Ohio St. 532, 83 N. E. 907, 19 L. R. A. (N. S.) 49. **Pa.**—*Com. ex rel. O'Brien v. Gibbons*, 196 Pa. 97, 46 Atl. 313. **Tenn.**—*Hardin County Court v. Hardin*, Peek 291. **Tex.**—*Bradley v. McCrabb*, Dallam Dig. 504. **Utah.**—*Pratt v. Board of Police & Fire Comrs.*, 15 Utah 1, 49 Pac. 747. **Va.**—*Lewis v. Whittle*, 77 Va. 415; *Dew v. Judges of Sweet Springs*, 3 H. & M. (13 Va.) 1, 3 Am. Dec. 639. **Wis.**—*State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78.

Contra.—*State v. Dunlap*, 5 Mart. O. S. (La.) 271. See also *King v. Oxford*, 6 Ad. & El. 349, 33 E. C. L. 198, 112 Eng. Reprint 133, per Williams, J., holding that the officer being assumed to be in office, no mandamus is necessary to restore him.

[a] **Reason.**—In contemplation of law, he was never out of office, and the writ merely compels recognition of his right. *Com. ex rel. O'Brien v. Gibbons*, 196 Pa. 97, 46 Atl. 313.

[b] **The Incumbent Is Not a Necessary Party.**—*Leeds v. Atlantic City*, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697. Compare *Dew v. Judges of Sweet Springs*, 3 Hen. & M. (13 Va.) 1, 3 Am. Dec. 639.

54. **Mandamus to control matters arising under civil service generally**, see *infra*, V, R.

55. **Conn.**—*Thompson v. Troup*, 74 Conn. 121, 49 Atl. 907. **Ill.**—*People ex rel. Blachly v. Coffin*, 279 Ill. 401,

2. After Reduction in Rank.—An officer who is wrongfully reduced in rank, contrary to statute, may compel his reinstatement by mandamus.⁵⁶

O. To COMPEL HOLDING OF OFFICE AT PROPER PLACE.—Mandamus is a proper remedy to compel public officers to hold their offices at the place required by law.⁵⁷

P. To COMPEL RELINQUISHMENT OF OFFICE PROPERTY, ETC.—An officer who is unlawfully retaining books and other paraphernalia pertaining to an office may be compelled to deliver them to the proper authorities by mandamus.⁵⁸ The writ will not lie against a private citizen

117 N. E. 85 (petition must show legal existence of office); *People v. Lindblom*, 215 Ill. 58, 74 N. E. 73; *Chicago v. People ex rel. Gray*, 210 Ill. 84, 71 N. E. 816. **Mass.**—*Lattime v. Hunt*, 196 Mass. 261, 81 N. E. 1001; *Sims v. Police Comrs., etc.*, 193 Mass. 547, 79 N. E. 824. **N. J.**—See *Brokaw v. Burk*, 89 N. J. L. 132, 98 Atl. 11. **N. Y.**—*People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, 81 N. E. 453; *People ex rel. Taylor v. Welde*, 61 App. Div. 580, 70 N. Y. Supp. 869; *People ex rel. Brower v. Williams*, 154 N. Y. Supp. 296. See *People ex rel. O'Toole v. Hamilton*, 98 App. Div. 59, 90 N. Y. Supp. 547. **Ohio.**—*Hornberger v. State ex rel. Fischer*, 95 Ohio St. 148, 116 N. E. 28. **Wash.**—*State ex rel. Roe v. Seattle*, 88 Wash. 589, 153 Pac. 336.

[a] Unless the allowance of the writ would be fruitless. *United States ex rel. Palmer v. Lapp*, 244 Fed. 377, 157 C. C. A. 3, where the relator could be immediately removed again for failure to execute a bond.

[b] On a removal without a statement as to the reason of the dismissal or opportunity to answer, the court will compel a reinstatement notwithstanding an answer setting up a good cause for removal. **Conn.** *Thompson v. Troup*, 74 Conn. 121, 49 Atl. 907. **N. Y.**—*People ex rel. O'Toole v. Hamilton*, 98 App. Div. 59, 100 N. Y. Supp. 547; *People ex rel. Percival v. Cram*, 50 App. Div. 380, 64 N. Y. Supp. 158. **Pa.**—*Truitt v. Philadelphia*, 221 Pa. 331, 70 Atl. 757.

[c] If the cause for removal did not exist, the party's remedy is that prescribed by the statute instead of mandamus. *State ex rel. Bannen v. Arnold*, 151 Wis. 38, 138 N. W. 85; *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78.

[d] Where the municipality in good faith abolishes the office, the writ will

not issue. *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797; *People ex rel. Corrigan v. Mayor of Brooklyn*, 149 N. Y. 215, 43 N. E. 554.

56. In the Matter of *Shepard v. Oakley*, 181 N. Y. 339, 74 N. E. 227; In the Matter of *Sugden v. Partridge*, 174 N. Y. 87, 66 N. E. 655; *People ex rel. Strahan v. Feitner*, 49 App. Div. 101, 63 N. Y. Supp. 209.

[a] But the exercise of a discretion vested in an officer as to reduction in rank will not be controlled. *United States ex rel. Hall v. Whitney*, 5 Mackey (D. C.) 370.

57. **Ariz.**—*Territory v. Supervisors of Mohave Co.*, 2 Ariz. 248, 12 Pac. 730. **Cal.**—*Calaveras Co. v. Brockway*, 30 Cal. 325. **Kan.**—*State ex rel. Wells v. Marston*, 6 Kan. 524. **Mich.**—*Rice v. Shay*, 43 Mich. 380. **Minn.**—*State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N. W. 561. **Neb.**—*State ex rel. Ferguson v. Shropshire*, 4 Neb. 411. **N. D.** *State ex rel. Little v. Langlie*, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723. **S. C.**—*State v. Walker*, 5 S. C. 263. **Wis.**—*State ex rel. Field v. Saxton*, 11 Wis. 27.

But see *Chapman v. People ex rel. Beard*, 9 Colo. App. 268, 48 Pac. 153.

[a] Mandamus is a proper remedy to test an election as to removal of county seat and to require officer to keep office at county seat. *State ex rel. Little v. Langlie*, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. (N. S.) 723; *State ex rel. Field v. Saxton*, 11 Wis. 27. See *State ex rel. Wells v. Marston*, 6 Kan. 524. Compare *Territory v. Supervisors of Mohave Co.*, 2 Ariz. 248, 12 Pac. 730, holding by mandamus the court cannot go behind the board of supervisors and contest the election. Mandamus to contest elections generally, see 8 STANDARD PROC. 40.

58. See *infra*, this note.

That officer unlawfully holding over

detaining books and papers of an office, however.⁵⁹

A duty to furnish an officer with the necessary apparatus for the performance of his duties will be enforced by mandamus.⁶⁰

Q. CIVIL SERVICE.—Mandamus is an appropriate remedy to enforce some duties arising under the civil service laws.⁶¹ The classification of

may be required to deliver the office property to his successor, see *supra*, V, J.

[a] Restoration of office property to an officer illegally removed will be compelled. Ill.—*Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237. Kan.—*Metsker v. Neally*, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269. Tex.—*Bradley v. McCrabb*, Dallam Dig. 504.

[b] An officer who has been legally suspended may be compelled to deliver up the books, buildings, etc., to the officer who appointed and removed him. *Burr v. Norton*, 25 Conn. 103; *State ex rel. Board of Chosen Freeholders of Hudson Co. v. Layton*, 28 N. J. L. 244, 255.

[c] Where a sheriff has seized the books during a controversy as to the rightful claimant to an office, mandamus will lie to compel their delivery. *Lawrence v. Hanley*, 84 Mich. 399, 47 N. W. 753, wherein the court determined the title to office, the respondent's lack of title being plain.

[d] But it is otherwise if they are in possession of a de facto incumbent. *People ex rel. Phillips v. Lieb*, 85 Ill. 484. Compare, *Walter v. Belding*, 24 Vt. 658, where an officer who was elected at a void adjournment after election of the plaintiff and who obtained the books by replevin was compelled by mandamus to deliver the books.

59. Kan.—*Hussey v. Hamilton*, 5 Kan. 462. Mo.—*State ex rel. Cooper Co. v. Trent*, 58 Mo. 571. Okla.—*State ex rel. Wells v. Cline*, 29 Okla. 157, 116 Pac. 767, Ann. Cas. 1913A, 481, 35 L. R. A. (N. S.) 527; *Eberle v. King*, 20 Okla. 49, 61, 93 Pac. 748, where held by officer in private capacity.

[a] Even where it is alleged that he pretends to act under a claim and color of office. *State ex rel. Wells v. Cline*, 29 Okla. 157, 116 Pac. 767, Ann. Cas. 1913A, 481, 35 L. R. A. (N. S.) 527.

Mandamus against individuals, see the title "Mandamus."

60. *Carter County v. Mobley*, 150

Ky. 482, 150 S. W. 497, duty to furnish inspector of weights with necessary weights and balances.

61. *People ex rel. Akin v. Kipley*, 171 Ill. 44, 91, 49 N. E. 229, 41 L. R. A. 775, duty of head of a department to notify commissioners of vacancies.

[a] Duty To Hold a Civil Service Examination.—*People ex rel. Williams v. Errant*, 229 Ill. 56, 82 N. E. 271. See *People ex rel. Ryan v. Wheeler*, 41 Hun 287, 3 How. Pr. (N. S.) 40, 2 N. Y. St. 656.

[b] Certification of names of persons eligible to an office. *People ex rel. Drake v. Common Council of Syracuse*, 26 Misc. 522, 57 N. Y. Supp. 617. See *People ex rel. Akin v. Kipley*, 171 Ill. 44, 91, 49 N. E. 229, 41 L. R. A. 775; *People ex rel. Drake v. Knauber*, 43 App. Div. 342, 60 N. Y. Supp. 298 (holding board has no power to certify that a person is entitled to be appointed); *People ex rel. Distler v. McGuire*, 68 Misc. 516, 125 N. Y. Supp. 90, compelling certification of persons residing in borough only.

[c] Compelling striking of names of ineligible persons (1) from eligible lists. *Powell v. People*, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117 (person whose name to be stricken necessary party); and (2) to replace names unlawfully removed. *People ex rel. Van Petten v. Cobb*, 13 App. Div. 56, 43 N. Y. Supp. 120.

[d] Duty to transfer a person to another branch of service on abolition of an office. *People ex rel. Zeiger v. Whitehead*, 164 N. Y. Supp. 663.

[e] Refusal to pass a person on a civil service examination does not authorize mandamus in the absence of fraud. *Reese v. Board of Mine Examiners*, 248 Pa. 617, 94 Atl. 246.

[f] Appointment of one to a civil service position will not be compelled where it will disarrange the public service, especially where his right is not clear. *Carson v. Chicago*, 189 Ill. App. 247, based on *Kenneally v. Chicago*, 220 Ill. 485, 77 N. E. 155.

positions as competitive or as exempt from examination is a duty involving the exercise of judgment not subject to review on mandamus, however.⁶²

R. SALARY.⁶³ — 1. Generally. — A duty to make appropriations for the payment of salaries of officers prescribed and authorized by a valid statute,⁶⁴ or to include a sum in an estimate sufficient to pay them,⁶⁵ may be enforced by mandamus. So also mandamus lies to compel a board to act in fixing a salary,⁶⁶ but not to control the exercise of its discretion in this regard,⁶⁷ unless it is abused.⁶⁸ The duty of an officer to certify payrolls to be correct may be enforced by mandamus.⁶⁹ So when the auditor or auditing officers are vested with a discretion as to the allowance of claims for salary, mandamus will issue to compel them to act if they refuse to do so;⁷⁰ but it cannot issue to control their dis-

62. In the Matter of Dill, 185 N. Y. 106, 77 N. E. 789; *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785; *People ex rel. Sims v. Collier*, 175 N. Y. 196, 67 N. E. 309.

[a] Unless decision of commission is palpably erroneous and constitutes an abuse of discretion. *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785; *Weeks v. Kraut*, 147 App. Div. 403, 132 N. Y. Supp. 228 (denying petition because premature); *In re Simons*, 145 App. Div. 471, 130 N. Y. Supp. 306; *Weeks v. Kraft*, 129 N. Y. Supp. 690; *In re Farley*, 131 N. Y. Supp. 353.

[b] Duty to make a classification judicially determined to be correct will be compelled. *People ex rel. Akin v. Kraus*, 171 Ill. 130, 48 N. E. 1052.

63. Claims against municipal corporations generally, see the title "Municipal Corporations."

64. *Hover v. People*, 17 Colo. App. 375, 68 Pac. 679; *People ex rel. O'Loughlin v. Prendergast*, 219 N. Y. 377, 114 N. E. 860.

65. *People ex rel. O'Loughlin v. Board of Estimate of New York*, 87 Misc. 601, 150 N. Y. Supp. 12.

66. *Revenue & Road Comrs. of Mobile Co. v. State ex rel. Campbell*, 163 Ala. 441, 50 So. 972.

[a] Where a board reduces the salary of an office when (1) they are not authorized to do so, mandamus is a proper remedy to enforce the right to the salary the officer is entitled to (*People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38), (2) even though he may have accepted and discharged its duties after the reduction.

[b] Entry of Fees.—There is a remedy by contempt proceedings where

a clerk of court refuses to enter officer's fees in a proceeding in court, and mandamus will not lie. *Shrewsbury v. Ellis*, 26 Tex. Civ. App. 406, 64 S. W. 700.

67. *State ex rel. Barnett v. Noblesville*, 156 Ind. 590, 60 N. E. 453; *In re Hurlbut*, 88 Misc. 679, 152 N. Y. Supp. 426.

[a] Where the right to an increase in salary is controverted on questions of law and fact, mandamus will not lie. *People ex rel. Ajas v. Board of Education*, 104 App. Div. 162, 93 N. Y. Supp. 300, his remedy is at law.

68. *State ex rel. Thurmond v. Shreveport*, 124 La. 178, 50 So. 3, 134 Am. St. Rep. 496.

[a] Where a board seeks to remove an officer without cause indirectly, by reducing his salary, mandamus will lie. *State ex rel. Thurmond v. Shreveport*, 124 La. 178, 50 So. 3, 134 Am. St. Rep. 496; *People ex rel. Jones v. Saxe*, 92 Misc. 409, 156 N. Y. Supp. 975, under statute relating to veterans.

69. *Haley v. Cochran*, 31 Ky. L. Rep. 505, 102 S. W. 852.

[a] Where salaries are paid on a certificate approved by the executive, a ministerial duty to approve a certificate showing service rendered may be enforced by mandamus. *State ex rel. Turner v. Henderson (Ala.)*, 74 So. 344.

[b] Respondents. — The governor whose duty it is to approve pay rolls when certified should not be made a party to mandamus to certify a pay roll. *Haley v. Cochran*, 31 Ky. L. Rep. 505, 102 S. W. 852.

70. *Colo.*—*Merwin v. Boulder*, 29 Colo. 169, 67 Pac. 285. *Md.*—*Robey v. County Comrs. of Prince George's*

cretion as to the allowance of the claim.⁷¹ The writ will lie to compel an auditing of salaries fixed by law.⁷² If the relator's right is in doubt,⁷³ or if the board in the exercise of its powers refused to make an appropriation to pay salary of relator,⁷⁴ the court will withhold its writ.

County, 92 Md. 150, 48 Atl. 48. **Mich.**—*Sherman v. Board of Suprs. of Sanilac Co.*, 84 Mich. 108, 47 N. W. 513. **Ohio.**—*Burnet v. Auditor of Portage County*, 12 Ohio 54.

[a] **Constitutionality of statutes reducing salary** will not be determined. *State ex rel. Luminais v. Judges*, 34 La. Ann. 1114. See *infra*, V, R, 3.

71. **Ariz.**—*Dorrington v. Yuma*, 8 Ariz. 4, 68 Pac. 541. **Colo.**—*Merwin v. Boulder*, 29 Colo. 169, 67 Pac. 285. **Ill.**—*Board of Suprs. of Kane Co. v. Pierce*, 60 Ill. 481. **Mich.**—*Sherman v. Board of Suprs. of Sanilac Co.*, 84 Mich. 108, 47 N. W. 513. **Ohio.**—*Burnet v. Auditor of Portage County*, 12 Ohio 54. **Va.**—*Simons v. Military Board of Va.*, 99 Va. 390, 39 S. E. 125.

[a] **Where amount of fees is in discretion of board.** *Robey v. County Comrs. of Prince George's County*, 92 Md. 150, 48 Atl. 48.

[b] **On rejection of claim solely because of an erroneous construction of statute** as to whether they were a city or county charge, mandamus will lie. *People ex rel. Van Tassel v. Columbia County*, 67 N. Y. 330.

[c] **Where the duty of auditing claims for fees is imposed on other officers**, the county auditor will not be compelled to audit the claim. *Shumar v. Applegate*, 51 N. J. L. 117, 16 Atl. 59.

72. **Ark.**—*Black v. Auditor of State*, 26 Ark. 237. **Cal.**—*Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941; *Puterbaugh v. Wadham*, 162 Cal. 611, 123 Pac. 804; *U'ren v. State Board of Control*, 31 Cal. App. 6, 159 Pac. 615. **Fla.**—*Board of Comrs. of Escambia County v. Board of Pilot Comrs.*, 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196. **Ill.**—*Illinois State Hospital v. Higgins*, 15 Ill. 185. **Ky.**—*O'Connor v. Weissinger*, 142 Ky. 452, 134 S. W. 1127. **La.**—*State ex rel. Collins v. Jumel*, 30 La. Ann. 861. **Mo.**—*State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S. W. 403; *State ex rel. Hawes v. Mason*, 153 Mo. 23, 62, 54 S. W. 524. **Mont.**—*State v. Kenney*, 9 Mont. 223, 23 Pac. 733. **N. J.**—*Shumar v. Applegate*, 51 N. J. L. 117,

16 Atl. 59. **N. Y.**—*People ex rel. Downing v. Stout*, 23 Barb. 338; *People ex rel. Schneider v. Prendergast*, 94 Misc. 481, 159 N. Y. Supp. 574. **Ohio.**—*Burnet v. Auditor of Portage County*, 12 Ohio 54. **Utah.**—*State ex rel. Davis v. Cutler*, 34 Utah 99, 95 Pac. 1071; *State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720. **Vt.**—*Peck v. Powell*, 62 Vt. 296, 19 Atl. 227.

[a] **Unless there has not been** (1) a previous allowance of the claim, when such is required (*Burnet v. Auditor of Portage County*, 12 Ohio 54), or (2) unless he has a remedy by action (*Mansfield v. Fuller*, 50 Mo. 338 [claim for services of sheriff's posse]; *Shumar v. Applegate*, 51 N. J. L. 117, 16 Atl. 59, where auditor refused to audit and allow claim through misapprehension of his duty), or (3) by error, *State v. Comrs. of Franklin Co.*, 7 Ohio N. P. 563.

[b] **The rule that the state cannot be sued without its consent** does not preclude mandamus to compel an audit of a salary claim. *U'ren v. State Board of Control*, 31 Cal. App. 6, 159 Pac. 615.

[c] **If a gross sum is allowed where compensation by the day is fixed**, mandamus will lie to compel a proper audit. *People ex rel. Thurston v. Board of Auditors*, 82 N. Y. 80.

[d] **Where a party employed by the month is discharged without cause before the expiration of a month**, mandamus to approve a claim of salary for the month will lie. *Ross v. Board of Education*, 18 Cal. App. 222, 122 Pac. 967.

73. *Moore v. State ex rel. Cox*, 4 Neb. (Unof.) 235, 93 N. W. 986.

[a] **Where the Amount Due for Services Is in Dispute.**—*People v. Getzenander*, 137 Ill. 234, 34 N. E. 297; *Kennedy v. Normal*, 145 Ill. App. 523.

74. **Ill.**—*Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797. **Mo.**—*State ex rel. Murray v. Brown*, 141 Mo. 21, 28, 41 S. W. 911. **N. Y.**—*People ex rel. Plancon v. Prendergast*, 219 N. Y. 252, 114 N. E. 433, where board refused to make an appropriation for unnecessary employees.

2. Issuance of Warrant.—A ministerial duty to issue,⁷⁵ sign,⁷⁶ and countersign,⁷⁷ warrants for salaries of officers and employees of public corporations will be enforced by writ of mandamus,⁷⁸ if the relator's right is indisputably clear *ex aequo et bono*,⁷⁹ even though it has been held there are no funds in the treasury to meet the warrant.⁸⁰ Such is the case where the salary is fixed by law;⁸¹ but it is otherwise if the

75. U. S.—Smith *v.* Jackson, 241 Fed. 747, 154 C. C. A. 449. **Ala.**—Reynolds *v.* Taylor, 43 Ala. 420; Nichols *v.* Comptroller, 4 Stew. & P. 154. **Ark.** Black *v.* Auditor of State, 26 Ark. 237. **Cal.**—Scott *v.* Boyle, 164 Cal. 321, 128 Pac. 941; Puterbaugh *v.* Wadham, 162 Cal. 611, 123 Pac. 804. **Conn.** Brainard *v.* Staub, 61 Conn. 570, 22 Atl. 1040. **Idaho.**—Ward *v.* Holmes, 26 Idaho 602, 144 Pac. 1104; Jeffreys *v.* Huston, 23 Idaho 372, 129 Pac. 1065. **Ky.**—Schmitt *v.* Dooling, 145 Ky. 240, 140 S. W. 197, Ann. Cas. 1913B, 1078, 36 L. R. A. (N. S.) 881. **Mo.**—State *ex rel.* Hawes *v.* Mason, 153 Mo. 23, 59, 54 S. W. 524; Sanford *v.* Kansas City, 69 Mo. 466. **N. J.**—Schwarzrock *v.* Board of Education (N. J. L.), 101 Atl. 394. **N. Y.**—People *ex rel.* Satterlee *v.* Board of Police, 75 N. Y. 38. **Okl.**—Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. **Pa.** Doverspike *v.* Magee, 51 Pa. Super. 525. **S. C.**—State *ex rel.* Marshall *v.* Starling, 13 S. C. 262. **S. D.**—Howard *v.* Burns, 14 S. D. 382, 85 N. W. 920. **Utah.**—Kendall *v.* Raybould, 13 Utah 226, 44 Pac. 1034; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398. **Va.** Richmond *v.* Epps, 98 Va. 233, 35 S. E. 723. **Wash.**—State *ex rel.* Beach *v.* Olsen, 91 Wash. 56, 157 Pac. 34; State *ex rel.* Dudley *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

[a] Relator's eligibility cannot be tried in this proceeding. Turner *v.* Melony, 13 Cal. 621.

[b] Under the rule that an officer holds office until his successor is appointed, an incumbent so holding over may compel the auditor to issue a warrant for his salary. State *ex rel.* Dudley *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

76. Minn.—State *ex rel.* Trebbly *v.* Vasaly, 98 Minn. 46, 107 N. W. 818. **Mo.**—State *ex rel.* Harvey *v.* Gilbert, 163 Mo. App. 679, 147 S. W. 505. **N. J.** Crane *v.* Shoenthal, 76 N. J. L. 378, 69 Atl. 972.

77. Runkle v. Com. ex rel. Keppelman, 97 Pa. 328.

78. See the cases cited in the preceding notes.

[a] The writ will issue notwithstanding (1) an assignment of the salary before it is due as the assignment is void (Schmitt *v.* Dooling, 145 Ky. 240, 140 S. W. 197, Ann. Cas. 1913B, 1078, 36 L. R. A. (N. S.) 881; Granger *v.* French, 152 Mich. 356, 116 N. W. 181, 125 Am. St. Rep. 416), and (2) it is immaterial that the relator neglects his official duties. State *ex rel.* Harvey *v.* Gilbert, 163 Mo. App. 679, 147 S. W. 505.

79. O'Hara v. Fagan, 56 N. J. L. 279, 27 Atl. 1089, where the mayor refused to sign the warrant because the relator was previously paid money to which he was not entitled and which he still retains. See State *ex rel.* Waitt *v.* Hill, 32 Minn. 275, 20 N. W. 196, holding that writ will be denied if the relator is not entitled to the salary even though his claim has been audited.

[a] If the board, being of the opinion that the relator is in a position to enforce his claim for services, allows it to save expenses of litigation, the signing of a warrant will be directed. Doverspike *v.* Magee, 51 Pa. Super. 525.

80. State ex rel. Harvey v. Gilbert, 163 Mo. App. 679, 147 S. W. 505; People *ex rel.* Satterlee *v.* Board of Police, 75 N. Y. 38.

[a] But if no appropriation has been made when required, the writ will be refused. State *ex rel.* Mighels *v.* Eggers, 36 Nev. 364, 136 Pac. 104. See Reynolds *v.* Taylor, 43 Ala. 420, holding no appropriation necessary where the salary is fixed.

81. Mich.—Granger *v.* French, 152 Mich. 356, 116 N. W. 181, 125 Am. St. Rep. 416. **Va.**—Richmond *v.* Epps, 98 Va. 233, 35 S. E. 723. **Wash.**—State *ex rel.* Dudley *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

[a] Writ will issue without an audit or allowance of a salary fixed by law where it is held to be unnecessary. State *ex rel.* Marshall *v.* Starling, 13

salary has not been fixed by law,⁸² or is in anywise discretionary.⁸³

3. Payment.—*a. In General.*—If a treasurer refuses to pay a claim for salary which is audited and allowed,⁸⁴ or which is certified by the proper authorities without an allowance,⁸⁵ when it is his duty to do so, mandamus is a proper remedy. But the writ has been denied because the party has another remedy,⁸⁶ because no appropriation has been made for the salary in question,⁸⁷ and because the claim has not been presented and allowed, when such is necessary.⁸⁸

S. C. 262; *Kendall v. Raybould*, 13 Utah 226, 44 Pac. 1034.

82. *Richmond v. Epps*, 98 Va. 233, 35 S. E. 723. See *Moore v. State ex rel. Cox*, 4 Neb. (Unof.) 235, 93 N. W. 986; *Orr v. Davis*, 9 Tex. Civ. App. 628, 30 S. W. 249.

83. *Richmond City v. Epps*, 98 Va. 233, 35 S. E. 723.

84. Cal.—*Ward v. Forkner*, 118 Cal. xvi, 50 Pac. 713. Fla.—*Board of Comrs. of Escambia County v. Board of Pilot Comrs.*, 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196. Me.—*Baker v. Johnson*, 41 Me. 15. Md.—*Robey v. County Comrs. of Prince George's County*, 92 Md. 150, 48 Atl. 48; *Robb v. Carter*, 65 Md. 321, 336, 4 Atl. 282. Mich.—*Bloomfield v. Bay City*, 192 Mich. 488, 158 N. W. 1043; *Friedman v. Horning*, 128 Mich. 606, 87 N. W. 752. N. J.—*Lindabury v. Freeholders of Ocean*, 47 N. J. L. 417, 1 Atl. 701. N. Y.—*Matter of Brenner*, 170 N. Y. 185, 63 N. E. 133; *People ex rel. Stuart v. Edmonds*, 19 Barb. 468, 9 How. Pr. 470; *People ex rel. Morris v. Edmonds*, 15 Barb. 529; *People ex rel. Corsecaden v. Howe*, 88 App. Div. 617, 84 N. Y. Supp. 604. Utah.—*State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720.

[a] That he is an officer *de jure* (1) must be shown by an officer seeking to compel payment of salary. *Stott v. Chicago*, 205 Ill. 281, 68 N. E. 736. (2) Under the rule that salary is incident to the title to the office, not to its occupation, a *de facto* officer cannot maintain mandamus. *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732; *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488. Compare *State ex rel. Vail v. Draper*, 48 Mo. 213, holding person with best *prima facie* right must be recognized; also *Friedman v. Horning*, 128 Mich. 606, 87 N. W. 752.

[b] An officer holding over (1) after the expiration of his term of office until the qualification of his suc-

cessor may enforce his right to salary by mandamus (Md.—*Robb v. Carter*, 65 Md. 321, 332, 4 Atl. 282. Ore. *Eddy v. Kincaid*, 28 Ore. 537, 41 Pac. 156. Wash.—*State ex rel. Dudley v. Daggett*, 28 Wash. 1, 68 Pac. 340), even though (2) the ordinance does not provide that he shall so hold over. *Robb v. Carter*, 65 Md. 321, 332, 4 Atl. 282.

[c] While a petition to review the salary allowed is pending, payment of the sum allowed will not be compelled by mandamus. *Adams v. Hampden*, 16 Gray (Mass.) 41.

[d] If the warrant is defective, the writ will not issue. *Thomas v. Owens*, 4 Md. 189.

[e] Payment of an unliquidated sum for fees will not be compelled. *Howell v. State ex rel. Edwards*, 54 Fla. 199, 45 So. 453.

85. *Huff v. Knapp*, 5 N. Y. 65.

86. *People ex rel. Ryan v. Green*, 58 N. Y. 295, 306 (if the relator is a city official he has a remedy by action); *People ex rel. Perry v. Thompson*, 25 Barb. (N. Y.) 73; *State ex rel. Banks v. Board of County Comrs.*, 18 Wash. 160, 51 Pac. 368, as by appeal from the board of commissioners in rejecting the claim.

Proceedings by action to recover compensation, see *infra*, X.

[a] For services rendered after hours, an action at law, not mandamus, is the proper remedy to compel payment. *Goodson v. Board of Health*, 114 Mich. 345, 72 N. W. 185.

87. Ark.—*Ex parte Tully*, 4 Ark. 220, 38 Am. Dec. 33. Ill.—*Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797. N. Y.—*People ex rel. Daly v. York*, 66 App. Div. 453, 73 N. Y. Supp. 331; *People ex rel. Bagley v. Green*, 1 Hun 1, 3 Thomp. & C. 90.

88. *People ex rel. Ryan v. Green*, 58 N. Y. 295; *People ex rel. McLaughlin v. Prendergast*, 70 Misc. 6, 127 N. Y. Supp. 1057, even though the salary is fixed by law.

b. *Where Title to Office Is in Question.*—The court cannot determine the ultimate right to the office in such a proceeding;⁸⁹ and, therefore, it will not issue its writ in favor of a person out of possession, where the office is filled de facto.⁹⁰ But an incumbent may compel payment of his salary although a question as to his title arises incidentally.⁹¹ If the right of the relator to the office is in question,⁹² or if the relator's employment, or appointment is unauthorized,⁹³ or if the

89. **Cal.**—McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661. **Mo.**—State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S. W. 403; State ex rel. Simmons v. John, 81 Mo. 13. **Mont.**—State ex rel. Thompson v. Kenney, 9 Mont. 223, 232, 23 Pac. 733.

Mandamus to try title to office, see *supra*, V, C.

90. **U. S.**—United States v. Guthrie, 17 How. 284, 15 L. ed. 102, *per* Curtis, J. **Cal.**—Black v. Board of Police Comrs. of San Jose, 17 Cal. App. 310, 119 Pac. 674. Compare Davenport v. Los Angeles, 146 Cal. 508, 80 Pac. 684, compelling payment of salary where on recall proceedings void because petitioners' names were not on register, relator was removed and another was elected and recognized as councilman. **Mo.**—State ex rel. Goodnow v. Police Comrs., 80 Mo. App. 206, 221. **N. Y.**—People ex rel. Sulzer v. Sohmer, 211 N. Y. 565, 105 N. E. 647. **S. C.**—Contra, McDowell v. Burnett, 90 S. C. 400, 73 S. E. 782, making incumbent a party for purpose of settling right to office, the facts being undisputed and the issue being one of law only.

91. **Cal.**—Bannerman v. Boyle, 160 Cal. 197, 116 Pac. 732. **Mo.**—State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S. W. 403; State ex rel. Simmons v. John, 81 Mo. 13; State ex rel. Vail v. Draper, 48 Mo. 213. **Mont.**—State ex rel. Thompson v. Kenney, 9 Mont. 223, 232, 23 Pac. 733. **Utah.**—Williams v. Clayton, 6 Utah 86, 21 Pac. 398. **Wash.**—State ex rel. Dudley v. Daggett, 28 Wash. 1, 68 Pac. 340. **Wyo.**—State ex rel. Hamilton v. Grant, 14 Wyo 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588.

[a] **Where two persons claim to be de facto officers** and claim the salary therefor, the court in a mandamus proceeding to compel the audit of the claim may determine whether the plaintiff holds the legal title to the office. Bannerman v. Boyle, 160 Cal. 197, 116

Pac. 732; McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661; State ex rel. Thompson v. Kenney, 9 Mont. 223, 232, 23 Pac. 733. See State ex rel. Simmons v. John, 81 Mo. 13; State ex rel. Vail v. Draper, 48 Mo. 213.

[b] **Parties.**—A person out of office to whom a warrant for salary has been issued is not a necessary party to a mandamus proceeding by the incumbent. Williams v. Clayton, 6 Utah 86, 21 Pac. 398.

[c] **A decision in favor of the relator means no more** than that he is a de facto incumbent to the office and entitled to its emoluments. State ex rel. Hamilton v. Grant, 14 Wyo. 41, 52, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588.

[d] **The court cannot declare** that relator's title is unassailable, or adjudicate as between the relator and another claimant to the office which has the better title. State ex rel. Hamilton v. Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588.

92. McDowell v. Burnett, 90 S. C. 400, 73 S. E. 782.

[a] **Where the right to the office depends on the construction of an ambiguous statute,** mandamus to compel payment of salary will not lie. People ex rel. Dolan v. Lane, 55 N. Y. 217. Compare People ex rel. McLaughlin v. Board of Police Comrs., 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596.

[b] **Pending a contest** (1) as to the office before the courts or other competent tribunal, mandamus will not lie to enforce the right to salary (State v. Kenney, 9 Mont. 223, 23 Pac. 733; Runkle v. Com. ex rel. Keppelman, 97 Pa. 328), unless (2) the statute provides otherwise. See the statutes and Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850.

93. **Cal.**—Falk v. Reis, 88 Cal. 514, 26 Pac. 359. **N. Y.**—Dobrovolny v. Prendergast, 219 N. Y. 280, 114 N. E. 436; People ex rel. O'Loughlin v.

statute creating the office is unconstitutional,⁹⁴ the writ will not issue. But an issue as to whether or not the officer appointing the relator was elected has been held to be immaterial to the mandamus proceeding.⁹⁵

c. *Where Officer Is Prevented From Performing Duties.*—If an officer is wrongfully prevented from holding his office and performing his duties without fault on his part and against his consent, either by reason of a wrongful removal,⁹⁶ or otherwise,⁹⁷ he may enforce his right to salary by mandamus, unless another person is in possession of the office *de facto*;⁹⁸ and he may do this, according to some authorities, notwithstanding his duties were performed by another person during his suspension, who was paid a salary.⁹⁹

S. PENSIONS.—Mandamus to enforce duties of officers with respect to applications for pensions of officers is discussed elsewhere in this work.¹

Board of Estimate of New York, 167 App. Div. 76, 152 N. Y. Supp. 625; *In re Fuller*, 33 App. Div. 617, 53 N. Y. Supp. 1090. **Ohio.**—*State ex rel. Seiter v. Hoffman*, 25 Ohio 328.

94. *McDermont v. Dinnie*, 6 N. D. 278, 69 N. W. 294; *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708.

95. *Brainard v. Staub*, 61 Conn. 570, 22 Atl. 1040.

96. **Cal.**—*Davenport v. Los Angeles*, 146 Cal. 508, 80 Pac. 684 (suit to compel restoration and payment of salary); *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198, where removal was set aside. **Ill.** *People ex rel. Blachly v. Coffin*, 279 Ill. 401, 117 N. E. 85. **La.**—*State ex rel. Young v. Capdevielle*, 135 La. 669, 65 So. 890. **N. J.**—*Schwarzroek v. Board of Education of Bayonne (N. J. L.)*, 101 Atl. 394, where removal was subsequently set aside. **N. Y.**—*People ex rel. Mead v. Dalton*, 27 Misc. 667, 59 N. Y. Supp. 666, suit to compel restoration and payment of salary.

[a] An officer who, claiming his removal was unauthorized, remains in possession, may maintain mandamus to compel payment of his salary. *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588.

[b] If the removal or suspension was legal, the writ will not issue. *Hartwig v. Manistee*, 134 Mich. 615, 96 N. W. 1067; *Moores v. State ex rel. Cox*, 4 Neb. (Unof.) 235, 93 N. W. 986. See *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. (N. S.) 588.

[c] **Joinder of Actions.**—Where relief is authorized, an officer who has been removed may ask to be reinstated and to be paid arrears in salary in one action. *People ex rel. Blachly v. Coffin*, 279 Ill. 401, 117 N. E. 85; *People ex rel. Mead v. Dalton*, 27 Misc. 667, 59 N. Y. Supp. 666. *Contra*, *Chicago v. People ex rel. Gray*, 210 Ill. 84, 71 N. E. 816; *Lattime v. Hunt*, 196 Mass. 261, 81 N. E. 1001.

97. *Scott v. Boyle*, 25 Cal. App. 806, 144 Pac. 311; *McEvers v. Boyle*, 25 Cal. App. 476, 144 Pac. 308, where officer was enjoined from performing duties of office. But see *Lattime v. Hunt*, 196 Mass. 261, 81 N. E. 1001, holding recovery of arrears of salary must be recovered by action.

98. See *supra*, V, S, 3, b.

99. **Cal.**—*Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; *Scott v. Boyle*, 25 Cal. App. 806, 144 Pac. 311; *McEvers v. Boyle*, 25 Cal. App. 476, 144 Pac. 308. **Ill.**—*People ex rel. Blachly v. Coffin*, 279 Ill. 401, 117 N. E. 85. **Neb.**—But see *State ex rel. Greeley Co. v. Milne*, 36 Neb. 301, 54 N. W. 521, 38 Am. St. Rep. 724, 19 L. R. A. 689. **N. J.**—*McDonald v. Newark*, 58 N. J. L. 12, 32 Atl. 384. **N. Y.**—*People ex rel. Grady v. Palmer*, 15 App. Div. 504, 44 N. Y. Supp. 578. **Utah.**—*Kendall v. Raybould*, 13 Utah 226, 44 Pac. 1034.

[a] If the payment to the *de facto* officers has exhausted the fund appropriated, the writ will not lie. *Chicago v. People ex rel. Gray*, 210 Ill. 84, 71 N. E. 816.

1. See the title, "Pensions and Bounties."

VI. INJUNCTION BY AND AGAINST OFFICERS.² — A. AGAINST WHAT OFFICERS.³ — The writ of injunction may issue against federal,⁴ state,⁵ and municipal⁶ officers, school directors and school officers,⁷ health boards,⁸ and highway officers.⁹ But the remedy by injunction can be rarely used against election officers.¹⁰

The governor of a state,¹¹ and any member of the state executive department may be enjoined from performing purely ministerial duties.¹²

2. As to injunctions generally, see 12 STANDARD PROC. 991, et seq.

Restraining sheriff from levying an execution and enforcing a judgment, see 16 STANDARD PROC. 450.

As to injunctions granted in quo warranto proceeding, see the title "Quo Warranto."

3. Injunction against officers of the land department, see the title, "Public Lands."

4. See *infra* this note, and the title, "United States."

[a] Heads of (1) departments (Noble v. Union River Logging R. Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123), such as (2) secretary of interior (Noble v. Union River Logging R. Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123; Gaines v. Thompson, 7 Wall. [U. S.] 347, 19 L. ed. 62), and (3) postmaster general. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. ed. 90; Masses Pub. Co. v. Patten, 245 Fed. 102, 157 C. C. A. 398. See the title, "Post Office."

[b] The president cannot be enjoined from carrying into effect an act of congress alleged to be unconstitutional. Mississippi v. Johnson, 4 Wall. (U. S.) 475, 498, 18 L. ed. 437, fact that he is described as a citizen immaterial.

[c] As to whether president can be required to perform ministerial acts, query. Mississippi v. Johnson, 4 Wall. (U. S.) 475, 498, 18 L. ed. 437.

5. U. S.—Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. ed. 632; *In re* Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Minneapolis Brew. Co. v. McGillivray, 104 Fed. 258. Fla.—Louisville & N. R. Co. v. Railroad Comrs., 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189. N. D.—State v. District Court, 17 N. D. 285, 115 N. W. 675, 15 L. R. A. (N. S.) 331, pure food commissioner. Tex.—Missouri, K. & T. R. Co. v. Shannon, 100 Tex. 379, 388, 100

S. W. 138, 10 L. R. A. (N. S.) 681. See the title, "States and Territories."

As to when action is deemed an action against the state, see the title, "States and Territories."

[a] The federal courts have jurisdiction to enjoin a state officer from enforcing an unconstitutional law. Reagan v. Farmers' Loan & Tr. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; Mutual Life Ins. Co. v. Boyle, 82 Fed. 705; Cotting v. Kansas City Stock-Yards Co., 79 Fed. 679. As to injunction against enforcement of statutes, see the title "Statutes." See also the title, "United States Courts."

[b] A citizen of another state may maintain an injunction suit against a state officer in a federal court. Dinsmore v. Southern Exp. Co., 92 Fed. 714.

Whether attorney general is a necessary party, see 13 STANDARD PROC. 38.

6. See the title, "Municipal Corporations."

7. See the title, "Schools and School Districts."

8. See 10 STANDARD PROC. 988.

9. See 11 STANDARD PROC. 107, 126, 138, 174, 197, 269.

10. See 8 STANDARD PROC. 51.

11. Kan.—Martin v. Ingham, 38 Kan. 641, 17 Pac. 162. Minn.—Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415. Tenn. See Bates v. Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316. Wis.—State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561. But see State ex rel. Attorney General v. Huston, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380, holding district court cannot enjoin governor.

12. Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415; State ex rel. Attorney General v. Huston, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380.

[a] Thus (1) the secretary of state (Colo.—People ex rel. O'Reilly v. Mills,

B. AGAINST PERFORMANCE OF PARTICULAR ACTS.—1. Generally. When there is no question as to whether an officer has a right to hold and exercise the office,¹³ equity has jurisdiction to restrain officers from performing illegal ministerial acts under the warrant of their offices.¹⁴ And if an officer threatens to exercise powers not conferred upon the office,¹⁵ or to exercise the powers of his office in a territory or jurisdiction within which he is not authorized to act,¹⁶ an injunction is a proper remedy. But equity will not enjoin an officer from the performance of lawful acts,¹⁷ or exercise supervisory jurisdiction over public officials in

30 Colo. 262, 70 Pac. 322 [denying relief as court had no power to direct the particular act]; *People v. McClees*, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646. **Del.**—*Delaware Surety Co. v. Layton*, 50 Atl. 378. **Fla.**—*Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963. **Mo.** *State ex rel. Missouri & N. A. R. Co. v. Johnston*, 234 Mo. 338, 137 S. W. 595. **N. C.**—*Brem v. Houck*, 101 N. C. 627, 8 S. E. 365. **Wis.**—*State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561), (2) attorney general (*Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. 679), (3) state auditor (*Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. [N. S.] 415; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408), and (4) state treasurer (*See State v. Folk*, 124 Tenn. 119, 135 S. W. 776), may be enjoined. (5) But the delivery of election returns to the speaker of the house by the secretary of state cannot be restrained. *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23, 25 Am. St. Rep. 792, 3 L. R. A. 53.

[b] **The state tax board consisting of the secretary of state, the comptroller and the tax commissioner may be enjoined.** *Missouri, K. & T. R. Co. v. Shannon*, 100 Tex. 379, 387, 100 S. W. 138, 10 L. R. A. (N. S.) 681. See also *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761.

[c] **Commissioner of the general land office may be enjoined.** *Kaufman v. McGaughey*, 3 Tex. Civ. App. 655, 21 S. W. 261.

13. **Injunction to try title to office,** see *infra*, VI, C.

14. **Ala.**—*Long v. Shepherd*, 159 Ala. 595, 48 So. 675. **Kan.**—*State ex rel. Roberts v. Lawrence*, 80 Kan. 707, 103 Pac. 839. **Minn.**—*Burke v. Leland*, 51 Minn. 355, 53 N. W. 716. **N. Y.** *People ex rel. Wood v. Draper*, 24 Barb.

265; *Kingsley v. Pounds*, 96 Misc. 27, 160 N. Y. Supp. 228. **Pa.**—*Hagner v. Heyberger*, 7 Watts & S. 104, 42 Am. Dec. 220.

Injunction against particular acts, see the title "Municipal Corporations," and the specific titles.

[a] **Where the officer has retired from office,** the bill for an injunction against performing unlawful acts must be dismissed. *Chandler v. Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. ed. 1129.

15. **U. S.**—*Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. ed. 623. **Ark.**—*McConnell v. Arkansas Brick & M. Co.*, 70 Ark. 568, 591, 69 S. W. 559. **Del.**—*Delaware Surety Co. v. Layton*, 50 Atl. 378. **Haw.**—*Widemann v. Thurston*, 7 Haw. 470. **Ill.** *People v. Whitecomb*, 55 Ill. 172. **Ind.** *Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025. **Mo.**—*Judson v. Smith*, 104 Mo. 61, 15 S. W. 956. **N. J.**—*Bayonne v. North Arlington*, 77 N. J. Eq. 166, 75 Atl. 558, 140 Am. St. Rep. 547. **N. Y.** *Roosevelt v. New York*, 1 How. Pr. (N. S.) 205. **N. D.**—*State v. District Court*, 17 N. D. 283, 115 N. W. 675, 15 L. R. A. (N. S.) 331.

16. **Ill.**—*People v. Whitecomb*, 55 Ill. 172. See also *Hyde Park v. Chicago*, 124 Ill. 156, 16 N. E. 222; *East St. Louis v. New Brighton*, 34 Ill. App. 494. **Ind.**—*Stultz v. State ex rel. Steele*, 65 Ind. 492. **Ohio.**—*State ex rel. Schwartz v. Davies*, 12 Ohio Cir. Ct. 218. **Okla.**—*Needles v. Frost*, 2 Okla. 19, 35 Pac. 574. **Pa.**—*Com. ex rel. Hunter v. Smail*, 238 Pa. 106, 85 Atl. 1088, Ann. Cas. 1914C, 326 note.

Injunction against exercise of authority over illegally annexed territory, see the title "Municipal Corporations."

17. *Montgomery v. Wasem*, 116 Ind. 343, 352, 15 N. E. 795, 19 N. E. 184; *Kingsley v. Pounds*, 96 Misc. 27, 160 N. Y. Supp. 228.

[a] **A ministerial officer who is en-**

the exercise of their powers.¹⁸ The courts cannot by injunction control officers in the exercise of discretionary acts in the absence of an abuse of discretion.¹⁹ An injunction against the performance of purely political duties will not be granted.²⁰

Parties. — Where an injunction is a proper remedy, the suit may be instituted by a taxpayer if the act in question would inflict an injury on taxpayers by increasing their burdens of taxation;²¹ otherwise it must be brought by the state acting through its proper officials.²²

2. Acts Under Void Statute. — Equity has jurisdiction to pass upon the constitutionality of a statute in a proceeding to enjoin officers from

gaged in executing an order made by a competent court having jurisdiction and who obeys the order cannot be enjoined. *Montgomery v. Wasem*, 116 Ind. 343, 352, 15 N. E. 795, 19 N. E. 184.

18. *Long v. Shepherd*, 159 Ala. 595, 48 So. 675; *People v. Canal Board*, 55 N. Y. 390. See also *Rickman v. Whitehurst* (Fla.), 74 So. 205.

[a] Mere negligence of official routine, not gross or wanton, mere mistake or error of judgment, or lack of experience, in the absence of fraud, will not authorize courts of equity to enjoin public officers from doing acts authorized by law, whatever may be the opinion of the court or public as to the wisdom of such acts or the mode of doing them. *Long v. Shepherd*, 159 Ala. 595, 48 So. 675.

19. **U. S.**—*Ex parte Young*, 209 U. S. 123, 158, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932; *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62; *Taylor v. Kercheval*, 82 Fed. 497. **Ga.** *Hood v. Hood*, 132 Ga. 778, 64 S. E. 1074. **Haw.**—*McCandless v. Carter*, 18 Haw. 221. **Kan.**—*Hessin v. Manhattan*, 81 Kan. 153, 105 Pac. 44, 25 L. R. A. (N. S.) 228. **Minn.**—*Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415, 420. **N. Y.** *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216. **Okla.** *Afton v. Gill*, 156 Pac. 658.

See also the title "Municipal Corporations."

[a] But an act which is entirely without the discretion reposing in the officer or board will be enjoined. *People ex rel. Roosevelt v. Edson*, 19 Jones & S. (N. Y.) 238, 256, 7 Civ. Proc. 5, 1 How. Pr. (N. S.) 231; *Afton v. Gill* (Okla.) 156 Pac. 658.

20. **U. S.**—*Green v. Mills*, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90.

Haw.—*Castle v. Atkinson*, 16 Haw. 769. **Ill.**—*People ex rel. McKinlay v. Rose*, 211 Ill. 252, 71 N. E. 1124; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143. **Ind.**—*Smith v. Myers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375. **Md.** *Hardesty v. Taft*, 23 Ind. 512, 87 Am. Dec. 584. **W. Va.**—*Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23, 25 Am. St. Rep. 792, 3 L. R. A. 53.

21. **Ala.**—*Long v. Shepherd*, 159 Ala. 595, 48 So. 675. **Fla.**—*Rickman v. Whitehurst*, 74 So. 205. **Haw.**—*McCandless v. Carter*, 18 Haw. 221; *Lucas v. American-Hawaiian E. & C. Co.*, 16 Haw. 80; *Castle v. Atkinson*, 16 Haw. 769. **Ind.**—*Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811. **Mo.**—*Givens v. McIlroy*, 79 Mo. App. 671. **Ohio.** *Pierce v. Hagans*, 79 Ohio St. 9, 86 N. E. 519, 15 Ann. Cas. 1170 note, 36 L. R. A. (N. S.) 1. **Tex.**—*Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523. **W. Va.**—*Bryant v. Logan*, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011.

As to taxpayers' suits generally, see the title "Municipal Corporations"; also 13 STANDARD PROC. 14, 78.

22. *State ex rel. Roberts v. Lawrence*, 80 Kan. 707, 103 Pac. 839; *State ex rel. McCain v. Metschan*, 32 Ore. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692. See also the title "Municipal Corporations."

[a] The state may maintain injunction against a public officer to restrain him from a violation of his official duty, although other remedies may be open, and he may have given a sufficient bond. The state need not, as an individual plaintiff must, show grounds of fearing more specific injury. *State ex rel. Roberts v. Lawrence*, 80 Kan. 707, 103 Pac. 839. Necessity for allegation of injury, see 13 STANDARD PROC. 78.

acting under it.²³ Mere unconstitutionality of the statute alone does not authorize an injunction, however.²⁴

C. TO TRY TITLE TO OFFICE. — Equity cannot exercise its jurisdiction to determine contests between conflicting claims of title to an office, or to try title to office when it is directly involved.²⁵ But equity

23. *Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

Injunction to restrain enforcement of void statutes, see the title "Statutes."

Injunction to restrain enforcement of void ordinances, see the title "Municipal Corporations."

Restraining assessment and collection of taxes because of unconstitutionality of statute, see the title "Taxation."

24. **U. S.**—*Cruikshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. ed. 277. **Colo.**—*People v. District Court*, 29 Colo. 182, 68 Pac. 242; *Frost v. Thomas*, 26 Colo. 222, 56 Pac. 899, 77 Am. St. Rep. 259. **N. Y.**—*Wells v. Buffalo*, 80 N. Y. 253. **Pa.**—See *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272.

[a] It must appear also that (1) the party has no adequate remedy by the ordinary processes of law (**U. S.** *Cruikshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. ed. 277. **Ohio.** *Reemelin v. Mosby*, 47 Ohio St. 570, 26 N. E. 717. **S. D.**—*Franklin v. Appel*, 10 S. D. 391, 73 N. W. 259. See generally the title "Legal Remedy"), or that (2) the case falls within some recognized head of equity jurisdiction (*Cruikshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. ed. 277; *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. ed. 648), and (3) that an injury will result to the plaintiff. *Reemelin v. Mosby*, 47 Ohio St. 570, 26 N. E. 717.

25. **Ala.**—*Little v. Bessemer*, 138 Ala. 127, 35 So. 64. **Cal.**—*Barendt v. McCarthy*, 160 Cal. 680, 118 Pac. 228. **Colo.**—*Arnold v. Hilts*, 52 Colo. 391, 121 Pac. 753, Ann. Cas. 1913E, 724; *People v. Elbert Dist. Court*, 46 Colo. 1, 101 Pac. 777; *Lawson v. Hays*, 39 Colo. 250, 89 Pac. 968. **Ill.**—*Lavin v. Board of Comrs. of Cook County*, 245 Ill. 496, 92 N. E. 291; *Marshall v. Board of Mgrs. Illinois State Reform-*

atory, 201 Ill. 9, 66 N. E. 314; *Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353. **Ind.**—*Landes v. Walls*, 160 Ind. 216, 66 N. E. 679. **Ia.** *Grove v. Myles*, 109 Iowa 541, 80 N. W. 544; *State v. Alexander*, 107 Iowa 177, 77 N. W. 841. **Kan.**—*Wilder v. Underwood*, 60 Kan. 859, 57 Pac. 965; *Neeland v. State*, 39 Kan. 154, 18 Pac. 165. **Ky.**—*Hill v. Anderson*, 122 Ky. 87, 90 S. W. 1071. **La.**—*Guillotte v. Poincy*, 41 La. Ann. 333, 6 So. 509, 5 L. R. A. 403. **Md.**—*Price v. Collins*, 122 Md. 109, 89 Atl. 383. **Mich.**—*Stenglein v. Beach*, 128 Mich. 440, 87 N. W. 449. **Minn.**—*School Dist. No. 47 v. Weise*, 77 Minn. 167, 79 N. W. 668; *Burke v. Leland*, 51 Minn. 355, 53 N. W. 716. **Mo.**—*Arnold v. Henry*, 155 Mo. 48, 55 S. W. 1089, 78 Am. St. Rep. 556; *State ex rel. Hawes v. Withrow*, 154 Mo. 397, 55 S. W. 460. **Neb.** *Hotchkiss v. Keek*, 86 Neb. 322, 125 N. W. 509. **N. J.**—*Collins v. Scull*, 84 N. J. Eq. 616, 94 Atl. 398. **N. Y.** *Welker v. Lathrop*, 210 N. Y. 434, 104 N. E. 938; *Seneca Nation v. Jameson*, 114 N. Y. Supp. 401. **N. C.**—*Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822; *Jones v. Granville*, 77 N. C. 280. **Ohio.** *State ex rel. Garrison v. Brough*, 94 Ohio St. 115, 113 N. E. 683; *Harding v. Eichinger*, 57 Ohio St. 371, 49 N. E. 306. **Ore.**—*Bennett Trust Co. v. Sengstacken*, 58 Ore. 333, 113 Pac. 863. **Pa.**—*Graeff v. Felix*, 200 Pa. 137, 49 Atl. 758; *Brower v. Kantner*, 190 Pa. 182, 43 Atl. 7. *Strange v. Williams*, 15 Pa. Dist. 155. **S. C.**—*Hardy v. Reamer*, 84 S. C. 487, 66 S. E. 678. **Va.** *Brown v. Baldwin*, 112 Va. 536, 72 S. E. 143; *Kilpatrick v. Smith*, 77 Va. 347.

[a] Not even in a proceeding auxiliary or incidental to a contest suit will equity lend its process in aid of either contestant if the object is to hold the functions of the office or the rights of the parties thereto in suspension. *Lawrence v. Leidigh*, 58 Kan. 676, 50 Pac. 889. *Compare Paine v. Keller*, 22 Ohio Cir. Ct. (N. S.) 81, as to quo warranto.

may act where the question of title arises only incidentally.²⁶

D. INJUNCTION AGAINST EXERCISE OF DUTIES. — An injunction will not lie to restrain a person from entering upon his official duties or from performing the functions pertaining to the office on the ground that he is not entitled to the office for some reason,²⁷ as because he was not legally appointed or elected,²⁸ or because he is disqualified or in-

26. *Hurley v. Levee Comrs.*, 76 Miss. 141, 23 So. 580; *Johnson v. Milwaukee*, 147 Wis. 476, 133 N. W. 627. See *Poyntz v. Shackelford*, 107 Ky. 546, 54 S. W. 855.

In suits to restrain payment of salaries, see *infra*, VI, J.

27. *Ala.*—*Little v. Bessemer*, 138 Ala. 127, 35 So. 64. *Ark.*—*Lucas v. Futrall*, 84 Ark. 540, 551, 106 S. W. 667. *Colo.*—*People v. Elbert Dist. Court*, 46 Colo. 1, 101 Pac. 777; *Lawson v. Hays*, 39 Colo. 250, 89 Pac. 968, where plaintiffs claimed a board consisted of but three members and there were no vacancies. *Ga.*—*Davis v. Dawson*, 90 Ga. 817, 17 S. E. 110. *Ill.*—*Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353. *Ia.*—*State ex rel. Deal v. Alexander*, 107 Iowa 177, 77 N. W. 841. *Kan.*—*Foster v. Moore*, 32 Kan. 483, 4 Pac. 850. *La.*—*Guillotte v. Poiney*, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403. *Md.*—*State v. Jarrett*, 17 Md. 309. *Minn.*—*Burke v. Leland*, 51 Minn. 355, 53 N. W. 716. *Neb.* *State ex rel. Hunt v. Mayor of Kearney*, 28 Neb. 103, 44 N. W. 90. *N. C.* *Rogers v. Powell*, 93 S. E. 917; *State ex rel. Campbell v. Wolfenden*, 74 N. C. 103. *Pa.*—*Hagner v. Heyberger*, 7 Watts & S. 104, 42 Am. Dec. 220. *S. D.* *State v. Herreid*, 10 S. D. 16, 71 N. W. 319. *Tenn.*—*Adcock v. Houk*, 122 Tenn. 269, 122 S. W. 979. *Tex.*—*McAllen v. Rhodes*, 65 Tex. 348; *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874. *Va.*—*Brown v. Baldwin*, 112 Va. 536, 72 S. E. 143; *Johnson v. Barham*, 99 Va. 305, 38 S. E. 136. *W. Va.*—*Swinburn v. Smith*, 15 W. Va. 483.

[a] Where a claim of office is asserted, injunction is not the proper remedy to secure or retain possession of the office. *Callaghan v. Irvin*, 40 Tex. Civ. App. 453, 90 S. W. 335; *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328; *Callaghan v. McGown* (Tex. Civ. App.), 90 S. W. 319.

[b] A de facto officer (1) will not be enjoined from performing the duties of the office. *Lavin v. Board of*

Comrs. of Cook County, 245 Ill. 496, 92 N. E. 291; *Burgess v. Davis*, 133 Ill. 578, 28 N. E. 817, *Deemer v. Boyne*, 103 Ill. App. 464; *Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379. (2) Taxpayers cannot prevent de facto officers from serving. *Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379.

[c] A de jure officer cannot enjoin an illegal claimant of an office in possession from performing its functions, whether he seeks permanent or temporary possession. *Vette v. Byington*, 132 Iowa 487, 109 N. W. 1073; *Cochran v. McCleary*, 22 Iowa 75, 86.

[d] Pending a suit for the office, the court will not restrain the person in possession from discharging its duties or enjoying its emoluments. *Ala.* *Casey v. Bryce*, 173 Ala. 129, 55 So. 810. *N. Y.*—*People ex rel. Wood v. Draper*, 24 Barb. 265. *Tex.*—*McAllen v. Rhodes*, 65 Tex. 348.

[e] But where the resignation of an officer is accepted, equity will at the instance of a person elected to the office enjoin the incumbent from performing its functions after an unauthorized withdrawal of the resignation. *State ex rel. Bergschieder v. Grace*, 113 Tenn. 9, 82 S. W. 485.

28. *Ala.*—*Beebe v. Robinson*, 52 Ala. 66, overruling *Bruner v. Bryan*, 50 Ala. 522. *Alaska.*—*Monahan v. Lynch*, 2 Alaska 132. *Colo.*—*People v. District Court*, 29 Colo. 277, 68 Pac. 224, 93 Am. St. Rep. 61. *Ga.*—*Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108. *Ia.*—*State ex rel. Deal v. Alexander*, 107 Iowa 177, 77 N. W. 811. *La.*—*State ex rel. Saizan v. Judge, etc.*, 48 La. Ann. 1501, 1516, 21 So. 94. *Mo.*—*State ex rel. Hawes v. Withrow*, 154 Mo. 397, 55 S. W. 460. *N. Y.*—*Dows v. Irvington*, 13 Abb. N. C. 162, where officer had not taken oath of office. *Pa.*—*Goldsworthy v. Boyle*, 175 Pa. 246, 34 Atl. 630; *Updegraff v. Crans*, 47 Pa. 103. *Tex.*—*Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379; *Brumby v. Boyd*, 28 Tex. Civ. App. 164, 66 S. W. 874.

[a] An appointment when there is

eligible,²⁹ or because the statute providing for the office is unconstitutional,³⁰ or because the office has become vacant for some reason.³¹ But it is otherwise if two persons or bodies assume to exercise the functions of the office.³²

E. INJUNCTION AGAINST INTERFERENCE WITH DUTIES.—Although some courts hold otherwise, as to contests between rival claimants,³³ the general rule is that an incumbent, whether *de facto* or *de jure*, may restrain an interference with the exercise of his functions until it can be determined by appropriate legal proceedings who is legally entitled to the office.³⁴ But the plaintiff must be in actual possession of the of-

no vacancy does not authorize an injunction against the appointee. Price v. Collins, 122 Ind. 109, 89 Atl. 383.

Questioning incorporation of municipality by injunction, see the title "Municipal Corporations."

Remedy by quo warranto, see the title "Quo Warranto."

29. Hill v. Anderson, 122 Ky. 87, 90 S. W. 1071; Fahy v. Johnstone, 21 App. Div. 154, 47 N. Y. Supp. 402.

30. **U. S.**—Green v. Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90. **Mo.**—State *ex rel.* Hawes v. Withrow, 154 Mo. 397, 55 S. W. 460. **N. Y.** People *ex rel.* Wood v. Draper, 24 Barb. 265.

[a] But where quo warranto is not adequate, see Le Maire v. Crockett (Me.), 101 Atl. 302.

31. School District No. 116 v. Wolf, 78 Kan. 805, 98 Pac. 237, 20 L. R. A. (N. S.) 353 (where territory in which officer resided was detached); Hagner v. Heyberger, 7 Watts & S. (Pa.) 104, 42 Am. Dec. 220, where the officer accepted another office. See also Markle v. Wright, 13 Ind. 548, refusing to enjoin incumbent whose term has expired.

32. People *ex rel.* Connelly v. Zeeh, 85 Misc. 151, 148 N. Y. Supp. 111 (granting an injunction pending a proceeding to try title to office); Kerr v. Trego, 47 Pa. 292, distinguished in Neeland v. State, 39 Kan. 154, 18 Pac. 165, and Goldsworthy v. Boyle, 175 Pa. 246, 34 Atl. 630.

[a] One of the conflicting bodies or its members may maintain the suit for an injunction. Kerr v. Trego, 47 Pa. 292.

33. Arnold v. Henry, 155 Mo. 48, 55 S. W. 1089, 78 Am. St. Rep. 556; State *ex rel.* Buchholz v. Seehorn, 143 Mo. App. 182, 128 S. W. 240; Welker v. Lathrop, 210 N. Y. 434, 104 N. E. 938; People *ex rel.* Corscadden v. Howe, 177

N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; Tappan v. Gray, 9 Paige (N. Y.) 507 (affirmed in 7 Hill 259); Coulter v. Murray, 15 Abb. Pr. N. S. (N. Y.) 129. But see Seneca Nation v. Jameson, 114 N. Y. Supp. 401.

34. **U. S.**—White v. Butler, 171 U. S. 379, 18 Sup. Ct. 949, 43 L. ed. 204. **Ala.**—Casey v. Bryce, 173 Ala. 129, 55 So. 810. **Cal.**—Scott v. Sheehan, 145 Cal. 691, 79 Pac. 353. **Colo.**—Arnold v. Hiltz, 52 Colo. 391, 121 Pac. 753, Ann. Cas. 1913E, 724. But see People v. District Court, 29 Colo. 277, 68 Pac. 224, 93 Am. St. Rep. 61. **Ind.**—Landes v. Walls, 160 Ind. 216, 66 N. E. 679; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047 (where the decision expressly recognized the unsettled question of title); Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025. **Kan.**—Neeland v. State, 39 Kan. 154, 18 Pac. 165; Braidy v. Theritt, 17 Kan. 468. **Ky.**—Hutchinson v. Miller, 158 Ky. 363, 164 S. W. 961; Hollar v. Cornett, 144 Ky. 420, 138 S. W. 298; Denny v. Bosworth, 113 Ky. 785, 68 S. W. 1078. **La.**—Jackson v. Powell, 119 La. 882, 44 So. 689; Sanders v. Emmer, 115 La. 590, 39 So. 631; Guilotte v. Poiney, 41 La. Ann. 533, 6 So. 507, 5 L. R. A. 403. **Mich.** Stenglein v. Beach, 128 Mich. 440, 87 N. W. 449, distinguishing Detroit v. Board of Public Works, 23 Mich. 546, on ground that suit was brought by city instead of incumbent. **Minn.** School Dist. No. 47 in Waseca County v. Weise, 77 Minn. 167, 79 N. W. 668. **Neb.**—Hotchkiss v. Keck, 86 Neb. 322, 325, 125 N. W. 509. **N. M.**—Baca v. Armijo, 3 N. M. 344. See Hubbell v. Armijo, 13 N. M. 480, 85 Pac. 477 (holding commission of governor to defendant is *prima facie* title and therefore the incumbent has not even a *prima facie* right to the office); Vijil v. Stroup, 13 N. M. 481, 85 Pac. 1048. **N. Y.**—Jewell v. Mohr, 136 N. Y. Supp.

fice;³⁵ and must establish a continued prima facie right to occupy it.³⁶

F. **APPOINTMENT AND REMOVAL.**—It is a general rule that political questions concerning the appointment and removal of officers cannot be determined by equity,³⁷ whether the power is vested in executive or

273; *Seneca Nation v. Jameson*, 62 Misc. 91, 114 N. Y. Supp. 401. **N. C.** See *Jones v. Granville*, 77 N. C. 280. **Ohio.**—State *ex rel. Garrison v. Brough*, 94 Ohio St. 115, 113 N. E. 683; *Palmer v. Zeigler*, 76 Ohio St. 210, 229, 81 N. E. 234; *Harding v. Eichinger*, 57 Ohio St. 371, 49 N. E. 306. **Pa.**—*Ewing v. Thompson*, 43 Pa. 372. **S. C.**—*Hardy v. Reamer*, 84 S. C. 487, 66 S. E. 678. **Tex.**—*Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379; *Young v. Dudney* (Tex. Civ. App.), 140 S. W. 802; *Lefevre v. Belsterling* (Tex. Civ. App.), 137 S. W. 1159; *Bonner v. Belsterling* (Tex. Civ. App.), 137 S. W. 1154; *Callaghan v. McGown* (Tex. Civ. App.), 90 S. W. 319; *Ehlinger v. Rankin*, 9 Tex. Civ. App. 424, 29 S. W. 240. **Wash.**—State *v. Superior Court*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893. **Wis.**—*Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796. See *Meany v. Staehle*, 160 Wis. 452, 152 N. W. 165.

[a] **A de facto officer** may enjoin one who, claiming under a certificate of election, forcibly ousts him. *Arnold v. Hiltz*, 52 Colo. 391, 121 Pac. 753, Ann. Cas. 1913E, 724; *Blain v. Chipewewa Circ. Judge*, 145 Mich. 59, 108 N. W. 440. See also *Terry v. Stauffer*, 17 La. Ann. 306; *McCue v. Holleran*, 9 Kulp (Pa.) 433. But see *Barendt v. McCarthy*, 160 Cal. 680, 118 Pac. 228 (*distinguishing* *Braidy v. Theritt*, 17 Kan. 468); and *Scott v. Sheehan*, 145 Cal. 691, 79 Pac. 353, holding the person thus gaining possession is entitled to an injunction and the former holder is not.

[b] **A person holding over** is within the rule. *Goldman v. Gillespie*, 43 La. Ann. 83, 8 So. 880; *Guillotte v. Poincy*, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403; *Hotchkiss v. Keck*, 86 Neb. 322, 125 N. W. 509.

[c] **Appointing officers cannot enjoin** persons acting under illegal appointments under this rule. *Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379.

[d] **Other officers who although not claiming to exercise plaintiff's office,** claim the right to exercise some of its

functions, will be enjoined. *Lucas v. Hagedorn*, 158 Ky. 369, 164 S. W. 978.

[e] **Respective claims to the office under conflicting commissions** cannot be passed on. *Goldman v. Gillespie*, 43 La. Ann. 83, 8 So. 880.

[f] **Eligibility of plaintiff** cannot be considered in the suit. *Hollar v. Cornett*, 144 Ky. 420, 138 S. W. 298.

35. **Kan.**—*Neeland v. State*, 39 Kan. 154, 18 Pac. 165. **La.**—*Jackson v. Powell*, 119 La. 882, 44 So. 689; *State ex rel. Kuhlman v. Rost*, 47 La. Ann. 53, 16 So. 776. **N. M.**—*Hubbell v. Armijo*, 13 N. M. 480, 85 Pac. 477.

[a] **If the plaintiff abandons possession,** the suit will be dismissed. *Hubbell v. Armijo*, 13 N. M. 480, 85 Pac. 477.

36. **Ala.**—*Casey v. Bryce*, 173 Ala. 129, 55 So. 810. **La.**—*Goldman v. Gillespie*, 43 La. Ann. 83, 8 So. 880; *Guillotte v. Poincy*, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403. **Minn.**—*School District No. 47 v. Weise*, 77 Minn. 167, 79 N. W. 668. **Ohio.**—*Davies v. State ex rel. Scherer*, 11 Ohio Cir. Ct. (N. S.) 209. **Pa.**—*Brower v. Kantner*, 190 Pa. 182, 43 Atl. 7. **Tex.**—*Stamps v. Tittle* (Tex. Civ. App.), 167 S. W. 776; *Ehlinger v. Rankin*, 9 Tex. Civ. App. 424, 29 S. W. 240. **Wis.**—*Meany v. Staehle*, 160 Wis. 452, 152 N. W. 165.

[a] **Allegations of facts establishing plaintiff's title to office do not oust equity** of jurisdiction as they are made only to explain his de facto right to possession. *State v. Superior Court*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893. See also: **Colo.**—*Arnold v. Hiltz*, 52 Colo. 391, 121 Pac. 753, Ann. Cas. 1913E, 724. **La.**—*Guillotte v. Poincy*, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403. **Tex.**—*Callaghan v. Irvin*, 40 Tex. Civ. App. 453, 90 S. W. 335.

37. **U. S.**—*White v. Berry*, 171 U. S. 366, 377, 18 Sup. Ct. 917, 43 L. ed. 199; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402 (federal court cannot enjoin removal of state officer); *Morgan v. Nunn*, 84 Fed. 551, removals from federal, state, and municipal offices are within the rule of the text. **Ill.**—*People ex rel. Malley v. Barrett*,

administrative boards or officers, or is entrusted to a judicial tribunal.³³ But this does not prevent an injunction if a board is proceeding to remove an officer it has no authority to remove.³⁹

G. REINSTATEMENT.—Since a court of equity has no jurisdiction to prevent an illegal removal,⁴⁰ it cannot by mandatory injunction compel reinstatement of a person illegally removed,⁴¹ except where no power of removal exists.⁴²

203 Ill. 99, 67 N. E. 742, 96 Am. St. Rep. 296; *Marshall v. Illinois State Reformatory*, 201 Ill. 9, 66 N. E. 314 (*affirming* 103 Ill. App. 65); *Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353; *Michels v. McCarty*, 196 Ill. App. 493. **Ind.**—*Landes v. Walls*, 160 Ind. 216, 66 N. E. 679; *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700. **La.**—*State ex rel. Kuhlman v. Rost*, 47 La. Ann. 53, 16 So. 776. **Md.** *Price v. Collins*, 122 Md. 109, 89 Atl. 383. **Neb.**—*Cox v. Moores*, 55 Neb. 34, 40, 75 N. W. 35 (*distinguishing* *Stahlhut v. Bauer*, 51 Neb. 64, 70 N. W. 496); *Fort v. Thompson*, 49 Neb. 772, 69 N. W. 110. **N. Y.**—*People ex rel. Corscadden v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; *Palmer v. Board of Education*, 47 App. Div. 547, 62 N. Y. Supp. 485; *Armatage v. Fisher*, 74 Hun 167, 26 N. Y. Supp. 264; *McNiece v. Sohmer*, 29 Misc. 238, 61 N. Y. Supp. 193. **Ohio.**—*Paine v. Keller*, 22 Ohio Cir. Ct. (N. S.) 81. **Okla.**—*Howe v. Dunlap*, 12 Okla. 467, 72 Pac. 365, 895. **Tex.**—*Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328; *Riggins v. Thompson*, 30 Tex. Civ. App. 242, 70 S. W. 578.

[a] One claiming to have been unlawfully removed from an office cannot review the action of the board by injunction to prevent the appointment of his successor or interfere with him in the discharge of his duties. His remedy is by quo warranto or mandamus. **U. S.**—*Morgan v. Nunn*, 84 Fed. 551. **Ill.**—*Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237. **N. Y.**—*McNiece v. Sohmer*, 29 Misc. 238, 61 N. Y. Supp. 193. Mandamus to review removal proceedings, see *supra*, V, N; as to quo warranto proceedings, see the title "*Quo Warranto*."

[b] Issuance of a commission to person appointed to succeed a person on the theory that a vacancy existed will not be enjoined. *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108.

[c] Enforcement of an order removing a party from office will not be enjoined, on the ground of its illegality. *Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353.

[d] Unconstitutionality of statute abolishing office or creating new one does not authorize injunction. *People ex rel. Corscadden v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; *Reemelin v. Mosby*, 47 Ohio St. 570, 26 N. E. 717, where statute abolished board of public improvements and created board of city affairs. See also *Fort v. Thompson*, 49 Neb. 772, 69 N. W. 110, where it was claimed election changing county organization was illegal.

[e] Hearing of charges against an officer will not be enjoined. *Paine v. Keller*, 22 Ohio Cir. Ct. (N. S.) 81.

[f] Appointment and confirmation of an officer through bribery and corruption are illegal acts that may be enjoined. *Roosevelt v. New York*, 1 How. Pr. N. S. (N. Y.) 205; *People ex rel. Roosevelt v. Edson*, 19 Jones & S. (N. Y.) 238, 7 Civ. Proc. 5, 1 How. Pr. (N. S.) 231.

38. *White v. Berry*, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. ed. 199; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402.

39. *Stahlhut v. Bauer*, 51 Neb. 64, 70 N. W. 496; *Callaghan v. Irvin*, 40 Tex. Civ. App. 453, 90 S. W. 335; *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 328, *distinguishing* *Riggins v. Thompson*, 30 Tex. Civ. App. 242, 70 S. W. 578, on the ground that in that case the board had power of removal.

40. See *supra*, VI, F.

41. *McNiece v. Sohmer*, 29 Misc. 238, 61 N. Y. Supp. 193.

Mandamus to compel reinstatement, see *supra*, V, O.

42. *Denny v. Bosworth*, 113 Ky. 785, 68 S. W. 1078; *McCue v. Holleran*, 9 Kulp (Pa.) 433.

H. APPURTENANCES TO OFFICE. — An injunction will issue to prevent the illegal seizure or use of the books and papers pertaining to a public office.⁴³

I. CIVIL SERVICE. — Under a statute authorizing taxpayer's suits to prevent illegal official acts,⁴⁴ the unlawful employment of persons in contravention to civil service law may be enjoined.⁴⁵ If the board of civil service commissioners has authority to remove civil service employees an injunction will not prevent them from exercising it;⁴⁶ but it is otherwise if they have no such power.⁴⁷

J. INJUNCTION AGAINST PAYMENT OF SALARY. — 1. Generally. — At the instance of a taxpayer,⁴⁸ equity will enjoin the issuance and payment of warrants for services not performed,⁴⁹ or for which the state, county or city, as the case may be, is not liable.⁵⁰ It will enjoin the payment of salary under an illegal ordinance or resolution voting or raising salary,⁵¹ or the payment of an order for an appropriation as a

43. *Clark County v. Gamble*, 136 Ga. 332, 71 S. E. 797; *Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523; *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S. W. 325.

[a] But an incumbent whose term of office has expired will not be enjoined from performing the duties or be required to deliver the appurtenances of the office to his successor. *Markle v. Wright*, 13 Ind. 548.

44. As to discussion of statute, see the title "Municipal Corporations."

[a] Where the civil service commissioners are regarded as state officers, a taxpayer's suit is not appropriate under a statute authorizing such suits against municipal officers only. *Slavin v. McGuire*, 205 N. Y. 84, 98 N. E. 405, Ann. Cas. 1913C, 881, mandamus is proper remedy.

45. *Peck v. Belknap*, 130 N. Y. 394, 29 N. E. 977, enjoining employment of persons failing to pass examination.

46. *State ex rel. Kansas City v. Lucas*, 236 Mo. 18, 139 S. W. 348; *Paine v. Keller*, 22 Ohio Cir. Ct. (N. S.) 81.

[a] Removal in violation of the president's rules will not be enjoined. *Page v. Moffett*, 85 Fed. 38; *Morgan v. Nunn*, 84 Fed. 551 (*disapproving* *Priddie v. Thompson*, 82 Fed. 186); *Taylor v. Kercheval*, 82 Fed. 497; *Carr v. Gordon*, 82 Fed. 373.

47. *State ex rel. Kansas City v. Lucas*, 236 Mo. 18, 139 S. W. 348.

48. *Ga.*—*Fluker v. Union Point*, 132 Ga. 568, 61 S. E. 648. *Ky.*—*Davies v. Goodwin*, 116 Ky. 891, 77 S. W. 185. *Minn.*—*Grannis v. Blue Earth*, 81 Minn. 55, 83 N. W. 495. *N. Y.*—*Gregory v.*

Simpson, 173 App. Div. 6, 159 N. Y. Supp. 1016. *Ore.*—*Burness v. Multnomah*, 37 Ore. 460, 60 Pac. 1005; *Brownfield v. Houser*, 30 Ore. 534, 49 Pac. 843. *Wis.*—*Frederick v. Douglas*, 96 Wis. 411, 416, 71 N. W. 798, that taxes are small does not affect right to relief.

As to taxpayers' suits generally, see the title "Municipal Corporations."

49. *Lundberg v. Boldenweck*, 35 Ill. App. 79.

50. *Md.*—*Peter v. Prettyman*, 62 Md. 566. *Ore.*—*Brownfield v. Houser*, 30 Ore. 534, 49 Pac. 843. *Wis.*—*Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

[a] Thus (1) it will enjoin the payment of warrants for services drawn for more than is due (*Foster v. Coleman*, 10 Cal. 278), and (2) will prevent the enforcement or performance (Ill.—*Stevens v. Henry*, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A. [N. S.] 339, contract to search for property omitted for taxation in previous years. *Minn.*—*Grannis v. Blue Earth*, 81 Minn. 55, 83 N. W. 495, contract to discover unassessed property. *Ore.*—*Burness v. Multnomah*, 37 Ore. 460, 60 Pac. 1005, (3) and payment (Ind.—*Mitchell v. Wiles*, 59 Ind. 364. *Mich.*—*Schurtz v. Grand Rapids*, 165 N. W. 766, contract for attorney's services. *N. D.*—*Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23. *Wis.*—*Frederick v. Douglas*, 96 Wis. 411, 71 N. W. 798, contract for attorney's services when county has a district attorney) of illegal contracts for services.

51. *West Chicago Park Comrs. v.*

gratuity in addition to an officer's regular salary.⁵² And if there has been no appropriation made for the payment of salaries, payment will be enjoined to prevent a diversion of other funds from their purposes.⁵³

2. As Affected by Questions of Title.—In or pending a proceeding to secure possession of an office, a claimant cannot enjoin the payment of salary to the incumbent.⁵⁴ The head of a department claiming the right to make an appointment cannot enjoin the payment of salary to a *de facto* officer.⁵⁵

In a suit by a taxpayer to restrain the payment of salary, the question of title arises only incidentally,⁵⁶ and equity will enjoin payment to persons not legally appointed,⁵⁷ unless the incumbent is a *de facto* officer,⁵⁸ or no loss would be sustained.⁵⁹

VII. REMOVAL OF OFFICERS.⁶⁰—A. GENERALLY.—In addition

Brenock, 18 Ill. App. 559; South Omaha v. Taxpayers' League, 42 Neb. 671, 60 N. W. 957.

[a] Where ordinance provides for increase in salary during term of office, payment will be enjoined. Ark. Barnes v. Williams, 53 Ark. 205, 13 S. W. 845. Ill.—Stadler v. Fahey, 87 Ill. App. 411. Ky.—Board of Education v. Moore, 114 Ky. 640, 71 S. W. 621.

[b] Form of complaint, see South Omaha v. Taxpayers' League, 42 Neb. 671, 60 N. W. 957.

[c] A councilman who voted for the ordinance may sue as a taxpayer to enjoin payment. Stadler v. Fahey, 87 Ill. App. 411.

[d] Injury Must Result.—Maxwell v. Smith, 87 Wash. 629, 152 Pac. 530.

52. Beauchamp v. Kankakee, 45 Ill. 274; Perry v. Kinnear, 42 Ill. 160.

53. Thiel v. Philadelphia, 245 Pa. 406, 91 Atl. 490.

54. Ga.—Stone v. Wetmore, 42 Ga. 601. Kan.—Lawrence v. Leidigh, 58 Kan. 676, 50 Pac. 889. N. Y.—Tappan v. Gray, 9 Paige 507. Tex.—McAllen v. Rhodes, 65 Tex. 348; Uhr v. Brown (Tex. Civ. App.), 191 S. W. 379.

[a] Even Though He May Be Insolvent.—Lawrence v. Leidigh, 58 Kan. 676, 50 Pac. 889; Tappan v. Gray, 9 Paige (N. Y.) 507, affirmed in 7 Hill 259.

55. Uhr v. Brown (Tex. Civ. App.), 191 S. W. 379.

56. Johnson v. Milwaukee, 147 Wis. 476, 133 N. W. 627.

57. See *infra*, this note.

[a] Where appointing officers had no authority to create the office or make the appointment, a taxpayer may enjoin payment of salary to the ap-

pointee. Conn.—Samis v. King, 40 Conn. 298. Ga.—Fluker v. Union Point, 132 Ga. 568, 64 S. E. 648. Ky.—Davies v. Goodwin, 116 Ky. 891, 77 S. W. 185. Mich.—Robinson v. Detroit, 107 Mich. 168, 65 N. W. 10.

[b] Where an appointment was made in violation of the civil service law, equity will enjoin payment of salary to appointee. Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; Johnson v. Milwaukee, 147 Wis. 476, 133 N. W. 627; Butler v. Milwaukee, 119 Wis. 526, 97 N. W. 185. See Hellyer v. Prendergast, 176 App. Div. 383, 162 N. Y. Supp. 788, under statute.

[c] Where a person who failed to pass the civil service examination was appointed, payment of salary will be restrained. Peck v. Belknap, 130 N. Y. 394, 29 N. E. 977; Gregory v. Simpson, 173 App. Div. 6, 159 N. Y. Supp. 1016.

58. Ill.—Lavin v. Board of Comrs. of Cook Co., 245 Ill. 496, 92 N. E. 291; Burgess v. Davis, 138 Ill. 578, 28 N. E. 817, affirming 37 Ill. App. 353. Mass. Prince v. Boston, 148 Mass. 285, 19 N. E. 218, where it was claimed statute under which appointment was made was unconstitutional. N. Y.—Greene v. Knox, 175 N. Y. 432, 67 N. E. 910, where there was fraud in the appointment. Tex.—Uhr v. Brown (Tex. Civ. App.), 191 S. W. 379.

59. See *infra*, this note.

[a] Where rightful incumbent cannot recover salary from city after payment to person in possession. Tappen v. Crissey, 64 How. Pr. (N. Y.) 496.

60. Mandamus to compel removal, etc., see *supra*, V, M.

Enjoining removal, see *supra*, VI, F.

to the removal of officers by administrative order, subject to review by certiorari,⁶¹ the statutes in a number of jurisdictions provide for a summary proceeding for removal by the courts.⁶² Such proceedings are variously deemed of a civil,⁶³ criminal,⁶⁴ or quasi-criminal,⁶⁵ nature. The purpose of the proceeding being to remove an officer, no such accusation can be maintained after the accused has ceased to hold office or the term of his office has expired.⁶⁶

B. PARTIES.⁶⁷ — The statutes usually designate the persons who may bring such suits.⁶⁸

C. PLEADING. — The proceedings are usually begun by accusation,⁶⁹ or information.⁷⁰ The accusation is sometimes required to be reduced to writing and entered of record.⁷¹ The same strictness in charging the

61. See 4 STANDARD PROC. 927.

62. See the statutes, and *infra*, this section.

[a] Statutes must be strictly construed. Ia.—*Tennant v. Kuhlmeier*, 142 Iowa 241, 120 N. W. 689. Ohio. *State v. Jaquis*, 11 Ohio Cir. Dec. 91. S. D.—*Minnehaha v. Thorne*, 6 S. D. 449, 61 N. W. 688.

63. Idaho.—*Ponting v. Isaman*, 7 Idaho 283, 62 Pac. 680. Kan.—*State v. Foster*, 32 Kan. 14, 3 Pac. 534. Me. *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172. N. M.—*State ex rel. Mitchell v. Medler*, 17 N. M. 644, 131 Pac. 976, Ann. Cas. 1915B, 1141. N. Y.—*People v. Meakin*, 133 N. Y. 214, 30 N. E. 828. Okla.—*State ex rel. Smith v. Brown*, 24 Okla. 433, 103 Pac. 762. Utah. *Skeen v. Craig*, 31 Utah 20, 86 Pac. 487.

64. Cal.—*Coffey v. Superior Court*, 147 Cal. 525, 82 Pac. 75; In the Matter of *Burleigh*, 145 Cal. 35, 78 Pac. 242; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615. Mont.—*State ex rel. McGrade v. District Court*, 52 Mont. 371, 157 Pac. 1157, and court may appoint attorney to prosecute, in event county attorney is unable to act. Tex.—*Bland v. State* (Tex. Civ. App.), 38 S. W. 252.

65. Ga.—*Gill v. Brunswick*, 118 Ga. 85, 44 S. E. 830; *Cobb v. Smith*, 102 Ga. 585, 27 S. E. 763. Idaho.—*Daugherty v. Nagel*, 27 Idaho 511, 149 Pac. 729. N. D.—*State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014.

66. *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *In re Stow*, 98 Cal. 587, 33 Pac. 490.

[a] Resignation of an officer whose removal is sought by such a proceeding operates to terminate it. *Roberts v. Paull*, 50 W. Va. 528, 40 S. E. 470.

[b] But the fact that the term of an officer expires during the pendency of an appeal does not constitute a ground for dismissal of the appeal. *Daugherty v. Nagel*, 27 Idaho 511, 149 Pac. 729.

67. See generally the title "Parties."

68. See the statutes.

[a] Thus (1) under some statutes, a private person, having no special interest in the matter, cannot institute a proceeding for the removal of a public officer for malfeasance except in cases enumerated in the statute. *McRoberts v. Hoar*, 28 Idaho 163, 152 Pac. 1046; *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590. (2) But usually the proceeding may be commenced either in the name of the state as plaintiff or in the name of the informant. *Smith v. Ellis*, 7 Idaho 196, 61 Pac. 695.

[b] Where the statute does not specify by whom the charges for the removal of an officer may be presented, taxpayers may properly institute a proceeding for such removal. *Dawson v. Phillips*, 78 W. Va. 14, 88 S. E. 456.

69. Ark.—*Haskins v. State*, 47 Ark. 243, 1 S. W. 242. Idaho.—*Hays v. Simmons*, 6 Idaho 651, 59 Pac. 182. W. Va.—*Dawson v. Phillips*, 78 W. Va. 14, 88 S. E. 456.

[a] The accusation is not deemed an indictment. In the Matter of *Burleigh*, 145 Cal. 35, 78 Pac. 242.

70. *Ponting v. Isaman*, 7 Idaho 283, 62 Pac. 680; *Com. v. Cooley*, 1 Allen (Mass.) 358, form.

71. See the statutes, and *Dawson v. Phillips*, 78 W. Va. 14, 88 S. E. 456.

[a] Mere filing of the charges preferred and the issuance of summons thereon is not a compliance with the

offense is not required as in indictments for criminal offenses.⁷² But the breach of the particular official duty must be alleged,⁷³ and that it was committed by the officer in his official capacity.⁷⁴ Where the statute authorizes any person to bring an action against an officer for neglect in the performance of his official duties, plaintiff need not aver that he has sustained any special damage by reason of the official neglect complained of.⁷⁵

A demurrer to the accusation will not lie, as the proceeding is summary.⁷⁶

D. TRIAL.⁷⁷ — Where proceedings for removal of officers are regarded as civil proceedings, the rules regulating the trial of civil actions prevail.⁷⁸ On the other hand, where such proceedings are deemed criminal or quasi-criminal, they are governed by the rules applicable to the trial of criminal cases.⁷⁹ A jury trial is not authorized,⁸⁰ unless it is expressly given by the statute.⁸¹

E. COSTS. — The proceeding for removal of an officer being purely statutory, no costs can be allowed except where expressly provided by the statute.⁸²

F. APPEAL. — Where a proceeding for removal of an officer is deemed criminal or quasi-criminal, no appeal lies from a judgment in favor of defendant.⁸³ But where the proceeding is not regarded as

statute. *Dawson v. Phillips*, 78 W. Va. 14, 88 S. E. 456.

72. *Haskins v. State*, 47 Ark. 243, 1 S. W. 242; *Hays v. Simmons*, 6 Idaho 651, 59 Pac. 182.

[a] Allegations on information and belief will suffice where the matters set forth are not within informant's knowledge. *Corker v. Pence*, 12 Idaho 152, 85 Pac. 388.

73. *Corker v. Pence*, 12 Idaho 152, 85 Pac. 388; *State v. Richardson*, 16 N. D. 1, 109 N. W. 1026.

[a] The specific acts must be set forth. *Smith v. Ellis*, 7 Idaho 196, 61 Pac. 695.

[b] That the illegal collection of fees on several different occasions is charged does not render the pleading objectionable. *Ponting v. Isaman*, 7 Idaho 283, 62 Pac. 680.

74. *McRoberts v. Hoar*, 28 Idaho 163, 152 Pac. 1046.

75. *In the Matter of Marks*, 45 Cal. 199.

76. *State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014.

77. See generally the title "Trial."

78. *State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014.

79. Ala.—*Nelson v. State*, 182 Ala. 449, 62 So. 189. Cal.—*Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435. Idaho.—*Daugherty v. Nagel*, 28 Idaho 302, 154

Pac. 375. Okla.—*Rutter v. Territory*, 11 Okla. 454, 68 Pac. 507. Utah.—*Skeen v. Craig*, 31 Utah 20, 86 Pac. 487.

[a] An impeachment proceeding against a judicial officer commenced in the supreme court by information is criminal in its nature and the guilt of defendant must be proved beyond a reasonable doubt. *State v. Tally*, 102 Ala. 25, 15 So. 722.

80. *State ex rel. Thompson v. Crump*, 134 Tenn. 121, 183 S. W. 505.

Right to trial by jury in summary proceedings against public officers generally, see 16 STANDARD PROC. 908.

81. *Callahan v. State*, 2 Stew. & P. (Ala.) 379; *Law v. Smith*, 34 Utah 394, 98 Pac. 300.

Right to trial by jury in prosecutions of officers by indictment, see *infra*, IX, C.

82. *Roberts v. Paull*, 50 W. Va. 528, 40 S. E. 470. See generally the title "Costs."

[a] A private person is not entitled to costs under a statute authorizing such costs in favor of the prosecuting officer, as it refers only to the prosecuting attorney. *Pugh v. Miller*, 27 Ind. App. 522, 61 N. E. 739.

83. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *Cobb v. Smith*, 102 Ga.

criminal, such judgment is subject to review by appeal.⁸⁴

A reversal of a judgment of removal ipso facto restores defendant to his office.⁸⁵

VIII. PROCEEDINGS FOR USURPATION OF OFFICE, ETC.⁸⁶

A summary proceeding, in the name of the state is sometimes provided for, where one person is usurping the office of another.⁸⁷ Under some statutes, the action may be brought in the name of the de jure officer,⁸⁸ who is also authorized by some statutes to sue for the recovery of fees illegally collected by the usurper,⁸⁹ or for the recovery of the salary received by the usurper while occupying the office.⁹⁰ Pursuant to some statutes the usurper of a public office may also be prosecuted criminally.⁹¹

IX. CRIMINAL PROSECUTION OF OFFICERS.—A. GENERALLY.—A public officer upon whom a ministerial duty is enjoined by law renders himself liable to criminal prosecution for a willful neglect to perform such duty.⁹² But a public officer is not subject to criminal prosecution for an act done by him in the exercise of discretion given him by law unless he acted corruptly,⁹³ or in excess of the powers conferred upon him.⁹⁴ A person who exercises the duties of a public office is equally liable to criminal prosecution as is an officer de jure.⁹⁵

B. INDICTMENT OR INFORMATION.—1. Generally.—The general rules as to charging statutory offenses⁹⁶ apply to criminal proceedings against public officers.⁹⁷

585, 27 S. E. 763. See generally the title "Review."

84. *Ponting v. Isaman*, 7 Idaho 283, 62 Pac. 680. See generally the title "Appeals."

85. *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777, not necessary for court to order that party be restored to office.

86. Injunction against, see *supra*, VI, E.

87. See the statutes, and *Ind. State v. Peterson*, 74 Ind. 174. *Ky. Stack v. Com.*, 118 Ky. 481, 81 S. W. 917. *N. Y.—People v. Ryder*, 16 Barb. 270.

88. *Cramer v. Brown*, 26 La. Ann. 272; *State v. Dahl*, 65 Wis. 510, 27 N. W. 343.

89. *Cal.—Stoddard v. Williams*, 65 Cal. 472, 4 Pac. 452. *Ind.—Glasecock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299. *La.—George v. Tucker*, 27 La. Ann. 67. *W. Va.—Bier v. Gorrel*, 30 W. Va. 95, 2 S. E. 30, 8 Am. St. Rep. 17.

90. *People v. Nolan*, 101 N. Y. 539, 5 N. E. 446.

91. See the statutes, and *Com. v. Adams*, 3 Mete. (Ky.) 6.

92. *Colo.—Adams v. People*, 25 Colo. 732, 55 Pac. 800. *Kan.—State v. Gluck*, 49 Kan. 533, 31 Pac. 690. *Miss.—Bra-*

cey v. State, 64 Miss. 17, 8 So. 163. *N. J.—State v. Kern*, 51 N. J. L. 259, 17 Atl. 114. *N. Y.—People v. Meakim*, 133 N. Y. 214, 30 N. E. 828. *Tenn. State v. Jones*, 2 Lea 716. *Tex.—State v. Baldwin*, 39 Tex. 155.

Prosecution of street and highway officers for neglect of official duty, see 11 STANDARD PROC. 143 et seq.

[a] Prosecution may be instituted even after the expiration of his term of office. *Com. v. Coyle*, 160 Pa. 36, 28 Atl. 576, 634, 40 Am. St. Rep. 708, 24 L. R. A. 552.

93. *Baker v. State*, 27 Ind. 485.

94. *State v. Wedge*, 24 Minn. 150.

95. *Com. v. Pate*, 110 Ky. 468, 61 S. W. 1009; *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216.

96. See 12 STANDARD PROC. 437 et seq.

97. See *infra*, this note.

[a] Thus (1) it is generally sufficient to charge the particular offence in the language of the statute (*Ark. Moose v. State*, 49 Ark. 499, 5 S. W. 885. *Mich.—People v. Glazier*, 159 Mich. 523, 124 N. W. 582. *Mo.—State v. Kelly*, 103 Mo. App. 711, 77 S. W. 996; *State v. Ragsdale*, 59 Mo. App. 590); (2) not necessary to charge that the several acts of the defendant were

An indictment, though not in the language of the statute, is sufficient if it contains every material and substantial fact required to complete the offense.⁹⁸ Where the definition of an offense whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the particulars.⁹⁹

Where several acts constitute but one offense, they may be alleged in one indictment, in accordance with the general rule of charging many acts constituting one offense.¹ The rule in reference to joinder of offenses restricting indictments to a single charge does not apply to accusations against officers charging corrupt misconduct in office.²

2. Particular Averments.—In an indictment charging an officer with neglect to perform an official act, his duty to perform such act must be alleged.³ The specific breach of duty constituting the offense charged must be distinctly averred.⁴ Where the charge is a violation of duty in neglecting to arrest parties for violating the law, there must be a specific averment that such parties were guilty of a violation of the law.⁵ If an officer is charged with the failure to account to his successor for public funds, it must affirmatively appear from the indictment that the term of office of the defendant had expired,⁶ and that the successor's term had begun;⁷ but it is not necessary to negative the loss of funds without defendant's fault.⁸ Where the charge is the approving of a false claim, it must be alleged that it was the defendant's

done knowingly and from an improper motive, a charge in the language of the statute with proper specifications of the acts constituting the offense being sufficient. *State v. Leeper*, 146 N. C. 655, 61 S. E. 585. See generally 12 STANDARD PROC. 447 et seq. (3) But where the statute creating the offense does not specifically define or describe it, then the information or indictment must set out in full all acts of the defendant constituting the offense. *State v. Ragsdale*, 59 Mo. App. 590; *State v. Kern*, 51 N. J. L. 259, 17 Atl. 114. (4) The indictment need not negative the exceptions mentioned in the statute. *State v. O'Gorman*, 68 Mo. 179. See also 12 STANDARD PROC. 458 et seq.

98. Ill.—*Uzzell v. People*, 173 Ill. App. 257. Ind.—*Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127. Va.—*Boyd v. Com.*, 77 Va. 52.

99. *Boyd v. Com.*, 77 Va. 52.

1. *Adams v. People*, 25 Colo. 532, 55 Pac. 806; *Uzzell v. People*, 173 Ill. App. 257. See also 12 STANDARD PROC. 503.

2. Cal.—*In re Shepard*, 161 Cal. 171, 118 Pac. 513, distinct charges of mis-

conduct may be joined in one accusation. Kan.—*State v. Gluck*, 49 Kan. 533, 31 Pac. 690. Mich.—*People v. Glazier*, 159 Mich. 528, 124 N. W. 582. See generally 12 STANDARD PROC. 499 et seq.

3. Ky.—*Com. v. Kinnaird*, 18 Ky. L. Rep. 647, 37 S. W. 840. Minn.—*State v. Coon*, 14 Minn. 456. N. C.—*State v. Fishplate*, 83 N. C. 654.

[a] But it is not necessary to set out the various acts which he was required to perform. *People v. Murray*, 76 App. Div. 118, 78 N. Y. Supp. 721.

4. Ind.—*Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127. Me.—*State v. Darling*, 89 Me. 400, 36 Atl. 632. Minn.—*State v. Coon*, 14 Minn. 456. Mo.—*State v. Boyd*, 196 Mo. 52, 94 S. W. 536. Mont.—*State v. King*, 28 Mont. 268, 72 Pac. 657. N. Y.—*People v. Auditors of Castleton*, 44 How. Pr. 238.

5. *State v. Darling*, 89 Me. 400, 36 Atl. 632.

6. *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372; *State v. Hebel*, 72 Ind. 361.

7. *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372.

8. *Dreyer v. People*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. ed. 79.

duty to pass upon claims;⁹ and that such claims by reason of defendant's approval became a charge against the commonwealth.¹⁰ A charge of auditing illegal claims is insufficient unless it states facts showing the illegality of such claims.¹¹ In an indictment for corrupt misbehavior in office it must be distinctly charged that the act was done corruptly.¹² And where misconduct is charged it must allege that defendant acted willfully.¹³ An information charging the receipt of illegal fees must show that the fees were illegal,¹⁴ and were actually collected by defendant.¹⁵

That the defendant was an officer is sometimes a necessary averment.¹⁶

C. TRIAL.¹⁷—In a prosecution of an officer by indictment, the accused is entitled to a trial by jury.¹⁸

X. PROCEEDINGS TO RECOVER COMPENSATION.—Salary or other compensation wrongfully withheld from a public officer is recoverable by him in an action brought for the amount due.¹⁹ He may also

9. *People v. Gleason*, 75 Hun 572, 27 N. Y. Supp. 670.

10. *People v. Kane*, 43 App. Div. 472, 61 N. Y. Supp. 195.

11. *People v. Auditors of Castleton*, 44 How. Pr. (N. Y.) 238.

12. *Boyd v. Com.*, 77 Va. 52.

[a] But an indictment charging a breach of a ministerial duty ordinarily need not allege that the act was corruptly done. *State v. Jones*, 2 Lea (Tenn.) 716.

13. *State v. Boyd*, 196 Mo. 52, 94 S. W. 536; *State v. Flynn*, 119 Mo. App. 712, 94 S. W. 543.

14. *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171.

15. *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171.

16. See *infra*, this note.

[a] In charging a municipal officer with being employed by a public service corporation in violation of a statute, it is necessary to allege that the defendant was an officer at the time he acted as attorney for the public utility corporation. *Boone v. State*, 170 Ala. 57, 54 So. 109, Ann. Cas. 1912C, 1065.

[b] An allegation that defendant was duly elected and entered upon the discharge of his duties sufficiently shows that defendant acted in his official capacity. *Edge v. Com.*, 7 Pa. 275.

17. See generally the title "Trial."

18. *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435.

Right to trial by jury generally, see the title "Juries and Jurors."

19. Cal.—*Marquis v. Santa Ana*, 103

Cal. 661, 37 Pac. 650. Ind.—*Logansport v. Crockett*, 64 Ind. 319. Mass.—*French v. Lawrence*, 190 Mass. 230, 76 N. E. 730. Minn.—*Hart v. Minneapolis*, 81 Minn. 476, 84 N. W. 342. Ohio—*Gobrecht v. Cincinnati*, 51 Ohio St. 68, 36 N. E. 782, 23 L. R. A. 609. Tex.—*Cawthon v. Houston*, 31 Tex. Civ. App. 1, 71 S. W. 329. Utah.—*Everill v. Swan*, 20 Utah 56, 57 Pac. 716.

[a] **Salary paid de facto officer** (1) not recoverable from payor by de jure officer. La.—*Michel v. New Orleans*, 32 La. Ann. 1094. N. Y.—*Dolan v. New York*, 68 N. Y. 274. Ohio—*State ex rel. Cronin v. Eshelby*, 2 Ohio Cir. Ct. 468. (2) To the contrary, see *Carroll v. Siebenthaler*, 37 Cal. 193.

[b] **A de jure officer may recover from a de facto officer** the amount paid to him as compensation while he was in unlawful possession of the office. Kan.—*Fenn v. Beeler*, 64 Kan. 67, 67 Pac. 461. La.—*Michel v. New Orleans*, 32 La. Ann. 1094. Va.—*Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584.

[c] **Amount remaining unpaid to de facto officer** is recoverable by de jure officer. *Michel v. New Orleans*, 32 La. Ann. 1094; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168.

[d] **A de facto officer cannot maintain an action to recover compensation for services while occupying the office.** Cal.—*People v. Potter*, 63 Cal. 127. Nev.—*Meagher v. County of Storey*, 5 Nev. 244. Pa.—*Philadelphia v. Given*, 60 Pa. 136.

[e] **Where an officer has been removed** (1) from office upon insuffi-

invoke the remedy by mandamus to compel payment of his salary.²⁰

XI. RECOVERY OF BOOKS AND PAPERS.²¹ — A summary statutory proceeding is provided for in some jurisdictions to recover books and papers pertaining to an office.²² Such statutory proceeding, however, is applicable only where the title to the office is free from doubt.²³ The matter must be determined by the court alone; it is not authorized to impanel a jury in such proceeding.²⁴

cient cause he cannot maintain an action for the recovery of salary due to him after his removal until his right to the office has been finally determined (*Selby v. Portland*, 14 Ore. 243, 12 Pac. 377, 58 Am. Rep. 307), (2) except where no other person is placed in the office in his stead. *Gorley v. Louisville*, 108 Ky. 789, 55 S. W. 886.

20. See *supra*, V, R, 3.

21. **Mandamus to compel**, see *supra*, V, P.

22. See the statutes, and *Ala.—Ex parte Scott*, 47 Ala. 609. *Ind.—McGee*

v. State, 103 Ind. 444, 3 N. E. 139. *Mich.—Murta v. Carr*, 140 Mich. 606, 104 N. W. 27. *N. Y.—In re Bradley*, 141 N. Y. 527, 36 N. E. 598. *S. C. Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860.

23. *Ala.—Thompson v. Holt*, 52 Ala. 491; *Ex parte Scott*, 47 Ala. 609. *N. Y.—In re Bradley*, 141 N. Y. 527, 36 N. E. 598. *S. C.—Verner v. Seibels*, 60 S. C. 572, 39 S. E. 274.

24. *Chambers v. Stringer*, 62 Ala. 596; *People ex rel. Williamson v. Allen*, 42 Barb. (N. Y.) 203. See generally the title "Juries and Jurors."

OFFICIAL BONDS. — See **Bonds; Officers; Principal and Surety.**

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Vol. XX

OPENING AND CLOSING

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CROSS-REFERENCES:

Arguments; Justices of the Peace;
Trial.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. NATURE OF RIGHT.—The right to open and close is universally recognized, being sometimes regarded as a privilege;¹ but more often considered an absolute right,² which if improperly denied will render the proceedings erroneous.³

II. TO WHOM RIGHT BELONGS.—A. IN GENERAL.—The right to open and close is usually determined by the pleadings;⁴ and belongs, as a rule, to the one who has the affirmative of the issues;⁵

1. See *infra*, VII, A.

2. See *infra*, VII, A.

3. See *infra*, VII, A.

4. **Ark.**—*Roberts v. Padgett*, 82 Ark. 331, 101 S. W. 753; *Beal & Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58. **Fla.**—*Pyles v. Piedmont, etc. Co.*, 58 Fla. 348, 50 So. 872. **Ga.** *Fletcher v. McMillan*, 132 Ga. 477, 64 S. E. 268; *Mitchem v. Allen*, 128 Ga. 407, 57 S. E. 721; *Wall v. Wall*, 15 Ga. App. 156, 82 S. E. 791. **Ind.**—*Mason v. Seitz*, 36 Ind. 516; *Goodrich v. Friedersdorff*, 27 Ind. 308; *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056. **Ia.**—*Fagg v. Minneapolis & St. L. R. Co.*, 175 Iowa 459, 157 N. W. 148. **Ky.**—*Baskett's Assn. v. Rash*, 165 Ky. 468, 177 S. W. 239; *Kentucky Wagon Mfg. Co. v. Louisville*, 97 Ky. 548, 31 S. W. 130. **Me.**—*Reed v. Reed*, 115 Me. 441, 99 Atl. 181. **Mass.**—*Merriam v. Cunningham*, 11 Cush. 40; *Wigglesworth v. Atkins*, 5 Cush. 212. **Miss.** *Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510. **Neb.**—*Kraus v. Clark*, 81 Neb. 575, 116 N. W. 164; *Zweibel v. Myers*, 69 Neb. 294, 95 N. W. 597. **N. H.**—*Buzzell v. Snell*, 25 N. H. 474. **N. Y.**—*Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Hollander v. Farber*, 52 Misc. 507, 102 N. Y. Supp. 506. **Okla.**—*Bass & Harbour Furniture & C. Co. v. Harbour*, 42 Okla. 335, 140 Pac. 956. **Pa.**—*Richards v. Nixon*, 20 Pa. 19. **S. C.**—*Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845. **Tex.**—*Ayers v. Lancaster*, 64 Tex. 305; *Ney v. Rothe*, 61 Tex. 374; *Jines v. Astle* (Tex. Civ. App.), 170 S. W. 1081. **Vt.**—*Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641; *State v. Ward*, 61 Vt. 153, 17 Atl. 483. **Wis.**—*Dahlmann v. Hammel*, 45 Wis. 466.

5. See the following: **U. S.**—*Sutton v. Mandeville*, 1 Cranch C. C. 187, 23 Fed. Cas. No. 13,651; *Murray v. Mason*, 1 Hayw. & H. 120, 17 Fed. Cas. No. 9,966; *Henderson v. Casteel*, 3 Cranch C. C. 365, 11 Fed. Cas. No. 6,350. **Ala.**

Worsham v. Goar, 4 Port. 441. **Ark.** *Mine La Motte L. & S. Co. v. Consolidated, etc. Co.*, 85 Ark. 123, 107 S. W. 174; *Railway Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598; *Mann v. Scott*, 32 Ark. 593. **Cal.**—*Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342. **Colo.**—*MacDermid v. Watkins*, 41 Colo. 231, 92 Pac. 701; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429. **Conn.** *Young v. Newark F. Ins. Co.*, 59 Conn. 41, 22 Atl. 32; *Scott v. Hull*, 8 Conn. 296, 303. **Del.**—*Lofland v. McDaniel*, 1 Penne. 416, 41 Atl. 882; *Jackson v. Delaplaine*, 6 Houst. 358. **Fla.**—*Gardner Lumber Co. v. Bank of Commerce*, 74 So. 313; *Pyles v. Piedmont*, 58 Fla. 348, 50 So. 872. **Ga.**—*Turner v. Elliott*, 127 Ga. 338, 56 S. E. 434; *Boston Merc. Co. v. Ould Carter Co.*, 123 Ga. 458, 51 S. E. 466; *Brunswick v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; *Young v. Anderson*, 19 Ga. App. 551, 91 S. E. 900; *James v. Thompson Co.*, 17 Ga. App. 578, 87 S. E. 842; *Hill-Atkinson Co. v. Hasty*, 17 Ga. App. 569, 87 S. E. 839. **Idaho.**—*Harrison v. Russell & Co.*, 17 Idaho 196, 105 Pac. 48. **Ill.**—*Bemis v. Hornes*, 165 Ill. 347, 46 N. E. 277; *Razor v. Razor*, 149 Ill. 621, 36 N. E. 963; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126. **Ind.**—*Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; *Stingley v. Nichols*, 131 Ind. 214, 30 N. E. 34; *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141; *Union Cent. Life Ins. Co. v. Loughmiller*, 33 Ind. App. 309, 69 N. E. 264; *Woodruff v. Hensley*, 26 Ind. App. 592, 60 N. E. 312; *Myers v. Binkley*, 26 Ind. App. 208, 59 N. E. 333. **Ind. Ter.**—*Craggs v. Bohart*, 4 Ind. Ter. 443, 69 S. W. 931; *Perry v. Archard*, 1 Ind. Ter. 487, 42 S. W. 421. **Ia.**—*Fagg v. Minneapolis & St. L. R. Co.*, 175 Iowa 459, 157 N. W. 148; *Wilson v. Big Joe Block Coal Co.*, 142 Iowa 521, 119 N. W. 604; *Fenton v. Iowa State T. M. Assn.*, 139 Iowa 166, 117 N. W. 251; *In re Wharton*, 132 Iowa 714, 109 N. W. 492. **Kan.**—*Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; *Per-*

to the party, in other words, against whom, in the absence of evidence, and providing the plaintiff's right to recover is not admitted by the pleadings,⁶ an adverse finding would necessarily be made.⁷

B. WHEN RIGHT IN PLAINTIFF.—At one time, and in some states, the plaintiff as a matter of right always opened and closed;⁸ but the right is usually accorded him now, only when he has the affirmative of the issue,⁹ that is to say, when he has the right to prove,¹⁰ even

- kings *v. Ermel*, 2 Kan. 325; *Degan v. Tufts*, 8 Kan. App. 338, 56 Pac. 1126.
- Ky.**—*Sovereign Camp W. O. W. v. Landrum*, 158 Ky. 841, 166 S. W. 598; *Hawkins Furn. Co. v. Morris*, 143 Ky. 738, 137 S. W. 527; *Lexington R. Co. v. Johnson*, 139 Ky. 323, 122 S. W. 830; *Doerhoefer v. Shewmaker*, 123 Ky. 646, 97 S. W. 7. **La.**—*Beaulieu v. Furst*, 3 Rob. 345. **Md.**—*Shoop v. Fidelity & Deposit Co.*, 124 Md. 130, 91 Atl. 753; *Ann. Cas.* 1916D, 954; *Baltimore v. Hurlock*, 113 Md. 674, 78 Atl. 558; *Yingling v. Hesson*, 16 Md. 112.
- Mass.**—*Hurley v. O'Sullivan*, 137 Mass. 86. **Minn.**—*Viehman v. Boelter*, 105 Minn. 60, 116 N. W. 1023; *Minnesota Val. R. Co. v. Doran*, 17 Minn. 188.
- Miss.**—*McNeer v. Norfleet*, 113 Miss. 611, 74 So. 577; *Thompson v. Poe*, 104 Miss. 586, 61 So. 656; *Porter v. Still*, 63 Miss. 357. **Mo.**—*James v. Mutual etc. Life Assn.*, 148 Mo. 1, 49 S. W. 978; *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120; *Citizens' Bank of Senath v. Douglas* (Mo. App.), 187 S. W. 158; *Dorrell v. Sparks*, 142 Mo. App. 460, 127 S. W. 103. **Mont.**—*Power v. Turner*, 37 Mont. 521, 97 Pac. 950.
- Neb.**—*Kraus v. Clark*, 81 Neb. 575, 116 N. W. 164; *Zweibel v. Myers*, 69 Neb. 294, 95 N. W. 597; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; *Hewitt v. Bank of Indian Territory*, 64 Neb. 463, 90 N. W. 250, 92 N. W. 741; *Brumbaek v. American Bank*, 53 Neb. 714, 74 N. W. 264. **N.**
- H.**—*Judge of Probate v. Stone*, 44 N. H. 593; *Chesley v. Chesley*, 37 N. H. 229. **N. J.**—*Chambers v. Hunt*, 18 N. J. L. 339; *Farmers' Nat. Bank v. Gaskill*, 9 N. J. L. J. 204. **N. Y.**—*Cilley v. Preferred Acc. Ins. Co.*, 187 N. Y. 517, 79 N. E. 1102; *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759; *Hersheoff v. American & Brit. Mfg. Co.*, 164 App. Div. 238, 149 N. Y. Supp. 703.
- N. C.**—*Stronach & Co. v. Bledsoe*, 85 N. C. 473; *Love v. Dickerson*, 85 N. C. 5. **Ohio.**—*Beatty v. Hatcher*, 13 Ohio St. 115; *Lexington F., L. & M. Ins. Co. v. Paver*, 16 Ohio 324; *Chicago Cottage Organ Co. v. Biggs*, 22 Ohio Cir. Ct. 392. **Okla.**—*Congdon v. McAlester C. & W. Factory*, 155 Pac. 597; *Bass & Harbour F. & C. Co. v. Harbour*, 42 Okla. 335, 140 Pac. 956; *Atchison, T. & S. R. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 428. **Pa.**—*Von Storch v. Von Storch*, 196 Pa. 545, 46 Atl. 1062; *Smaltz v. Ryan*, 112 Pa. 423, 3 Atl. 772. **S. C.**—*Sanders v. Sanders*, 30 S. C. 207, 9 S. E. 94. **Tex.**—*Parks v. Young*, 75 Tex. 278, 12 S. W. 986; *Milburn W. Co. v. Kennedy*, 75 Tex. 212, 13 S. W. 28; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663; *Hambleton v. S. W.*, etc. Baptist Hospital (Tex. Civ. App.), 172 S. W. 574. **Vt.**—*Goss v. Turner*, 21 Vt. 437; *State v. Windsor*, 14 Vt. 562.
- Va.**—*Overton's Heirs v. Davison*, 1 Gratt. (42 Va.) 211, 42 Am. Dec. 544; *Steptoe's Admrs. v. Harvey's Exrs.*, 7 Leigh (34 Va.) 501. **Wash.**—*McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530; *Hall v. Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049. **Wis.**—*Marshall v. American Exp. Co.*, 7 Wis. 1, 73 Am. Dec. 381.
- 6. Ark.**—*St. Louis, etc. Ry. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083. **Ind.**—*Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436. **Wis.**—*Cunningham v. Gallagher*, 61 Wis. 170, 20 N. W. 925.
- 7. Colo.**—*Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429. **Ga.**—*Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513. **Ind.**—*Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361. **Mo.**—*Crapson v. Wallace Bros.*, 81 Mo. App. 680.
- 8. Ala.**—*Montgomery So. Ry. Co. v. Sayre*, 72 Ala. 443; *Pearsall v. McCartney*, 28 Ala. 110, 117; *Chamberlain v. Gaillard*, 26 Ala. 504. **Cal.**—*Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342. **Md.**—*Kearney v. Gough*, 5 Gill & J. 457; *Townshend v. Townshend*, 7 Gill 10. **Mass.**—*Dorr v. Tremont Nat. Bk.*, 128 Mass. 349.
- 9. See supra**, II, A.
- 10. U. S.**—*Inglis v. Inglis*, 2 Dall. 45, 1 L. ed. 282. **Ark.**—*Mine La Motte*

though it be a mere matter of proving damages.¹¹ A plea of the gen-

L. & S. Co. v. Consolidated, etc. Co., 85 Ark. 123, 107 S. W. 174; **St. Louis, I. M. & S. Ry. Co. v. Taylor**, 57 Ark. 136, 20 S. W. 1083; **Bertrand v. Taylor**, 32 Ark. 470. **Colo.**—**Knowlton v. Knight-Campbell M. Co.**, 59 Colo. 51, 147 Pac. 330; **MacDermid v. Watkins**, 41 Colo. 231, 92 Pac. 701; **Teller v. Ferguson**, 24 Colo. 432, 51 Pac. 429. **Conn.**—**Ladany v. Assad**, 91 Conn. 316, 99 Atl. 762. **Fla.**—**Pyles v. Piedmont**, 58 Fla. 348, 50 So. 872. **Ga.**—**Smith v. Smith**, 133 Ga. 170, 65 S. E. 414; **McKibbin v. Folds**, 38 Ga. 235. **Idaho** **Grisinger v. Hubbard**, 21 Idaho 469, 122 Pac. 853, Ann. Cas. 1913E, 87. **Ill.** **Razor v. Razor**, 149 Ill. 621, 36 N. E. 963; **Carpenter v. First Nat. Bank**, 119 Ill. 352, 10 N. E. 18; **Geringer v. Novak**, 117 Ill. App. 160. **Ind.**—**Hyatt v. Clements**, 65 Ind. 12; **Heilman v. Shanklin**, 60 Ind. 424. **Kan.**—**Perkins v. Ermel**, 2 Kan. 325. **Ky.**—**Baker v. Morris**, 168 Ky. 168, 181 S. W. 943; **Aetna Life Ins. Co. v. Rustin**, 152 Ky. 42, 153 S. W. 14; **Aetna Life Ins. Co. v. Rustin**, 151 Ky. 103, 151 S. W. 366; **Lexington R. Co. v. Johnson**, 139 Ky. 323, 122 S. W. 830. **Me.**—**Johnson v. Josephs**, 75 Me. 544; **Lunt v. Wormell**, 19 Me. 100. **Md.**—**Shoop v. Fidelity & Deposit Co.**, 124 Md. 130, 91 Atl. 753, Ann. Cas. 1916D, 954. **Mass.**—**Ayer v. Austin**, 6 Pick. 225. **Mich.**—**Kincade v. Peck**, 193 Mich. 207, 159 N. W. 480. **Miss.**—**Thompson v. Poe**, 104 Miss. 586, 61 So. 656; **Porter v. Still**, 63 Miss. 357. **Mo.**—**Reis v. Epperson**, 143 Mo. App. 90, 122 S. W. 353; **Elder v. Oliver**, 30 Mo. App. 575. **Neb.** **Sorensen v. Sorensen**, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; **Hewitt v. Bank Ind. Terr.**, 64 Neb. 463, 90 N. W. 250, 92 N. W. 741; **Summers v. Simms**, 58 Neb. 579, 79 N. W. 155. **N. H.**—**Judge v. Stone**, 44 N. H. 593; **Chesley v. Chesley**, 37 N. H. 229; **Thurston v. Kennett**, 22 N. H. 151. **N. J.**—**Hopper v. Demarest**, 21 N. J. L. 525; **Green v. Stillwell**, 10 N. J. L. 60. **N. Y.**—**Lake Ontario Nat. Bank v. Judson**, 122 N. Y. 278, 25 N. E. 367; **Piercy v. Frankfort Marine**, 142 App. Div. 839, 127 N. Y. Supp. 354; **Kotlowitz v. Silberstein**, 83 Misc. 82, 144 N. Y. Supp. 766. **N. C.** **Brown v. Southern R.**, 140 N. C. 154, 52 S. E. 198; **Johnson v. Maxwell**, 87 N. C. 18. **Ohio**—**Dille v. Lovell**, 37 Ohio St.

415; **Lexington Fire, L. & M. Ins. Co. v. Paver**, 16 Ohio 324. **Pa.**—**Smaltz v. Ryan**, 112 Pa. 423, 3 Atl. 772. **S. C.** **Burekhalter v. Coward**, 16 S. C. 435. **Tenn.**—**Woodward v. Iowa L. Ins. Co.**, 104 Tenn. 49, 56 S. W. 1020. **Tex.** **Steed v. Petty**, 65 Tex. 490; **Houston & T. C. R. Co. v. Montgomery** (Tex. Civ. App.), 189 S. W. 350; **Houston & T. C. R. Co. v. Montgomery** (Tex. Civ. App.), 185 S. W. 633; **Luckenbach v. Thomas** (Tex. Civ. App.), 166 S. W. 99. **Vt.**—**Harvey v. Brouillette**, 61 Vt. 525, 17 Atl. 722; **Goss v. Turner**, 21 Vt. 437. **Va.**—**Wright v. Collins**, 111 Va. 806, 69 S. E. 492; **Overton's Heirs v. Davisson**, 1 Gratt. (42 Va.) 211, 42 Am. Dec. 544. **W. Va.**—**Huffman v. Alderson's Admr.**, 9 W. Va. 616; **Clay v. Robinson**, 7 W. Va. 348. **Wis.**—**Dahlman v. Hammel**, 45 Wis. 466; **Wittmann v. Watry**, 37 Wis. 238; **Central Bank v. St. John**, 17 Wis. 157.

[a] If plaintiff's claim is admitted (1) by one defendant and denied by another, plaintiff has the right to open and close. (**Ga.**—**King v. King**, 37 Ga. 205. **Ind.**—**Clodfelter v. Hulitt**, 92 Ind. 426; **Kirkpatrick v. Armstrong**, 79 Ind. 384. **Ky.**—**Leib v. Craddock**, 87 Ky. 525, 9 S. W. 838; **Simons v. Pearson**, 22 Ky. L. Rep. 1707, 61 S. W. 259. **Mo.**—**Boatmen's Sav. Ins. v. Forbes**, 52 Mo. 201. **N. H.**—**Buzzell v. Snell**, 25 N. H. 474. **N. C.**—**State v. Robinson**, 124 N. C. 801, 32 S. E. 494. **Tex.**—**Baum v. Sanger**, 49 S. W. 650; **Cockrell v. Ellison** [Tex. Civ. App.], 137 S. W. 150), though (2) this has been held to be in the court's discretion. **White v. White**, 99 Kan. 133, 160 Pac. 993; **Sodousky v. McGee**, 4 J. J. Marsh. (Ky.) 267; **Simons v. Pearson**, 22 Ky. L. Rep. 1707, 61 S. W. 259.

11. **Ark.**—**Prescott & N. W. R. Co. v. Brown**, 74 Ark. 606, 86 S. W. 806; **St. Louis, I. M. & S. Ry. Co. v. Taylor**, 57 Ark. 136, 20 S. W. 1083. **Colo.** **Filby v. Turner**, 9 Colo. App. 202, 47 Pac. 1037. **Fla.**—**Pyles v. Piedmont**, 58 Fla. 348, 50 So. 872. **Ga.**—**Brunswick & W. R. Co. v. Wiggins**, 113 Ga. 842, 39 S. E. 551, 61 Am. St. Rep. 513. **Ill.**—**Chicago & A. R. Co. v. Hill**, 130 Ill. App. 218. **Ind.**—**Baltimore & O. R. Co. v. McWhinney**, 36 Ind. 436; **Cox v. Vickers**, 35 Ind. 27. **Ky.**—**Louisville & E. R. Co. v. Mann**, 31 Ky. L.

eral issue,¹² or one which amounts to the general issue,¹³ gives the right to open and close to the plaintiff, and although the defendant may by his pleadings assume the affirmative of the issues,¹⁴ the plaintiff may in turn admit the defendant's case, thus retaining the right to open and close.¹⁵

C. WHEN DEFENDANT HAS RIGHT. — In view of the rule heretofore stated,¹⁶ the right to open and close would under certain circumstances belong to the defendant. Thus the defendant gains the right where he makes an admission, clear and comprehensive,¹⁷ as well as

Rep. 986, 104 S. W. 362; Doerhoefer v. Vincennes University, 23 Ind. 272; Shewmaker, 29 Ky. L. Rep. 1193, 97 McCloskey v. Davis, 8 Ind. App. 190, S. W. 7. **Me.**—Johnson v. Josephs, 75 35 N. E. 187. **Ia.**—Fountain v. West, Me. 544; Sawyer v. Hopkins, 22 Me. 23 Iowa 9, 92 Am. Dec. 405. **Ky.** 268, 276. **Mo.**—Elder v. Oliver, 30 Wright's Admr. v. Northwestern Mut. L. Ins. Co., 91 Ky. 208, 15 S. W. 242; Mo. App. 575. **Neb.**—Summers v. Stepp v. Hatcher, 23 Ky. L. Rep. 2441, Simms, 58 Neb. 579, 79 N. W. 155. **N. Y.**—Fry v. Bennett, 28 N. Y. 324; Parrish v. Sun Printing & Pub. Assn., 39 N. Y. Supp. 540. **Va.**—Young v. Highland, 9 Gratt. (50 Va.) 16. **Wis.** Wausau Boom Co. v. Dunbar, 75 Wis. 133, 43 N. W. 739; Cunningham v. Gallagher, 61 Wis. 170, 20 N. W. 925.

12. **Colo.**—Knowlton v. Knight-Campbell M. Co., 59 Colo. 51, 147 Pac. 330. **Fla.**—Pyles v. Piedmont, 58 Fla. 348, 50 So. 872. **Ga.**—Fletcher v. McMillan, 132 Ga. 477, 64 S. E. 268. **Ill.** Convert v. Bishop, 152 Ill. App. 516; Chicago & A. Ry. Co. v. Hill, 130 Ill. App. 218. **Ind.**—Wright v. Abbott, 85 Ind. 154; Cox v. Vickers, 35 Ind. 27. **Ia.**—*In re Coffman's Will*, 12 Iowa 491. **Kan.**—Perkins v. Ermel, 2 Kan. 325. **Neb.**—Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597. **N. H.**—Toppan v. Jenness, 21 N. H. 232. **N. Y.**—Hollander v. Farber, 52 Misc. 507, 102 N. Y. Supp. 506. **Vt.**—Farrington v. Jennison, 67 Vt. 569, 32 Atl. 641. **Va.** Wright v. Collins' Admr., 111 Va. 806, 69 S. E. 942; Valley Mut. Life Assn. v. Treewalt, 79 Va. 421. **Wash.**—Coffman v. Spokane C. Pub. Co., 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636. [a] Though defendant is compelled by statute to plead the general issue. Kilpatrick v. Rowan, 119 Ark. 175, 177 S. W. 893; Lunt v. Wormell, 19 Me. 100.

13. Denny v. Booker, 2 Bibb (Ky.), 427.

14. See *infra*, II, C.

15. **U. S.**—Leech v. Armitage, 2 Dall. 125, 1 L. ed. 316. **Ark.**—Mann v. Scott, 32 Ark. 593. **Ill.**—Edwards v. Hushing, 31 Ill. App. 223. **Ind.** Kent v. White, 27 Ind. 390; Judah v.

16. See *supra*, II, A.

17. **Cal.**—Clarke v. Fast, 128 Cal. 422, 61 Pac. 72. **Colo.**—Teller v. Ferguson, 24 Colo. 432, 51 Pac. 429. **Ga.**—Culver v. Wood, 138 Ga. 60, 74 S. E. 790; Berkner v. Dannenberg, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559; Phoenix Ins. Co. v. Gray, 113 Ga. 424, 38 S. E. 992; Reid v. Sewell, 111 Ga. 880, 36 S. E. 937; Luke v. Mayo, 18 Ga. App. 614, 89 S. E. 1090; Wade v. Hefner, 16 Ga. App. 106, 84 S. E. 598; Friese v. Simpson, 15 Ga. App. 786, 84 S. E. 219; Wall v. Wall, 15 Ga. App. 156, 82 S. E. 791. **Ind.**—Robbins v. Spencer, 121 Ind. 594, 22 N. E. 660; Shulse v. McWilliams, 104 Ind. 512, 3 N. E. 243; Hyatt v. Clements, 65 Ind. 12; Rothrock v. Perkinson, 61 Ind. 39; Myers v. Binkley, 26 Ind. App. 208, 59 N. E. 333; Samples v. Carnahan, 21 Ind. App. 55, 51 N. E. 425. **Ia.**—Farmer v. Norton, 129 Iowa 88, 105 N. W. 371; Viele v. German Ins. Co., 26 Iowa 9, 96 Am. Dec. 83; Goodpaster v. Voris, 8 Iowa 334, 74 Am. Dec. 313. But see Delaware County v. Duncombe, 48 Iowa 488. **Ky.**—Louisville, H. & St. L. R. Co. v. Schwab, 127 Ky. 82, 105 S. W. 110; Southern Ry. Co. v. Steele, 123 Ky. 262, 90 S. W. 548, 94 S. W. 653; Louisville & E. R. R. Co. v. McNally, 31 Ky. L. Rep. 1357, 105 S. W. 124; Louisville & N. R. Co. v. Ritter's Admr., 13 Ky. L. Rep. 44. **Mass.** Wigglesworth v. Atkins, 5 Cush. 212.

bona fide,¹⁸ of plaintiff's case,¹⁹ provided such admission is at the proper time,²⁰ and in the proper manner.²¹ Though a plea of the general

Mo.—Crapson *v.* Wallace Bros., 81 Mo. App. 680. **Neb.**—Sorensen *v.* Sorensen, 66 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Summers *v.* Simms, 58 Neb. 579, 79 N. W. 155; Rolfe *v.* Pilloud, 16 Neb. 21, 19 N. W. 615, 970. **N. H.**—Thurston *v.* Kennett, 22 N. H. 151. **N. Y.**—Cilley *v.* Preferred Acc. Ins. Co., 187 N. Y. 517, 79 N. E. 1102 (*affirming* 109 App. Div. 394, 96 N. Y. Supp. 282), Hunter *v.* American Popular Life Ins. Co., 4 Hun 794. **N. C.**—Churchill *v.* Lee, 77 N. C. 341. **Ohio.**—Beatty *v.* Hatcher, 13 Ohio St. 115. **S. C.**—Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719; Thompson *v.* Security Tr. & L. Ins. Co., 63 S. C. 290, 41 S. E. 464; Beckham *v.* Southern Ry. Co., 50 S. C. 25 Pac. 701. **Ga.**—Willet Seed Co. *v.* Bridges, 67 Tex. 93, 2 S. W. 663; Alstin's Exr. *v.* Cundiff, 52 Tex. 453; Houston & T. C. R. Co. *v.* Montgomery (Tex. Civ. App.), 185 S. W. 633; Albrecht *v.* Lignoski (Tex. Civ. App.), 154 S. W. 354; Meade *v.* Logan (Tex. Civ. App.), 110 S. W. 188.

18. Bush *v.* Wathen, 104 Ky. 548, 47 S. W. 599.

[a] If made merely to get the right to open and close it is not sufficient. Bush *v.* Wathen, 104 Ky. 548, 47 S. W. 599; Young *v.* Haydon, 3 Dana (Ky.) 145.

19. **Ark.**—Western Cabinet & Fixture Co. *v.* Davis, 121 Ark. 370, 181 S. W. 273; St. Louis & S. F. Ry. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598. **Colo.**—Fairbanks *v.* Irwin, 15 Colo. 366, 25 Pac. 701. **Ga.**—Willet Seed Co. *v.* Kirkeby G. S. Co., 145 Ga. 559, 89 S. E. 486; Widincamp *v.* Widincamp, 135 Ga. 644, 70 S. E. 566; Norton *v.* Aiken, 134 Ga. 21, 67 S. E. 425; Atlanta *v.* Austin, 122 Ga. 374, 50 S. E. 124; Stiles *v.* Sheddon, 2 Ga. App. 317, 58 S. E. 515. **Ill.**—Merchants' Life Assn. *v.* Treat, 98 Ill. App. 59. **Ind.**—Lindley *v.* Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141; McCormick Harv. Mach. Co. *v.* Gray, 100 Ind. 285. **Ind. Ter.**—Yocum *v.* Cary, 1 Ind. Ter. 626, 43 S. W. 756. **Ia.**—Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628; Whitney *v.* Brownnewell, 71 Iowa 251, 32 N. W. 285; Hallowell *v.* Faucett, 30 Iowa 491. **Kan.**—Bar-

tholomew *v.* Fell, 92 Kan. 64, 139 Pac. 1010. **Ky.**—Louisville & N. R. Co. *v.* Brown, 13 Bush 475; Page *v.* Carter, 8 B. Mon. 192; Kentucky Cent. R. R. Co. *v.* Bowen, 8 Ky. L. Rep. 609; Kentucky Cent. R. R. Co. *v.* Foster, 8 Ky. L. Rep. 525. **Minn.**—Viehman *v.* Boelter, 105 Minn. 60, 116 N. W. 1023. **Mo.**—Reis *v.* Epperson, 143 Mo. App. 90, 122 S. W. 353. **Neb.**—Rolfe *v.* Pilloud, 16 Neb. 21, 19 N. W. 615, 970. **N. H.**—Thurston *v.* Kennett, 22 N. H. 151; Seavy *v.* Dearborn, 19 N. H. 351. **N. Y.**—Cilley *v.* Preferred Acc. Ins. Co., 187 N. Y. 517, 79 N. E. 1102 (*affirming* 109 App. Div. 394, 96 N. Y. Supp. 282); Murray *v.* New York L. Ins. Co., 85 N. Y. 236; Van Ingen *v.* Marx, 154 N. Y. Supp. 112. **S. C.**—Gaffney Live Stock Co. *v.* Bonner, 92 S. C. 122, 75 S. E. 369; Early *v.* Early, 75 S. C. 15, 54 S. E. 827; Leesville Mfg. Co. *v.* Morgan Wood & Iron Wks., 75 S. C. 342, 55 S. E. 768. **S. D.**—Webster Co. *v.* Grossman, 33 S. D. 383, 146 N. W. 565. **Tex.**—Bell *v.* Fox, 37 Tex. Civ. App. 522, 84 S. W. 384; Joy *v.* Liverpool, etc. Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822; Calvert W. & B. V. Ry. Co. *v.* Smith (Tex. Civ. App.), 68 S. W. 68. **Wash.**—McDougall *v.* Walling, 19 Wash. 80, 52 Pac. 530. **Wis.**—Lange *v.* Hook, 51 Wis. 132, 7 N. W. 839; Second Ward Sav. Bank *v.* Shakman, 30 Wis. 333.

20. Massengale *v.* Pounds, 100 Ga. 770, 28 S. E. 510.

[a] Before Trial Begins. — **Ga.**—Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. 453. **Ia.**—Schoonover *v.* Osborne, 117 Iowa 427, 90 N. W. 844. **Mass.**—Merriam *v.* Cunningham, 11 Cush. 40. **Tex.**—Dugey *v.* Hughes Bros. & Co., 2 Wills. Civ. Cas., §4.

21. Smith *v.* Eastham (Tex. Civ. App.), 56 S. W. 218; Halsell *v.* Neal, 23 Tex. Civ. App. 26, 56 S. W. 137.

[a] Necessity of entry on record, see **Mass.**—Merriam *v.* Cunningham, 11 Cush. 40. **N. H.**—Buzzell *v.* Snell, 25 N. H. 474. **Tex.**—Hittson *v.* State Nat. Bank, 14 S. W. 780.

[b] Necessity of making admission by pleadings, see Fletcher *v.* McMillan, 132 Ga. 477, 64 S. E. 268; Mitchem *v.* Allen, 128 Ga. 407, 57 S. E. 721; Leesville Mfg. Co. *v.* Morgan Wood & I. Works, 75 S. C. 342, 55

issue gives plaintiff the right to open and close,²² upon withdrawal of such plea by defendant, he gets the right.²³ Defendant is entitled to open and close where he relies on affirmative pleas,²⁴ such as justification,²⁵ confession and avoidance,²⁶ payment,²⁷ counterclaim,²⁸ recoup-

S. E. 768; *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305.

[c] **By Oral Admissions Before Trial.** Ga.—*Massengale v. Pounds*, 100 Ga. 770, 28 S. E. 510; *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453. **Ind.**—*McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187. **Ia.**—*Schoonover v. Osborne*, 117 Iowa 427, 90 N. W. 844. **Kan.**—*Murchison v. Nies*, 87 Kan. 77, 123 Pac. 750. **Mass.**—*Merriam v. Cunningham*, 11 Cush. 40. **Tex.**—*Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 38 S. W. 259 (held error to deny it); *Dugey v. Hughes Bros. & Co.*, 2 Wills. Civ. Cas. §4. *Contra*, *Van Winkle Gin & Mach. Co. v. Pittman*, 2 Ga. App. 246, 58 S. E. 379.

[d] **Amendment filed before trial** gives defendant the right to open and close if it admits all of plaintiff's case. *Atlantic Coast Line R. Co., v. Bunn*, 13 Ga. App. 753, 79 S. E. 947; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307, *affirming Gardner v. Girtin*, 69 Ill. App. 422.

22. See *supra*, II, B.

23. **Ill.**—*Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307; *Gardner v. Girtin*, 69 Ill. App. 422. **Ind.**—*Blackledge v. Pine*, 28 Ind. 466. **Va.**—*Valley Mut. Life Assn. v. Treewalt*, 79 Va. 421.

24. **Ga.**—*Higdon v. Williamson*, 140 Ga. 187, 78 S. E. 767; *Southern Mut. Bldg. & L. Assn. v. Perry*, 103 Ga. 800, 30 S. E. 658; *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59. **Ind.**—*Bowen v. Spears*, 20 Ind. 146; *Shank v. Fleming*, 9 Ind. 189; *Kimble v. Adair*, 2 Blackf. 320. **Mo.**—*Grant Quarry Co. v. Lyon's Const. Co.*, 72 Mo. App. 530. **N. Y.**—*Kenny v. Lynch*, 61 N. Y. 654; *McShane v. Braender*, 66 How. Pr. 294; *Hoxie v. Greene*, 37 How. Pr. 97. **N. C.** *Elks v. Hemby*, 160 N. C. 20, 75 S. E. 854. **Tex.**—*Key v. Hickman* (Tex. Civ. App.), 149 S. W. 275. **Wis.**—*Dahlman v. Hammel*, 45 Wis. 466.

25. **U. S.**—*Cheesman v. Hart*, 42 Fed. 98. **Kan.**—*Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314. **Ky.**—*Rich v. Bailey*, 30 Ky. L. Rep. 155, 97 S. W. 747, false arrest.

26. **Ind.**—*Judah v. Vincennes University*, 23 Ind. 272; *Aurora v. Cobb*,

21 Ind. 492. **Ky.**—*Shirley v. Renick*, 151 Ky. 25, 151 S. W. 357. **N. C.** *Elks v. Hemby*, 160 N. C. 20, 75 S. E. 854.

27. **Ark.**—*Mann v. Scott*, 32 Ark. 593. **Del.**—*Saulsbury v. Ford*, 5 Houst. 575. **Ill.**—*Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532. **Ind.**—*Schee v. McQuilken*, 59 Ind. 269; *Bowen v. Spears*, 20 Ind. 146; *Brower v. Nellis*, 16 Ind. App. 183, 44 N. E. 939. **Ia.** *Schoonover v. Osborne*, 117 Iowa 427, 90 N. W. 844. **Ky.**—*Denhard v. Hirst*, 111 Ky. 546, 64 S. W. 393; *American Bridge Co. v. Glenmore Dist. Co.*, 32 Ky. L. Rep. 873, 107 S. W. 279; *Fitch v. Parker*, 20 Ky. L. Rep. 842, 47 S. W. 627; *Louisville & N. R. R. Co. v. Ritter's Admr.*, 13 Ky. L. Rep. 44. **Me.** *Washington Ice Co. v. Webster*, 68 Me. 449. **Mo.**—*Grant Quarry Co. v. Lyons Const. Co.*, 72 Mo. App. 530; *Ferguson v. Rittman* (Mo. App.), 180 S. W. 1046. **Mont.**—*Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950. **N. Y.**—*Woodruff v. Hunter*, 65 App. Div. 404, 73 N. Y. Supp. 210; *Bodine v. Andrews*, 47 App. Div. 495, 62 N. Y. Supp. 385; *Harley v. Fitzgerald*, 84 Hun 305, 32 N. Y. Supp. 414; *Fischer v. Frohne*, 51 Misc. 578, 100 N. Y. Supp. 1016. **N. C.**—*Banking Co. v. Walker*, 121 N. C. 115, 28 S. E. 253. **Tex.**—*Parks v. Young*, 75 Tex. 278, 12 S. W. 986; *Fischer v. Scherer* (Tex. Civ. App.), 169 S. W. 1133; *Stone v. Pettus*, 47 Tex. Civ. App. 14, 103 S. W. 413. **Wis.**—*Lange v. Hook*, 51 Wis. 132, 7 N. W. 839; *Bonnell v. Jacobs*, 36 Wis. 59. **Wyo.**—*Justice v. Brock*, 21 Wyo. 281, 131 Pac. 38, 133 Pac. 1070.

28. **Ark.**—*Western Cab & Fixt. Mfg. Co. v. Davis*, 121 Ark. 370, 181 S. W. 273. **Ill.**—*Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532; *Williams v. Shup*, 12 Ill. App. 454. **N. C.**—*Carrington v. Allen*, 87 N. C. 354; *Stronach & Co. v. Bledsoe*, 85 N. C. 473. **S. C.**—*Brown v. Kirkpatrick*, 5 S. C. 267.

But see *Dorr v. Tremont*, 128 Mass. 349; *Page v. Osgood*, 2 Gray (Mass.) 260; *Clark Bros. Coal Mining Co. v. Royal Mfg. Co.*, 87 N. J. L. 685, 95 Atl. 610.

ment,²⁹ usury,³⁰ fraud, mistake, or duress,³¹ or insanity.³² Defendant's failure to introduce evidence will in some states,³³ but not in others,³⁴ give him the right to open and close.

D. PARTICULAR PROCEEDINGS.—1. Preliminary or Incidental Proceedings.—On demurrer,³⁵ or exception,³⁶ the party who assumes the initiative has the right to open and close. On motions, the right ordinarily goes to the moving party.³⁷

2. Criminal Prosecutions.—In criminal cases, the state has the right to open and close,³⁸ even though defendant has an affirmative defense,³⁹ as where insanity is pleaded;⁴⁰ and in some states by statute the right is always given to the prosecution.⁴¹

3. Particular Cases.—The foregoing rules as to opening and closing are applicable in various classes of cases,⁴² such as actions for

29. *Carolina P. C. Co. v. Marshall*, 9 Ga. App. 555, 71 S. E. 942.

30. *Ark.*—*Seekel v. Norman*, 78 Iowa 254, 43 N. W. 190. *Neb.*—*Suiter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205. *N. Y.*—*Hoxie v. Greene*, 37 How. Pr. 97; *Stevens v. Rosenwasser*, 162 N. Y. Supp. 989. *N. C.*—*Syme v. Broughton*, 85 N. C. 367. *Ohio.*—*Fewster v. Goddard*, 25 Ohio St. 276. *Pa.*—*Smaltz v. Ryan*, 112 Pa. 423, 3 Atl. 772; *Horner v. Hower*, 49 Pa. 475. *W. Va.*—*Sammons v. Hawvers*, 25 W. Va. 678. *Wis.*—*Second Ward Sav. Bank v. Shakman*, 30 Wis. 333.

31. *Ark.*—*Roberts v. Padgett*, 82 Ark. 331, 101 S. W. 753. *Ga.*—*Martin v. Hale*, 136 Ga. 228, 71 S. E. 133; *Southern Mut. Bldg. & L. Assn. v. Perry*, 103 Ga. 800, 30 S. E. 658; *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59. *Ia.*—*Seekel v. Norman*, 78 Iowa 254, 43 N. W. 190. *Minn.*—*Cady v. Cady*, 88 Minn. 230, 95 N. W. 1129. *N. Y.*—*Brown v. Tausick*, 1 Misc. 16, 20 N. Y. Supp. 369; *Graboski v. Gewerz*, 17 N. Y. Supp. 528, 44 N. Y. St. 127. *S. C.*—*Martin v. Suber*, 39 S. C. 525, 18 S. E. 125; *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305. *Tex.*—*J. I. Case Threshing Mach. Co. v. Webb* (Tex. Civ. App.), 181 S. W. 853.

32. *Rea v. Bishop*, 41 Neb. 202, 59 N. W. 555.

33. *Newsom v. Harrell*, 146 Ga. 139, 90 S. E. 855; *Willett Seed Co. v. Kirkeby G. S. Co.*, 145 Ga. 559, 89 S. E. 486; *Cable Co. v. Parantha*, 118 Ga. 913, 45 S. E. 787.

[a] **Allowed by Statute.**—*Heffron v. State*, 8 Fla. 73; *Brown v. Southern R. Co.*, 140 N. C. 154, 52 S. E. 198.

34. *Worsham v. Goar*, 4 Port. (Ala.)

441; *De Maria v. Cramer*, 70 N. J. L. 682, 58 Atl. 341.

35. *Conn.*—*Stedman v. American Mut. Life Ins. Co.*, 45 Conn. 377. *N. J.*—*State v. Rockafeller*, 6 N. J. L. 332. *Vt.*—*State Treasurer v. Merrill*, 14 Vt. 557; *State v. Windsor*, 14 Vt. 562.

36. *Lampson v. Hobart*, 27 Vt. 784.

37. See the title "Motions."

[a] **Motion for New Trial.**—*Turnbull v. O'Hara*, 4 Yeates (Pa.) 446; *Messier v. Amery*, 1 Yeates 533, 1 Am. Dec. 316, 2 Dall. (Pa.) 231, 1 L. ed. 361. See the title "New Trial."

38. *Ia.*—*State v. Millican*, 15 La. Ann. 557. *Va.*—*Doss v. Com.*, 1 Gratt. (42 Va.) 557. *W. Va.*—*State v. Schnelle*, 24 W. Va. 767.

39. *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367. *Contra*, *Doss v. Com.*, 1 Gratt. (42 Va.) 557. Compare *supra*, II, C.

40. *Ark.*—*Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258. *Ia.*—*State v. Robbins*, 109 Iowa 650, 80 N. W. 1061. *Wash.*—*State v. Harris*, 74 Wash. 60, 132 Pac. 735. *Wis.*—*French v. State*, 93 Wis. 325, 67 N. W. 706.

41. See the statutes, and *People v. Mortimer*, 46 Cal. 114 (changing old law which in murder gave right to defendant); *People v. Fair*, 43 Cal. 137; *Heffron v. State*, 8 Fla. 73.

42. See the specific titles, and *infra*, this section.

[a] **Assumpsit.**—Denial of contract as claimed gives plaintiff right to open and close. *Acme Mills & E. Co. v. Rives*, 141 Ky. 783, 133 S. W. 786.

[b] **In suit on penal bond**, plaintiff has the right to open and close. *Sillivant v. Reardon*, 5 Ark. 140.

[c] **A plea of performance in covenant** gives defendant the right to

assault and battery,⁴³ attachment proceedings,⁴⁴ actions based on bills and notes,⁴⁵ condemnation proceedings,⁴⁶ actions based on insurance

open and close. *Scott v. Hull*, 8 Conn. 296, 303; *Norris v. Insurance Co. of North America*, 3 Yeates (Pa.) 84, 2 Am. Dec. 360.

[d] In ejectment, plaintiff has right. *McCausland v. McCausland*, 1 Yeates (Pa.) 304; *Von Storch v. Von Storch*, 96 Pa. 545, 46 Atl. 1062.

Escheat Proceedings.—See 8 STANDARD PROC. 673.

[e] In insanity inquisition, defendant opens and closes. *McGinnis v. Com.*, 74 Pa. 245. But see *Com. v. Haskell*, 2 Brewst. (Pa.) 491.

43. See 3 STANDARD PROC. 45.

[a] That plea of justification gives defendant the right to open and close, see *Strickland v. Atlanta*, etc. Ry. Co., 99 Ga. 124, 24 S. E. 981; *Phillips v. Mann*, 19 Ky. L. Rep. 1705, 44 S. W. 379, and 3 STANDARD PROC. 45.

[b] Son assault demesne, (1) if pleaded, entitles defendant to open and close (Ga.—*Horn v. Sims*, 92 Ga. 421, 17 S. E. 670. Ind.—*Downey v. Day*, 4 Ind. 531. Ky.—*Goldsberry v. Stuteville*, 3 Bibb 345; *Walls v. Robb*, 15 Ky. L. Rep. 159. S. C.—*McKenzie v. Milligan*, 1 Bay 248), (2) unless plaintiff replies de injuria. *Johnson v. Josephs*, 75 Me. 544.

44. See *infra*, this note.

[a] Where traverse is filed, plaintiff has the right. *Einstein v. Munnerlyn*, 32 Fla. 381, 13 So. 926; *Olds Wagon Co. v. Benedict*, 27 Neb. 344, 43 N. W. 108; *Olds Wagon Co. v. Benedict*, 25 Neb. 372, 41 N. W. 254.

[b] On motion to dissolve attachment, plaintiff is allowed to open and close where the grounds are denied by affidavit. *Buchanan v. McDonald*, 40 Ga. 286.

[c] Defendant has the right, where the only issue is on his counterclaim. *Whitney v. Brownell*, 71 Iowa 251, 32 N. W. 285.

45. See *infra*, this note.

[a] General denial gives plaintiff the right. Ark.—*Kilpatrick v. Rowan*, 119 Ark. 175, 177 S. W. 893. Colo.—*Mastin v. Bartholomew*, 41 Colo. 328, 92 Pac. 682. Ind.—*Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Jarboe v. Scherb*, 34 Ind. 350. Ind. Ter.—*Craggs v. Bohart*, 4 Ind. Ter. 443, 69 S. W. 931. Mo.—*Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120; *Oexner v. Loehr*, 133

Mo. App. 211, 113 S. W. 727. N. C.—*Carrington v. Allen*, 87 N. C. 354; *Stronach & Co. v. Bledsoe*, 85 N. C. 473.

[b] Though a partial admission of plaintiff's right is made, plaintiff opens and closes. Ark.—*Cammack v. Newman*, 86 Ark. 249, 110 S. W. 802. Colo.—*Mastin v. Bartholomew*, 41 Colo. 328, 92 Pac. 682. Ga.—*Hendricks v. Lott*, 143 Ga. 647, 85 S. E. 843; *Van Winkle Gin & Mach. Wks. v. Pittman*, 2 Ga. App. 246, 58 S. E. 379. Tex.—*Loggins v. Buck's Admrs.*, 33 Tex. 113.

[c] Where defendant denies execution of note on week day plaintiff has the right to open and close. *Cammack v. Newman*, 86 Ark. 249, 110 S. W. 802.

[d] Where plaintiff's right to sue is denied, he has the right. *Oexner v. Loehr*, 133 Mo. App. 211, 113 S. W. 727; *Redmond v. Tone*, 57 Hun 585, 10 N. Y. Supp. 506, 32 N. Y. St. 260.

[e] A defense of accommodation gives defendant the right. *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Lone Star L. Co. v. City Nat. Bank*, 12 Tex. Civ. App. 128, 34 S. W. 297.

[f] On an issue (1) of failure of consideration the right to open and close has been allowed plaintiff (*Roberts v. Padget*, 82 Ark. 331, 101 S. W. 753; *Gardner Lumber Co. v. Bank of Commerce (Fla.)*, 74 So. 313), (2) but in some cases it has been given to defendant. Ga.—*Fisher v. Whitehurst*, 14 Ga. App. 218, 80 S. E. 536. Ind. Ter.—*Yocum v. Cary*, 1 Ind. Ter. 626, 43 S. W. 756; *Perry v. Archard*, 1 Ind. Ter. 487, 42 S. W. 421. Mo.—*Sanders v. Mosbarger*, 159 Mo. App. 488, 141 S. W. 720.

[g] Where release is pleaded, the right is in defendant. *McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530.

46. See generally 8 STANDARD PROC. 301, et seq.

[a] Plaintiff (1) has the right to open and close (Cal.—*Mendocino v. Peters*, 2 Cal. App. 24, 82 Pac. 1122. Colo.—*Stuart v. Colorado East. R. Co.*, 61 Colo. 58, 156 Pac. 152. Tenn.—*Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123. Wash.—*Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Seattle v. Murphine*, 4 Wash. 448, 30 Pac. 720;

policies,⁴⁷ actions of libel and slander,⁴⁸ quo warranto proceedings,⁴⁹ actions in replevin,⁵⁰ and of trespass.⁵¹ So also, such rules are ap-

Bellingham Bay & B. C. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144. See also 8 STANDARD PROC. 301), (2) unless the right to condemn is admitted. Byrd Irr. Co. v. Smyth (Tex. Civ. App.), 157 S. W. 260; Calvert, W. & B. V. Ry. Co. v. Smith (Tex. Civ. App.), 68 S. W. 68; Gulf, C. & S. F. Ry. Co. v. Brugger, 24 Tex. Civ. App. 367, 59 S. W. 556.

[b] **The landowner** is in some states entitled to open and close where the question is one of damages only. **Colo.** Stuart v. Colorado Eastern R. Co., 61 Colo. 58, 156 Pac. 152. **Ind.**—Indiana, B. & W. R. Co. v. Cook, 102 Ind. 133, 26 N. E. 203. **Minn.**—Ellering v. Minneapolis, etc. R. Co., 107 Minn. 46, 119 N. W. 507; St. Paul & S. C. Ry. Co. v. Murphy, 19 Minn. 500; Minnesota Val. R. Co. v. Doran, 17 Minn. 188. **Nev.**—Truckee River Gen. El. Co. v. Durham, 38 Nev. 311, 149 Pac. 61. **N. J.**—Morris & E. R. Co. v. Bonnell, 34 N. J. L. 474. See also 8 STANDARD PROC. 302.

Matter discretionary with court. See 8 STANDARD PROC. 302.

[c] **In special assessment cases**, the right to open and close is given to petitioner, even though by statute the tax roll is prima facie evidence. Peru v. Bartels, 214 Ill. 515, 73 N. E. 755.

[d] **On appeal** (1) the land owner opens and closes (Baltimore City v. Hurlock, 113 Md. 674, 78 Atl. 558. See also 8 STANDARD PROC. 302), (2) unless the trial is de novo, in which case petitioner has the right. Baltimore v. Hurlock, 113 Md. 674, 78 Atl. 558.

47. See *infra*, this note.

[a] **Defense of insanity** gives plaintiff the right to open and close. Sartell v. Royal Neighbors, 85 Minn. 369, 88 N. W. 985.

[b] **Defense of notice** (1) of no approval of contract gives right to defendant (Young v. Newark F. Ins. Co., 59 Conn. 41, 44, 22 Atl. 32), (2) as does defense of violation of similar condition. Beller v. Supreme Lodge K. of P., 66 Mo. App. 449.

48. See *infra*, this note.

[a] **Plaintiff** (1) has right to open and close where there is not a complete admission by the defendant (**U. S.** Mann v. Dempster, 181 Fed. 76, 104 C. C. A. 110. **Ia.**—Fountain v. West, 23 Iowa 9, 92 Am. Dec. 405. **Wash.**

Olympia Waterworks v. Mottman, 88 Wash. 694, 153 Pac. 1074; Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636), (2) and where partial justification is pleaded. Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Taylor v. Chambers, 2 Ga. App. 178, 58 S. E. 369; Sample v. Carnahan, 21 Ind. App. 55, 51 N. E. 425.

[b] **Defendant** (1) has the right where justification is pleaded, in some (**Ga.**—Cox v. Strickland, 101 Ga. 482, 28 S. E. 655; Ransone v. Christian, 56 Ga. 351. **Ind.**—Palmer v. Adams, 137 Ind. 72, 36 N. E. 695; Heilman v. Shanklin, 60 Ind. 424. **Kan.**—Stith v. Fullinwider, 40 Kan. 73, 19 Pac. 314. **Md.**—Kearney v. Gough, 5 Gill & J. 457. **Mo.**—Buckley v. Knapp, 48 Mo. 152. **Neb.**—Kraus v. Clark, 81 Neb. 575, 116 N. W. 164. **S. C.**—Moses v. Gatewood, 5 Rich. 234; Burckhalter v. Coward, 16 S. C. 435. **Wash.**—Coffman v. Spokane, etc. Pub. Co., 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636; Hall v. Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049), (2) but not all states. Sawyer v. Hopkins, 22 Me. 268; Parrish v. Sun Printing & Pub. Assn., 6 App. Div. 585, 39 N. Y. Supp. 540; Fry v. Bennett, 3 Bosw. (N. Y.) 200.

49. See *infra*, this note, and the title "Quo Warranto."

[a] **Defendant** opens and closes. State v. Smith, 48 Vt. 266.

[b] **Relator** has right where the burden is on him. Newman v. United States *ex rel.* Frizzell, 43 App. Cas. (D. C.) 53.

50. See *infra*, this note, and the title "Replevin."

[a] **Plaintiff** has the right to open and close. **N. H.**—Bills v. Vose, 27 N. H. 212; Belknap v. Wendell, 21 N. H. 175. **N. J.**—Chambers v. Hunt, 18 N. J. L. 339. **Pa.**—Marsh v. Pier, 4 Rawle 273, 26 Am. Dec. 131.

51. See *infra*, this note, and the title "Trespass."

[a] **A plea of justification** entitles defendant to open and close. **Ga.** Strickland v. Atlanta, etc. Co., 99 Ga. 124, 24 S. E. 981; Seymour v. Bailey, 76 Ga. 338. **Ill.**—Kells v. Davis, 57 Ill. 261. **Ky.**—Sodousky v. McGee, 4 J. J. Marsh. 267. **Mass.**—Bangs v. Snow, 1 Mass. 181. **S. C.**—McKenzie v. Milligan, 1 Bay 248.

pliable in will contest proceedings.⁵²

III. WAIVER OF RIGHT, ETC.—Parties may waive the opening statement, even in criminal cases.⁵³ A waiver of the right to open is a waiver of the right to close,⁵⁴ if the opponent waives in turn,⁵⁵

[b] **Liberum tenementum**, (1) if pleaded allows defendant the right (U. S.—*Leech v. Armitage*, 2 Dall. 125, 1 L. ed. 316. Ky.—*Caskey v. Lewis*, 15 B. Mon. 27. Mass.—*Davis v. Mason*, 4 Pick. 156. S. C.—*Singleton v. Millet*, 1 Nott & M. 355), (2) but where plaintiff files plea absque hoc to defendant's liberum tenementum, plaintiff gets the right to open and close. *Leech v. Armitage*, 2 Dall. (U. S.) 125, 1 L. ed. 316.

52. See *infra*, this note, and the title "Wills."

[a] **Proponents of the will** have the privilege of opening and closing in some states. Neb.—*Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650. N. H.—*Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Boardman v. Woodman*, 47 N. H. 120. N. C.—*Mayo v. Jones*, 78 N. C. 402; *Syme v. Broughton*, 85 N. C. 367.

[b] **That contestant has the right**, see Ia.—*In re Wharton's Will*, 132 Iowa 714, 109 N. W. 492, issue as to mental capacity. Kan.—*Rich v. Bowker*, 25 Kan. 7. Md.—*Stocksdale v. Cullison*, 35 Md. 322; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Edelen v. Edelen*, 6 Md. 288; *Townshend v. Townshend*, 7 Gill 10.

[c] **On appeal from probate of will**, the appellees are held to have the right to open and close as they must prove will. *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Comstock v. Hadlyme*, etc. Soc., 8 Conn. 254, 20 Am. Dec. 100.

[d] **In case of bill in equity**, the probate will upholders have the right to open and close. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Mathews v. Forniss*, 91 Ala. 157, 8 So. 661; *Chamberlain v. Gaillard*, 26 Ala. 504; *McBee v. Bowman*, 89 Tenn. 132, 14 S. W. 481. But see *Tobin v. Jenkins*, 29 Ark. 151; *Rogers v. Diamond*, 13 Ark. 474.

53. Ala.—*Pope v. State*, 174 Ala. 63, 57 So. 245. Cal.—*People v. Weber*, 149 Cal. 325, 86 Pac. 671. Kan.—*Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58; *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950. Utah.—*United States v. Sprague*, 8 Utah 378, 31 Pac. 1049.

[a] **A party (1) waives his right by not demanding it** (Ga.—*McKibbin v. Folds*, 38 Ga. 235. Ia.—*Kassing v. Walter*, 65 N. W. 832; *Sherman v. Hale*, 76 Iowa 383, 41 N. W. 48. Kan.—*Piatt v. Head*, 35 Kan. 282, 10 Pac. 822. Ky.—*Wheatly v. Phelps*, 3 Dana 302. N. Y.—*Crawford v. Tyng*, 7 Misc. 239, 27 N. Y. Supp. 424. Okla.—*Congdon v. McAlester*, etc. Co., 155 Pac. 597; *Lynde-Bowman-Darby Co. v. Huff*, 33 Okla. 239, 124 Pac. 1085. Tex.—*Mutual Life Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294; *Hittson v. State Nat. Bank*, 14 S. W. 780), or (2) by demanding it on wrong grounds (*Nagle v. Schnadt*, 239 Ill. 595, 88 N. E. 178), or (3) by not objecting when his opponent opens (Ga.—*Northington v. Granade*, 118 Ga. 584, 45 S. E. 447; *McKibbin v. Folds*, 38 Ga. 235. Ind. Ter.—*Craggs v. Bohart*, 4 Ind. Ter. 443, 69 S. W. 931. Ia.—*Kassing v. Walter*, 65 N. W. 832; *Sherman v. Hale*, 76 Iowa 383, 41 N. W. 48. Neb.—*Burgess v. Burgess*, 44 Neb. 16, 62 N. W. 242; *Brooks v. Dutcher*, 22 Neb. 644, 36 N. W. 128. Okla.—*Bass & Harbour Furn. Co. v. Harbour*, 42 Okla. 335, 140 Pac. 956. Wash.—*Lynch v. Richter*, 10 Wash. 486, 39 Pac. 125; *Bozzio v. Vaglio*, 10 Wash. 270, 33 Pac. 1042), or (4) assumes the burden of proof. Ga.—*Baird v. Hill*, 141 Ga. 15, 80 S. E. 281; *Taylor v. J. B. Brown & Co.*, 139 Ga. 797, 77 S. E. 1062; *Jones v. Fourth Nat. Bank* (Ga. App.), 92 S. E. 964; *Morris v. Reed*, 14 Ga. App. 729, 82 S. E. 314. Ill.—*Atkinson v. National Coun. K. & L. of S.*, 193 Ill. App. 215. Ky.—*Longnecker v. Bondurant*, 173 Ky. 427, 191 S. W. 286; *Frey v. Mathias*, 18 Ky. L. Rep. 913, 38 S. W. 871; *Shank & Co. v. Stewart*, 16 Ky. L. Rep. 159. Okla.—*Bass & Harbour Furn. & C. Co. v. Harbour*, 42 Okla. 335, 140 Pac. 956.

54. *Montgomery So. Ry. Co. v. Sayre*, 72 Ala. 443; *Chamberlain v. Gaillard*, 26 Ala. 504; *Gebhardt v. England*, 8 N. J. L. J. 146.

55. Del.—*Tyre v. Morris*, 5 Harr. 3. Ill.—*Creager v. Blank*, 32 Ill. App. 615. Kan.—*Railroad Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156; *St. Louis & S. F. R. Co. v. Van Zego*, 71 Kan. 427, 80 Pac.

and if the first party is allowed to close, the second party may then be permitted a reply;⁵⁶ but if the opponent does not waive, then the first party may close,⁵⁷ though some courts hold this subject to be in the court's discretion.⁵⁸

IV. TIME TO OPEN.⁵⁹ — The time for opening whether by plaintiff,⁶⁰ or by defendant,⁶¹ is usually discretionary with the court, though some states hold that defendant's opening must come directly after plaintiff's.⁶²

V. SCOPE OF ARGUMENT.⁶³ — A. **OPENING STATEMENT.** — 1. **In General.** — The opening address, the scope of which is largely within the court's discretion, consists, in general, of a succinct statement of the party's case, the proof he expects to muster in support thereof;⁶⁴ and in some states,⁶⁵ though not in others,⁶⁶ the law applicable thereto. Counsel's opening need not be complete;⁶⁷ but it cannot be supple-

944; *Southern Kansas Ry. Co. v. Michaels*, 49 Kan. 388, 30 Pac. 408; *Nemaha County v. Allbert*, 6 Kan. App. 165, 51 Pac. 307. **N. J.**—*Gebhardt v. England*, 8 N. J. L. J. 146. **N. Y.**—*Ender v. Terwilliger*, 166 N. Y. 590, 59 N. E. 1118. **Okla.**—*Fire Assn. of Philadelphia v. Farmers' Gin Co.*, 39 Okla. 162, 134 Pac. 443; *Atchison, T. & S. R. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 428.

56. *New York, etc. R. Co. v. Garritty*, 63 N. J. L. 50, 42 Atl. 842; *Fire Assn. of Phila. v. Farmers' Gin Co.*, 39 Okla. 162, 134 Pac. 443; *Atchison, etc. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 428.

57. *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *Hickman v. Layne*, 47 Neb. 177, 66 N. W. 298.

58. *Conrad v. Cleveland, etc. R. Co.*, 34 Ind. App. 133, 72 N. E. 489; *State v. Stewart*, 9 Nev. 120.

59. **Time for closing argument**, see 2 **STANDARD PROC.** 733.

60. *Sinclair Co. v. Waddill*, 200 Ill. 17, 65 N. E. 437, *affirming* 99 Ill. App. 334.

61. *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027; *Williams v. State*, 170 Ind. 644, 85 N. E. 349.

62. *Dehler v. State*, 22 Ind. App. 383, 53 N. E. 850; *Kali Inla Coal Co. v. Ghinelli (Okla.)*, 155 Pac. 606.

63. See generally the title "**Arguments.**"

64. *Mass.*—*O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788. *Mich.*—*Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575. *Wis.*—*Lee v. Campbell*, 77 Wis. 340, 46 N. W. 497.

Stating the facts, see *infra*, V, A, 3.

65. *Fla.*—*Seaboard Air Line Ry. Co.*

v. Rentz, 60 Fla. 449, 54 So. 20. *Ind.*—*Copenhagen v. State*, 160 Ind. 540, 67 N. E. 453. *Mo.*—*Buck v. St. Louis Union Tr. Co.*, 267 Mo. 644, 185 S. W. 208; *Baughman v. Metropolitan St. Ry. Co. (Mo. App.)*, 177 S. W. 800. *Tex.*—*Morales v. State*, 1 Tex. App. 494, 28 Am. Rep. 419. *Vt.*—*Lewis v. Crane*, 78 Vt. 216, 62 Atl. 60. *Wis.*—*Ryan v. State*, 83 Wis. 486, 53 N. W. 836.

[a] **But counsel cannot argue the law in criminal cases in his opening.** *People v. Carty*, 77 Cal. 213, 19 Pac. 490; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643.

66. *San Miguel C. G. M. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025; *Pickett v. Handy*, 5 Colo. App. 295, 38 Pac. 606; *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813; *Hill v. Colorado Nat. Bank*, 2 Colo. App. 324, 30 Pac. 489; *Giffen v. City of Lewiston*, 6 Idaho 231, 55 Pac. 545.

67. *Ala.*—*Pope v. State*, 174 Ala. 63, 57 So. 245. *Cal.*—*People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604. *D. C.*—*Jones v. Baltimore & P. R. Co.*, 5 Mackey 8. *Idaho.*—*Wheeler v. Oregon R. & Nav. Co.*, 16 Idaho 375, 102 Pac. 347. *Ill.*—*Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325, 29 L. R. A. (N. S.) 218. *Kan.*—*Glenn v. Missouri Pac. R. Co.*, 87 Kan. 391, 124 Pac. 420; *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950; *Richards v. Griffith*, 1 Kan. App. 518, 41 Pac. 196. *Mich.*—*Petherick v. General Assembly*, 114 Mich. 420, 72 N. W. 262. *Mo.*—*Hackman v. Maguire*, 20 Mo. App. 286. *Nev.*—*State v. Smith*, 10 Nev. 106. *N. Y.*—*Nearing v. Bell*, 5 Hill 291; *Goodman v. Brooklyn Hebrew, etc. Asylum*, 178

mented by a full closing without letting the defendant reply.⁶⁸

2. Anticipating Defenses.—Each party should be confined to his own case, and prohibited from anticipating the opposing party's defense.⁶⁹

3. Stating the Facts.—In stating the facts, counsel is usually confined to a brief rehearsal thereof,⁷⁰ although the court in its discretion may permit him to give a detailed recital thereof.⁷¹ Facts which counsel expects to prove may be stated,⁷² though such facts are not later proven;⁷³ but counsel has no right to present facts which

App. Div. 682, 165 N. Y. Supp. 949; *Meeks v. Meeks*, 122 App. Div. 461, 106 N. Y. Supp. 907, reversing 100 N. Y. Supp. 667. **Tex.**—*Allen v. Hagan*, 4 Wills. Civ. Cas., §93, 16 S. W. 176. Wash.—*Reading v. Puget Sound*, etc. Works, 36 Wash. 642, 79 Pac. 308. Wis.—*Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254.

Contra, *Atchison, T. & S. R. Co. v. Lambert*, 32 Okla. 655, 123 Pac. 428.

[a] **Defendant's failure to read his pleas** to the jury does not bar him from giving evidence in support of them. *Allen v. Hagen*, 4 Wills. Civ. Cas. (Tex.), §93, 16 S. W. 176. To same effect, *Petherick v. General Assembly of O. of A.*, 114 Mich. 420, 72 N. W. 262.

[b] **Supplemented by Pleadings.** *Noble v. Track*, 5 Kan. App. 786, 48 Pac. 1004; *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254.

68. *Seaboard Air Line R. Co. v. Rentz*, 60 Fla. 449, 54 So. 20.

69. **Ark.**—*Kansas City Southern Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428. **Colo.**—*Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063. **Ind.**—*Reynolds v. State*, 147 Ind. 3, 46 N. E. 31. **N. Y.** *Ayrault v. Chamberlain*, 33 Barb. 229. **Wis.**—*Baker v. State*, 69 Wis. 32, 33 N. W. 52.

[a] **Discretionary With Court.**—*Reynolds v. State*, 147 Ind. 3, 46 N. E. 31; *Maxfield v. Jones*, 76 Me. 135.

[b] **As to those defenses disclosed** by the other party's pleadings, the rule does not hold. *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

70. **Ark.**—*Kansas City S. Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428. **Ill.**—*People v. Hamilton*, 268 Ill. 390, 109 N. E. 329. **Mich.**—*Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637.

[a] **Argument of the facts** (1) not permitted (*Henwood v. People*, 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916A, 1111; *Zucker v. Karpeles*, 88 Mich. 413,

50 N. W. 373), (2) but defendant, in his opening, can argue opponent's case as stated in opponent's opening. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Williams*, 43 Cal. 344; *Emery v. State*, 92 Wis. 146, 65 N. W. 848.

71. **Ga.**—*Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49. **Ind.** *Aylesworth v. Brown*, 31 Ind. 270. **Kan.**—*Glenn v. Missouri Pac. R. Co.*, 88 Kan. 235, 128 Pac. 362; *Glenn v. Missouri Pac. R. Co.*, 87 Kan. 391, 124 Pac. 420. **Ore.**—*Long v. Lander*, 10 Ore. 175.

[a] **Even in Criminal Cases.**—*People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604; *Russell v. State*, 62 Neb. 512, 87 N. W. 344.

72. **Ala.**—*Mann v. State*, 134 Ala. 1, 32 So. 704. **Ga.**—*Dowda v. State*, 74 Ga. 12. **Ill.**—*Paige v. Illinois Steel Co.*, 233 Ill. 313, 84 N. E. 239, reversing 136 Ill. App. 410; *Falkenau v. Abrahamson*, 66 Ill. App. 352. **Ind.** *Copenhagen v. State*, 160 Ind. 540, 67 N. E. 453. **Mass.**—*O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788. **Minn.** *State v. Virgens*, 128 Minn. 422, 151 N. W. 190. **Mont.**—*Downs v. Cassidy*, 47 Mont. 471, 133 Pac. 106, Ann. Cas. 1915B, 1155. **N. H.**—*Hoxie v. Walker*, 75 N. H. 308, 74 Atl. 183. **N. Y.** *Garrison v. Sun Printing & P. Assn.*, 164 App. Div. 737, 150 N. Y. Supp. 284. **Tex.**—*Chicago, R. I. & G. R. Co. v. Poore*, 49 Tex. Civ. App. 191, 108 S. W. 504. **Utah.**—*People v. Chalmers*, 5 Utah 201, 14 Pac. 131.

73. **Ark.**—*McFalls v. State*, 66 Ark. 16, 48 S. W. 492. **Cal.**—*People v. Gleason*, 127 Cal. 323, 59 Pac. 592; *People v. Lewis*, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 782; *People v. Searcey*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157. **Del.**—*Pritchard v. Henderson*, 3 Penn. 128, 50 Atl. 217. **Ia.**—*State v. Klute*, 160 Iowa 170, 140 N. W. 864; *State v. Todd*, 110 Iowa 631, 82 N. W. 322;

cannot be proved;⁷⁴ his doing so, however, would not work a reversal,⁷⁵ except where prejudicial.⁷⁶ Matters which are irrelevant,⁷⁷ or prejudicial,⁷⁸ should not be dwelt on, unless they are admissible in evidence.⁷⁹

4. **Reading Pleadings and Documents.**⁸⁰ — Pleadings may be read,⁸¹ providing they have not been superseded.⁸² But counsel has no right to read documents which he later intends to offer.⁸³

B. **CONCLUDING ARGUMENT.** — The concluding argument must be confined to a rebuttal of the other side's argument.⁸⁴

VI. EFFECT OF OPENING STATEMENT. — Counsel's opening

State v. Allen, 100 Iowa 7, 69 N. W. 274. **Mich.**—*Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652. **Minn.**—*Fisher v. Weinholzer*, 92 Minn. 347, 99 N. W. 1132. **Mont.**—*Downs v. Cassidy*, 47 Mont. 471, 133 Pac. 106, Ann. Cas. 1915B, 1155. **Neb.**—*Yechout v. Tesnohldek*, 97 Neb. 387, 150 N. W. 199. **N. M.**—*State v. McDonald*, 21 N. M. 110, 152 Pac. 1139.

Contra, *Marshall v. State*, 71 Ark. 415, 75 S. W. 584; *People v. Hamilton*, 268 Ill. 390, 109 N. E. 329.

74. **Ark.**—*Jones v. State*, 88 Ark. 579, 115 S. W. 166. **Cal.**—*People v. Gleason*, 127 Cal. 323, 59 Pac. 592. **Del.**—*Doe ex dem. Pritchard v. Roe*, 3 Penne. 128, 50 Atl. 217. **Ia.**—*State v. Allen*, 100 Iowa 7, 69 N. W. 274; *State v. Williams*, 63 Iowa 135, 18 N. W. 682. **Ky.**—*Louisville Gas Co. v. Kentucky Heating Co.*, 33 Ky. L. Rep. 912, 111 S. W. 374. **Mich.**—*Barto v. Detroit Iron & Steel Co.*, 155 Mich. 94, 118 N. W. 738; *Rickabus v. Gott*, 51 Mich. 227, 16 N. W. 384; *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575. **Mo.**—*Underwood v. Caruthersville* (Mo. App.), 184 S. W. 486; *McCormick Harvesting Mach. Co. v. Blair*, 181 Mo. App. 593, 164 S. W. 656. **Wis.**—*Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253.

75. **Ill.**—*Marder, Luse & Co. v. Leary*, 137 Ill. 319, 26 N. E. 1093. **Ind. Ter.**—*Hall v. Needles*, 1 Ind. Ter. 146, 38 S. W. 671. **Mich.**—*Hunkins v. Kent*, 151 Mich. 482, 115 N. W. 410; *Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373. **Mo.**—*Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689. **N. Y.**—*Elliott v. Luengene*; 20 Misc. 18, 44 N. Y. Supp. 775. **Pa.**—*Keim v. Maurer*, 2 Woodw. Dec. 412. **Wis.**—*Lee v. Campbell*, 77 Wis. 340, 46 N. W. 497.

76. See *infra*, note 78.

77. *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575.

78. **Ark.**—*Jones v. State*, 88 Ark. 579, 115 S. W. 166; *Marshall v. State*, 71 Ark. 415, 75 S. W. 584. **Ill.**—*McCarthy v. Spring Val. C. Co.*, 232 Ill. 473, 83 N. E. 957, that plaintiff had wife and children. **Ia.**—*State v. McCaskill*, 173 Iowa 563, 155 N. W. 976. **Mo.**—*Glover v. Atchison, T. & S. F. R. Co.*, 129 Mo. App. 563, 108 S. W. 105.

79. **Ala.**—*Summers v. State*, 14 Ala. App. 16, 70 So. 951. **Cal.**—*Vallejo, etc. Ry. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238. **Colo.**—*Reagan v. People*, 49 Colo. 316, 112 Pac. 785.

80. See generally 2 STANDARD PROC. 809, et seq.

81. *Waid v. Hobson*, 17 Colo. App. 54, 67 Pac. 176.

[a] **Indictment and Information.** *Sturgis v. State*, 2 Okla. Crim. 362, 102 Pac. 57.

82. *St. Louis, I. M. & S. R. Co. v. Bearden*, 107 Ark. 363, 155 S. W. 499; *Unfried v. Libert*, 20 Idaho 708, 119 Pac. 885; *Rasicot v. Royal Neighbors*, 18 Idaho 85, 168 Pac. 1048, 138 Am. St. Rep. 180, 29 L. R. A. (N. S.) 433.

83. *Hunkins v. Kent*, 151 Mich. 482, 115 N. W. 410; *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575.

[a] **Reading documents not ground for reversal unless prejudice ensues.** **Ark.**—*St. Louis, I. M. & S. R. Co. v. Earle*, 103 Ark. 356, 146 S. W. 520; *Kansas City So. Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428. **Cal.**—*People v. Sing Yow*, 145 Cal. 1, 9, 78 Pac. 235; *People v. Molina*, 126 Cal. 505, 59 Pac. 34. **Vt.**—*In re Barney's Will*, 71 Vt. 217, 44 Atl. 75.

84. *Wynn v. Lee*, 5 Ga. 217; *Kaime v. Trustees of Omro*, 49 Wis. 371, 5 N. W. 838; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

statements are in some jurisdictions binding on the party;⁸⁵ and if such statements show that recovery is absolutely impossible,⁸⁶ a nonsuit or judgment may be based thereon.⁸⁷ The rule is not universal, however; and some cases have not treated opening statements as admissions against the party,⁸⁸ refusing to pronounce an adverse judgment thereon.⁸⁹

85. *Territory v. Hanna*, 5 Mont. 248, 5 Pac. 252.

86. **Colo.**—*Roberts v. Colorado Springs, etc. R. Co.*, 45 Colo. 188, 101 Pac. 59. **Ga.**—*Walker v. Georgia R. R.*, 15 Ga. App. 238, 82 S. E. 905. **Idaho.**—*Wheeler v. Oregon, etc. Co.*, 16 Idaho 375, 102 Pac. 347. **Ill.**—*Emerich Outfitt Co. v. Siegel, Cooper Co.*, 108 Ill. App. 364. **Kan.**—*Moffatt v. Fouts*, 99 Kan. 118, 160 Pac. 1137; *Glenn v. Missouri Pac. R. Co.*, 88 Kan. 235, 128 Pac. 362; *McDonald v. Daniels*, 76 Kan. 388, 92 Pac. 51; *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950. **Mass.**—*Weil v. Boston Elev. R. Co.*, 218 Mass. 397, 105 N. E. 983. **Mich.**—*Kimmerle v. Bonine*, 188 Mich. 148, 154 N. W. 2; *Strachan v. Meyering*, 168 Mich. 253, 134 N. W. 11; *Barto v. Detroit Iron & Steel Co.*, 155 Mich. 94, 118 N. W. 738. **Minn.**—*Vineseck v. Great Northern R. Co.*, 136 Minn. 96, 161 N. W. 494; *Barrett v. Minneapolis, St. P. & S. S. M. R. Co.*, 106 Minn. 51, 117 N. W. 1047, 103 Am. St. Rep. 585, 18 L. R. A. (N. S.) 416. **N. J.**—*Carr v. Delaware, L. & W. R. Co.*, 78 N. J. L. 692, 75 Atl. 928; *Jordan v. Reed*, 77 N. J. L. 584, 71 Atl. 280; *Kelly v. Bergen County Gas Co.*, 74 N. J. L. 604, 67 Atl. 21. **N. Y.**—*Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169; *Goodman v. Brooklyn Heb., etc. Assn.*, 178 App. Div. 682, 165 N. Y. Supp. 949; *Horne v. Diamond*, 165 N. Y. Supp. 865. **Ore.**—*Lane v. Portland, etc. Co.*, 58 Ore. 364, 114 Pac. 940. **Wash.**—*Galbraith v. Devlin*, 85 Wash. 482, 148 Pac. 589; *James v. Pearson*, 64 Wash. 263, 116 Pac. 852; *Gross v. Bennington*, 52 Wash. 417, 100 Pac. 846.

87. **U. S.**—*Butler v. National Soldiers' Home*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. ed. 346; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. ed. 539. **Cal.**—*Bias v. Reed*, 169 Cal. 33, 145 Pac. 516; *Emmerson v. Weeks*, 58 Cal. 382. **Kan.**—*Lindley v. Atchison, T. & S. F. R. Co.*, 47 Kan. 432, 28 Pac. 201; *Missouri Pac. Ry. Co. v. Hartman*, 5 Kan. App. 581, 49 Pac. 109. **Mich.**—*Spicer v. Bonker*, 45 Mich. 630, 8 N. W. 518.

Minn.—*St. Paul Motor V. Co. v. Johnston*, 127 Minn. 443, 149 N. W. 667. **Mo.**—*Wonderly v. Little & Hays Ins. Co. (Mo. App.)*, 184 S. W. 1188; *Pillingham v. St. Louis Transit Co.*, 102 Mo. App. 573, 77 S. W. 314. **Mont.**—*Metlen v. Oregon Short Line R. Co.*, 33 Mont. 45, 81 Pac. 737. **N. H.**—*Miner v. Hopkinton*, 73 N. H. 232, 60 Atl. 433. **N. J.**—*Jordan v. Reed*, 77 N. J. L. 584, 71 Atl. 280. **N. Y.**—*Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169; *Stamm v. Purroy*, 170 App. Div. 584, 156 N. Y. Supp. 415; *Preusse v. Childwold, etc. Co.*, 134 App. Div. 383, 119 N. Y. Supp. 98; *Sims v. Metropolitan St. R. Co.*, 65 App. Div. 270, 72 N. Y. Supp. 835. **Ohio.**—*Cornell v. Morrison*, 87 Ohio St. 215, 100 N. E. 817. **Okla.**—*First State Bank v. Bridges*, 39 Okla. 355, 135 Pac. 378. **Wash.**—*Gross v. Bennington*, 52 Wash. 417, 100 Pac. 846; *Brooks v. McCabe*, 39 Wash. 62, 80 Pac. 1004.

[a] **Mere insufficiency** of opening is no ground for nonsuit. *Wheeler v. Oregon Ry. & Nav. Co.*, 16 Idaho 375, 102 Pac. 347.

88. **Ariz.**—*Tevis v. Ryan*, 13 Ariz. 120, 108 Pac. 461. **Ill.**—*Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325, 29 L. R. A. (N. S.) 218; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529, 89 Ill. App. 509. **Ind. Ter.**—*Hall v. Needles*, 1 Ind. Ter. 146, 38 S. W. 671. **Ia.**—*Nosler v. Chicago, B. & Q. Ry. Co.*, 73 Iowa 268, 34 N. W. 850; *Frederick v. Gaston*, 1 G. Gr. 401. **Mich.**—*Meade v. Bowles*, 123 Mich. 696, 82 N. W. 658. **Minn.**—*St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500. **N. Y.**—*Bowman v. Seamen*, 152 App. Div. 690, 137 N. Y. Supp. 568. **Okla.**—*Patterson v. Morgan*, 135 Pac. 694; *Sturgis v. State*, 2 Okla. Crim. 362, 102 Pac. 57.

89. **Cal.**—*People v. Stoll*, 143 Cal. 689, 77 Pac. 818; *Hirsch v. Rand*, 39 Cal. 315. **Ill.**—*Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325, 29 L. R. A. (N. S.) 218. **Pa.**—*Nesbitt v. Turner*, 155 Pa. 429, 26 Atl. 750. **Wis.**—*Haley v. Western Transit Co.*, 76 Wis. 344,

VII. REVIEW.—A. OF DENIAL OF RIGHT.—The right to open and close is in many states regarded as absolute, and its denial ground for reversal;⁹⁰ but the position taken in other jurisdictions is that the matter is discretionary with the court and its ruling thereon will not be reviewed by an appellate court,⁹¹ unless prejudice results to

45 N. W. 16; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322, 5 N. W. 804.

90. **Ark.**—*Western Cab., etc. Co. v. Davis*, 121 Ark. 370, 181 S. W. 273; *Mansur v. Davis*, 61 Ark. 627, 33 S. W. 1074; *St. Louis, etc. R. Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598. **Cal.** *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342. **Colo.**—*Little v. Little*, 23 Colo. App. 518, 130 Pac. 1022. **Ga.** *Widdincamp v. Widdincamp*, 135 Ga. 644, 70 S. E. 566; *James v. Kiser & Co.*, 65 Ga. 515; *Buchanan v. McDonald*, 40 Ga. 286. **Ind.**—*Kinney v. Dodge*, 101 Ind. 573; *Haines v. Kent*, 11 Ind. 126; *Shank v. Fleming*, 9 Ind. 189; *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056. **Kan.**—*Degan v. Tufts*, 8 Kan. App. 338, 56 Pac. 1126; *Nemaha v. Albert*, 6 Kan. App. 165, 51 Pac. 307. **Ky.**—*Pitman v. Drown*, 175 Ky. 677, 194 S. W. 913; *O'Connor v. Henderson*, 95 Ky. 633, 27 S. W. 251, 983; *Wright v. Northwestern Mut. L. Ins. Co.*, 91 Ky. 208, 15 S. W. 242. **Me.** *Reed v. Reed*, 115 Me. 441, 99 Atl. 181; *Johnson v. Josephs*, 75 Me. 544. **Md.**—*Edelen v. Edelen*, 6 Md. 288. **Mass.**—*Davis v. Mason*, 4 Pick. 156. **Miss.**—*Porter v. Still*, 63 Miss. 357. **N. H.** *Judge v. Stone*, 44 N. H. 593. **N. J.** *Farmers' Nat. Bk. v. Gaskill*, 9 N. J. L. J. 204. **N. Y.**—*Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Millard v. Thorn*, 56 N. Y. 402; *Herreshoff v. American & B. Mfg. Co.*, 164 App. Div. 238, 149 N. Y. Supp. 703; *Regan v. Kelley*, 91 Misc. 4, 154 N. Y. Supp. 139; *Kotlowitz v. Silberstein*, 83 Misc. 82, 144 N. Y. Supp. 766; *Fischer v. Frohne*, 51 Misc. 578, 100 N. Y. Supp. 1016; *Nagel Realty Co. v. Freund*, 151 N. Y. Supp. 517. **S. C.**—*Barnett v. Gottlieb*, 98 S. C. 180, 82 S. E. 406. **Tenn.**—*McBee v. Bowman*, 89 Tenn. 132, 14 S. W. 481. **Tex.**—*Knight Realty Co. v. Williams* (Tex. Civ. App.), 193 S. W. 168; *First St. Bank of Amarillo v. Cooper* (Tex. Civ. App.), 179 S. W. 295; *Carter Music Co. v. Bailey* (Tex. Civ. App.), 179 S. W. 547. **Wash.**—*Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042. **W. Va.** *Sammons v. Hawvers*, 25 W. Va. 678.

91. **U. S.**—*Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. ed. 373; *Hall v. Weare*, 92 U. S. 728, 23 L. ed. 500; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Florence Oil & R. Co. v. Farrar*, 109 Fed. 254, 43 C. C. A. 345. **Ala.**—*Mobile & Montgomery R. Co. v. Yeates*, 67 Ala. 164. **Conn.**—*In re Weed's Appeal*, 35 Conn. 452; *Scott v. Hull*, 8 Conn. 296, 303. **Del.**—*Bonwill v. Dickson*, 1 Harr. 105. **Idaho.**—*Exchange State Bank v. Taber*, 26 Idaho 723, 145 Pac. 1090. **Ill.**—*Carpen-ter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18. **Ia.**—*Breiner v. Nu-gent*, 136 Iowa 322, 111 N. W. 446; *Miller Brew. Co. v. De France*, 90 Iowa 395, 57 N. W. 959; *Van Horn v. Smith*, 59 Iowa 142, 12 N. W. 789. **Minn.** *Aultman & Co. v. Falkum*, 47 Minn. 414, 50 N. W. 471. **Mo.**—*Lucas v. Sul-livan*, 33 Mo. 389; *Reichard v. Man-hattan Life Ins. Co.*, 31 Mo. 518; *Mc-Cormick Harv. Mach. Co. v. Blair*, 181 Mo. App. 593, 164 S. W. 656; *Oexner v. Loehr*, 133 Mo. App. 211, 113 S. W. 727. **Neb.**—*Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455. **Nev.** *Truckee River G. Elect. Co. v. Dur-ham*, 38 Nev. 311, 149 Pac. 61. **N. C.** *Elks v. Hemby*, 160 N. C. 20, 75 S. E. 854; *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328. **Ohio.**—*Union Rolling Mill Co. v. Packard*, 1 Ohio Cir. Dec. 46, 1 Ohio Cir. Ct. 761. **Ore.**—*Pacific Ry. & Nav. Co. v. Elmore Packing Co.*, 60 Ore. 534, 120 Pac. 389, Ann. Cas. 1914A, 371. **Pa.**—*Smith v. Frazier*, 53 Pa. 226; *Hartmann v. Keystone Ins. Co.*, 21 Pa. 466; *Torak v. Philadelphia & R. Co.*, 60 Pa. Super. 248. **Tenn.** *Woodward v. Iowa Life Ins. Co.*, 104 Tenn. 49, 56 S. W. 1020; *Minor v. Bishop* (Tex. Civ. App.), 180 S. W. 909; *Cooper v. Marex* (Tex. Civ. App.), 166 S. W. 58; *Temple Nat. Bk. v. War-ner* (Tex. Civ. App.), 44 S. W. 1025. **Wis.**—*Kaime v. Trustees of Omro*, 49 Wis. 371, 5 N. W. 838.

[a] The party wrongfully given right to open and close cannot com-plain. **Ark.**—*Metropolitan L. Ins. Co. v. Shane*, 98 Ark. 132, 135 S. W. 836.

the party deprived of the right to open or close.⁹²

B. OF ERRORS IN ARGUMENT.—Improper opening is ground for reversal where clearly prejudicial,⁹³ though not, if not objected to by the parties,⁹⁴ or if the statement is not preserved in the record,⁹⁵ or if objection is sustained and the words are stricken out.⁹⁶

Ill.—*Priest v. Dodsworth*, 235 Ill. 613, 85 N. E. 940, 143 Ill. App. 225; *Bemis v. Horner*, 165 Ill. 347, 46 N. E. 277. **Minn.**—*Paine v. Smith*, 33 Minn. 495, 24 N. W. 305.

92. U. S.—*New York Dry Goods Store v. Pabst Brew. Co.*, 112 Fed. 381, 50 C. C. A. 295. **Colo.**—*Denver Land & Sec. Co. v. Rosenfeld Const. Co.*, 19 Colo. 539, 36 Pac. 146. **Ill.**—*Nagle v. Schnadt*, 239 Ill. 595, 88 N. E. 178. **Ia.**—*O'Connor v. Kleiman*, 143 Iowa 435, 121 N. W. 1088; *Fenton v. Iowa State T. M. Assn.*, 139 Iowa 166, 117 N. W. 251; *Breiner v. Nugent*, 136 Iowa 322, 111 N. W. 446; *Farmer v. Norton*, 129 Iowa 88, 105 N. W. 371. **Minn.**—*Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933; *Paine v. Smith*, 33 Minn. 495, 24 N. W. 305. **Miss.**—*Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510. **Mo.**—*McClintock v. Curd*, 32 Mo. 411; *Colt v. Beaumont*, 32 Mo. 118; *Oexner v. Loehr*, 133 Mo. App. 211, 113 S. W. 727; *Loy v. Rorick*, 100 Mo. App. 105, 71 S. W. 842. **N. H.**—*Seely v. Manhattan Life Ins. Co.*, 73 N. H. 339, 61 Atl. 585; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *Hilliard v. Beattie*, 59 N. H. 462. **Ohio**—*Dille v. Lovell*, 37 Ohio St. 415. *Congdon v. McAlister Faet.*, 155 Pac. 597. **Tenn.**—*Lancaster Mills v. Merchants C. P. & S. Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586. **Tex.**—*Belt v. Raguet*, 27 Tex. 471; *Gaines' Admr. v. Ann*, 26 Tex. 340; *Robb v. Robb* (Tex. Civ. App.), 62 S. W. 125. **Va.**—*Steptoe's Admrs. v. Harvey's Exrs.*, 7 Leigh (34 Va.) 501. **W. Va.**—*Ogle v. Adams*, 12 W. Va. 213. **Wis.**—*Winn v. Taylor*, 125 Wis. 19, 103 N. W. 220.

93. Ark.—*Marshall v. State*, 71 Ark. 415, 75 S. W. 584. **Idaho.**—*Unfried v. Libert*, 20 Idaho 708, 119 Pac. 885. **Ill.**—*Pioneer Reserve Assn. v. Jones*, 111 Ill. App. 156. **Ia.**—*State v. Mc-*

Caskill, 173 Iowa 563, 155 N. W. 976. **Kan.**—*Hunter Mill. Co. v. Allen*, 65 Kan. 158, 69 Pac. 159. **Mo.**—*Doggett v. Blanke*, 70 Mo. App. 499. **Utah.**—*Hecht v. Metzler*, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906. **Wash.**—*Duval v. Inland Nav. Co.*, 90 Wash. 149, 155 Pac. 768.

94. Ark.—*McFalls v. State*, 66 Ark. 16, 48 S. W. 492. **Ind.**—*United States Fidelity & Guar. Co. v. Poetker*, 180 Ind. 255, 102 N. E. 372; *Mosier v. Stoll*, 119 Ind. 244, 20 N. E. 752. **Kan.**—*State v. Harlan*, 71 Kan. 887, 81 Pac. 480; *Phoenix Ins. Co. v. Weeks*, 45 Kan. 751, 26 Pac. 410. **Mo.**—*Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689. **Neb.**—*Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308. **N. Y.**—*Avrault v. Chamberlain*, 33 Barb. 229; *McFadden v. Morning J. Assn.*, 28 App. Div. 508, 51 N. Y. Supp. 275. **Okla.**—*Boutcher v. State*, 40 Okla. Crim. 576, 111 Pac. 1006. **Tex.**—*Bonner v. Glenn*, 79 Tex. 531, 15 S. W. 572. **Vt.**—*Lewis v. Crane & Sons*, 78 Vt. 216, 62 Atl. 60. **Wash.**—*Galbraith v. Devlin*, 85 Wash. 482, 148 Pac. 589. **Wis.**—*Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253; *Lee v. Campbell*, 77 Wis. 340, 46 N. W. 497.

95. Basicot v. Royal Neighbors, 18 Idaho 85, 108 Pac. 1048, 138 Am. St. Rep. 180, 29 L. R. A. (N. S.) 433; *Lindley v. Acheson*, T. & S. F. R. Co., 47 Kan. 432, 28 Pac. 201.

96. Ill.—*Miller v. John*, 208 Ill. 173, 70 N. E. 27; *Marder, Luse & Co. v. Leary*, 137 Ill. 319, 26 N. E. 1093. **Ia.**—*State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *Erb v. German-American Ins. Co.*, 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845. **Minn.**—*Fisher v. Weinholzer*, 92 Minn. 347, 99 N. W. 1132; *Pierce v. Brennan*, 88 Minn. 50, 92 N. W. 507. **Wis.**—*Ruege v. Gates*, 71 Wis. 634, 38 N. W. 181; *Baker v. State*, 69 Wis. 32, 33 N. W. 52.

OPENING JUDGMENTS.—See Affidavits of Merits and Defense; Bills To Impeach Judgments and Decrees; Decrees; Default; Judgments.

OPENING STATEMENT. — See **Opening and Closing.**

OPERATION. — See **Abortion; Physicians and Surgeons.**

OPINION OF COURT. — See **Appeals; Courts; Law of the Case; Mandate and Proceedings Thereafter; Stare Decisis.**

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ORDER OF ARREST. — See **Arrest in Civil Cases; Judgments and Decrees, Enforcement of; Process; Warrants.**

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ORDERS

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CROSS-REFERENCES:

Judgments;

Motions.

For forms, see 9 STANDARD PROC. 900, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ORDERS OR RULES TO SHOW CAUSE. — A. **IN GENERAL.** Although an order to show cause may be notice of a proceeding other than motion,¹ generally an order to show cause is simply a notice of motion, and a citation to the party to appear at a stated time and place and show cause why the motion of the applicant should not be granted.² In granting the order, the judge or court does not express

1. See N. Y. Code Civ. Proc., §780.

In injunction suits, an order to show cause may serve the purpose of a subpoena. See 13 STANDARD PROC. 116, 117.

In mandamus cases, see the title "Mandamus."

[a] On a proceeding to disbar an attorney, the complaining party may present the evidence relied on and if the court concludes in favor of the proceeding, it will direct a rule to show cause. Anonymous, 22 Wend. (N. Y.) 656. See also Winkelman v. People, 50 Ill. 449. As to disbarment proceedings generally, see 3 STANDARD PROC. 861.

2. McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730; Pitt v. Davison, 37 N. Y. 235, 3 Abb. Pr. (N. S.) 398, 34 How. Pr. 355; Thompson v. Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 233; People v. McLaughlin, 2 App. Div. 408, 37 N. Y. Supp. 998; Stryker v. Churchill, 39 Misc. 578, 80 N. Y. Supp. 588.

[a] The order (1) is merely a notice (Gray v. Gaither, 71 N. C. 55. See Halsey v. Van Wagenen, 16 N. J. L. 350; Crane v. Condit, 16 N. J. L. 349), (2) the purpose of which is to give notice for a shorter time than that prescribed by the statute generally. Goodrich v. Hopkins, 10 Minn. 162;

any opinion on the merits of the case.³

B. HOW OBTAINED. — An order to show cause is not granted as of course.⁴ It is generally granted upon an ex parte application or motion,⁵ made to the court or judge specified in the statute,⁶ and supported by an affidavit showing the grounds therefor,⁷ and any additional facts required by statute or rule of court.⁸

C. FORM AND CONTENTS.⁹ — The order should be entitled¹⁰ in the

In re Argus Co., 138 N. Y. 557, 565, 34 N. E. 388.

3. *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y.) 233; *Gray v. Gaither*, 71 N. C. 55, so that no right of either party is affected unless the judge or court on the return day shall make some other order.

[a] **Matters Considered by the Court.** — The court in passing on an application for an order to show cause, considers only the question whether there is a necessity for a notice shorter than the usual notice. *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y.) 233.

[b] **An order to show cause does not amount to a determination that the judge will make the order desired, unless the defendant show cause to the contrary.** *Gray v. Gaither*, 71 N. C. 55. But compare *Succession of Porter*, 5 Rob. (La.) 96, holding that if the defendant fails to appear on the day specified, no judgment by default is necessary to make the rule absolute.

4. *Stille v. Wood*, 1 N. J. L. 224; *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388; *Sixth Avenue R. Co. v. Gilbert E. R. Co.*, 71 N. Y. 430.

[a] **It is obtained only by a compliance with the statutes and rules of court regulating the procedure in such cases.** *Stryker v. Churchill*, 39 Misc. 578, 80 N. Y. Supp. 588.

5. Cal. — *Kenney v. Kelleher*, 63 Cal. 442. N. Y. — *Thompson v. Erie R. Co.*, 9 Abb. Pr. (N. S.) 233. Pa. — *Snyder v. Castor*, 4 Yeates 443.

[a] **The adverse party cannot file depositions in opposition to the application as he can present his defenses on the hearing of the motion.** *Snyder v. Castor*, 4 Yeates (Pa.) 443.

[b] **Presumption That Order Regularly Obtained.** — *Goodrich v. Hopkins*, 10 Minn. 102.

6. *Conant v. American R. T. Co.*, 37 Misc. 129, 74 N. Y. Supp. 409; *Larkin v. Steele*, 25 Hun (N. Y.) 254.

[a] **A judge out of court may grant**

an order to show cause. *In re Argus Co.*, 138 N. Y. 557, 565, 34 N. E. 388.

[b] **If made by another judge, the irregularity may be waived.** *Conant v. American R. T. Co.*, 37 Misc. 129, 74 N. Y. Supp. 409.

7. *Cooper v. Galbraith*, 24 N. J. L. 219; *Barclay v. Moloney*, 44 App. Div. 632, 60 N. Y. Supp. 403; *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743; *In re Lyman*, 60 N. Y. Supp. 76. See *Stille v. Wood*, 1 N. J. L. 224, party must file reasons for order.

[a] **Affidavit in surrogate's court need not set forth grounds.** *In re Harris*, 1 Civ. Proc. (N. Y.) 162.

[b] **Affidavits Must Be Filed.** — (1) *Cooper v. Galbraith*, 24 N. J. L. 219; *In re Jeffery*, 1 Crompt. & M. (Eng.) 71. (2) And if not filed, the rule to show cause will be discharged as improvidently granted, unless the neglect was occasioned by some unavoidable casualty. *Cooper v. Galbraith*, 24 N. J. L. 219.

[c] **But on an ex parte motion by a party, the court may on its own motion order the adverse party to show cause why the motion made should not be granted.** *McAuliffe v. Coughlin*, 105 Cal. 268, 38 Pac. 730.

[d] **Objections to the papers on which the order is made must be taken at the special term.** *Wooster v. Bateman*, 4 Misc. 431, 24 N. Y. Supp. 112, 53 N. Y. St. 562.

8. See generally the statutes and rules of court.

[a] **Rule in New York.** — See *In re Directors of National Gram. Corp.*, 82 App. Div. 593, 81 N. Y. Supp. 853; *Proctor v. Soulier*, 82 Hun 353, 31 N. Y. Supp. 472, 1 N. Y. Ann. Cas. 118; *Wooster v. Bateman*, 4 Misc. 431, 24 N. Y. Supp. 112, 53 N. Y. St. 562.

9. **Forms of orders to show cause,** see 9 STANDARD PROC. 856, 908.

10. *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743. But see *Trimble v. Patton*, 5 W. Va. 432, holding

action in which it is granted, and be signed by the court or judge.¹¹ It should specify the grounds or irregularities on which the motion is based,¹² and should show the time¹³ and place¹⁴ at which it is returnable. It has been held that an order to show cause why a mandamus should not issue need not bear the teste¹⁵ or seal¹⁶ of the court.

D. SERVICE.—The service of an order to show cause must be made in compliance with any statutory regulations,¹⁷ and directions in the order itself.¹⁸ Generally there must be a service of a copy¹⁹ of the

rule is properly in the name of the state.

[a] Where order is annexed to a notice of motion properly entitled in the cause, and it explicitly refers to such notice, it is sufficient. *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743.

11. *Middlebrooks v. Warren*, Wallace & Co., 59 Ga. 230, a signature "by the court, Hardeman & Johnsons, plaintiff's attorneys" is sufficient, especially where the rule absolute is signed by the judge himself.

12. *Lewis v. Graham*, 16 Abb. Pr. (N. Y.) 126; *Van Dyke v. New York S. Banking Co.*, 18 Misc. 661, 43 N. Y. Supp. 735.

13. Ga.—*King v. Carey*, 5 Ga. 270. N. Y.—*In re Ferris*, 37 Misc. 606, 76 N. Y. Supp. 159. Wis.—*Durbin v. Waldo*, 15 Wis. 352, an order in the language of the statute providing for revival of actions against administrators is sufficient.

See *Desler v. Burden*, 1 Browne (Pa.) 220, holding if no time is stated, it is understood the rule is returnable to the next term.

[a] An order returnable in more than eight days is permissible under statute providing for an eight day notice, unless in an order to show cause the court directs less notice. *In re Ferris*, 37 Misc. 606, 76 N. Y. Supp. 159. See *Vale v. Brooklyn Cross-Town R. Co.*, 12 Civ. Proc. (N. Y.) 102; also *Gross v. Clark*, 1 Civ. Proc. (N. Y.) 17, 25.

[b] May Be Noticed for First Day of Term.—*Power v. Athens*, 19 Hun (N. Y.) 165.

[c] An order to show cause containing a stay of proceedings is irregular where a rule of court requires at least two days' notice of stay orders. *Asinari v. Volkening*, 2 Abb. N. C. (N. Y.) 454.

[d] Curing omission by an amendment nunc pro tunc. *In re Quo Vadis*

Amusement Co., 82 App. Div. 240, 81 N. Y. Supp. 394.

[e] Waiver of Omission.—See *Bu-ford v. New York Iron Mine*, 23 Jones & S. 516, 2 N. Y. Supp. 699, 18 N. Y. St. 400.

[f] An order referring to a notice of motion specifying the time and place at which it is returnable and annexed thereto is sufficient. *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743.

14. *Yale v. Edgerton*, 11 Minn. 271; *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743.

15. *Taylor v. Henry*, 2 Pick. (Mass.) 397, it is not a writ or process within the meaning of the statute requiring a teste and seal.

16. *Taylor v. Henry*, 2 Pick. (Mass.) 397; *People ex rel. Crouse v. Board of Supervisors*, 70 Hun 560, 24 N. Y. Supp. 597.

17. *Timolat v. S. J. Held Co.*, 15 Misc. 630, 37 N. Y. Supp. 221, 72 N. Y. St. 800, under statute requiring service at residence of attorney whose office is closed, and who has no office letter box. See generally the title "Service of Process and Papers."

[a] In Louisiana, no other citation than a notification of the rule to show cause is required. *Succession of Porter*, 5 Rob. (La.) 96.

[b] Copy of Answer.—In serving an order to show cause why the plaintiff should not be compelled to accept an answer served upon him, it is not necessary to deliver a copy of the answer where the answer has already been served. It is immaterial if the plaintiff has returned the answer. *Paddock v. Palmer*, 32 Misc. 426, 66 N. Y. Supp. 743.

18. *Marcele v. Saltzman*, 66 How. Pr. (N. Y.) 205, order requiring two days' service on the plaintiff's attorney on its face means personal service.

19. See notes below.

[a] Defects in the copy do not of themselves warrant a denial of the

order, on the party ordered to show cause or his attorney,²⁰ made within the state,²¹ although personal service on the party himself is sometimes required.²²

E. HEARING AND DETERMINATION ON RETURN DAY.—The party ordered to show cause is bound to answer it on the day fixed.²³ But if he neglects to do so, the party obtaining the order is only entitled to the relief specified in the order.²⁴ And even where the application is opposed, it has been held that the final order should follow the rule to show cause.²⁵

F. OPENING AND VACATING ORDERS OR RULES TO SHOW CAUSE. Orders to show cause which are improperly granted may be vacated on proper application therefor.²⁶

G. APPEAL AND REVIEW.—An appeal will not lie from an order to show cause,²⁷ or from an order vacating an order to show cause,²⁸ because the former is in the nature of a notice of motion merely and because the latter is in the discretion of the court or judge. But if the order granted on the hearing of the order to show cause is a final order, an appeal will lie.²⁹

II. ORDERS ON MOTION AND BY CONSENT.—**A. DEFINITIONS AND DISTINCTIONS.**—An order has been defined to be a decision made during the progress of the cause, either prior or subsequent to

motion. *Harrison Mach. Wks. v. Hosig*, 73 Wis. 184, 41 N. W. 70.

[b] An appearance to object to irregularities does not waive the defects. *Wood v. Critchfield*, 1 Comp. & M. (Eng.) 72, 3 Tyrw. 235.

[c] Affidavit on which the order is granted or a copy of it must be served with the copy of the order. See N. Y. Code Civ. Proc., §782.

20. *Marin v. Thierry*, 29 La. Ann. 362 (holding service not on the plaintiff in person or at his domicile or on his attorney is bad); *Pitt v. Davison*, 37 N. Y. 235, 3 Abb. Pr. (N. S.) 398, 34 How. Pr. 355; *Albany City Bank v. Sehermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

[a] In an action against a corporation, service of an order to show cause on the vice president is sufficient. *People v. Central City Bank*, 53 Barb. (N. Y.) 412, 35 How. Pr. 428.

21. *McCauley v. Palmer*, 40 Hun (N. Y.) 38, 9 Civ. Proc. 390, service without the state is a nullity.

22. *Pitt v. Davison*, 37 Barb. (N. Y.) 97, in a contempt proceeding.

23. *Succession of Porter*, 5 Rob. (La.) 96.

As to the hearing generally, see the title "Motions."

24. *Anderson v. Johnson*, 1 Sandf. (N. Y.) 713, 1 Code Rep. 95; *Rogers*

v. Toole, 11 Paige (N. Y.) 212.

[a] Under the alternative clause for other relief, the party obtaining the order cannot obtain further relief which he has not apprised the party in default he intended to ask for. *Rogers v. Toole*, 11 Paige (N. Y.) 212.

25. *Winkelman v. People*, 50 Ill. 449.

[a] Under an alternative clause for other relief not specified, the court may, if the application is opposed, grant such further and other relief as the facts presented show the party is entitled to. *Rogers v. Toole*, 11 Paige (N. Y.) 212.

As to form of orders generally, see *infra*, II.

26. *Cooper v. Galbraith*, 24 N. J. L. 219; *Sixth Avenue R. Co. v. Gilbert E. R. Co.*, 71 N. Y. 430 (the general term has discretion to vacate an order to show cause granted by a judge at chambers, and its discretion is not reviewable); *Stryker v. Churchill*, 39 Misc. 578, 80 N. Y. Supp. 588.

27. *Gray v. Gaither*, 71 N. C. 55; *Messervy v. Messervy*, 79 S. C. 58, 60 S. E. 692. And see *McAuliffe v. Coughlin*, 105 Cal. 268, 38 Pac. 730.

28. *Sixth Avenue R. Co. v. Gilbert E. R. Co.*, 71 N. Y. 430.

29. See 2 STANDARD PROC. 165, 171.

a final judgment, settling some points of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment.³⁰ The codes define an order to be every direction of a court or judge, made or entered in writing and not included in a judgment.³¹

The word "rule" and the word "order" are synonymous terms.³² But there is a wide distinction between an order and a direction for an order,³³ or between an order and an allocatur.³⁴ And strictly speaking, an order is not a judgment or decree,³⁵ although the terms are sometimes used somewhat indiscriminately.³⁶

30. *Loring v. Illsley*, 1 Cal. 24, quoted and characterized in *McGuire v. Drew*, 83 Cal. 225, 232, 23 Pac. 312, as a "correct definition."

[a] For other definitions, see *Craft R. Mach. Co. v. Quinnipiac Brew. Co.*, 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856; *Halbert v. Alford* (Tex.), 16 S. W. 814; 14 STANDARD PROC. 763.

[b] As distinguished from a final judgment, it is the judgment of a court upon any motion or proceeding. *Cal. In re Rose*, 80 Cal. 166, 22 Pac. 86; *Gilman v. Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290. *Idaho*.—*Alexander v. Leland*, 1 Idaho 425. *N. Y.*—*Bentley v. Jones*, 4 How. Pr. 335, 3 Code Rep. 37. See generally the title "Judgments."

[c] Illustrations.—The word rule or order includes, among others, (1) decisions on demurrer (14 STANDARD PROC. 764), (2) decisions settling interrogatories (*Uline v. New York C. & H. R. R. Co.*, 79 N. Y. 175, 53 Am. Rep. 123), (3) commands to lower courts or court officials to do ministerial acts (*Carter v. Louisiana P. E. Co.*, 124 Mo. App. 530, 102 S. W. 6), (4) orders approving guardians' accounts and discharging guardians (*Nicholson v. Nicholson* (Tex. Civ. App.), 125 S. W. 965. See 10 STANDARD PROC. 840), (5) orders allowing claims against estates of decedents (*Smith, Murphy & Co. v. Shawhan*, 37 Iowa 533. See 6 STANDARD PROC. 533), (6) orders issuing mandamus (*People ex rel. Lower v. Donovan*, 18 N. Y. Supp. 501. See the title "Mandamus"), and it has been held (7) writs of attachment (*Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120. See generally the title "Attachment"), but it does not include (8) a ruling during progress of a trial

upon the admissibility of evidence (*McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312), or (9) a direction of a verdict. *De Lendrecie v. Peck*, 1 N. D. 422, 48 N. W. 342.

31. See the statutes, and *U. S.*, *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133, 141. *Cal.*—*Code Civ. Proc.*, §1003; *In re Rose*, 80 Cal. 166, 22 Pac. 86. *Colo.*—*Mallam v. Higgenbotham*, 10 Colo. 264, 15 Pac. 352. *Idaho*.—*Dahlstrom v. Portland M. Co.*, 12 Idaho 87, 85 Pac. 916. *Ia.*—*Berryhill v. Smith*, 51 Iowa 127, 50 N. W. 495; *Smith, Murphy & Co. v. Shawhan*, 37 Iowa 533. *N. Y.*—*Bentley v. Jones*, 4 How. Pr. 335, 3 Code Rep. 37. *N. D.*—*De Lendrecie v. Peck*, 1 N. D. 422, 48 N. W. 342. *Ohio*.—*Myers v. Myers*, 3 Ohio N. P. 162.

[a] The Code definition is not a strict definition. The word "direction," so far as the right of appeal is concerned, can properly be understood to include only mandates on parties or officers, or final determination of rights. *Howard v. Freeman*, 6 Robt. (N. Y.) 511.

32. *Craft R. Mach. Co. v. Quinnipiac Brew. Co.*, 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856; *Carter v. Louisiana P. E. Co.*, 124 Mo. App. 530, 102 S. W. 6.

33. *Aetna Ins. Co. v. Swift*, 12 Minn. 437.

34. *Elwood v. Roof*, 82 N. Y. 428, a special term order directing judgment on account of frivolousness of the answer is an order, not an allocatur.

35. See 14 STANDARD PROC. 763.

36. See *Kremer v. Kremer*, 76 Kan. 134, 90 Pac. 998, 91 Pac. 45; *Moody v. Macomber*, 156 Mich. 76, 120 N. W. 358.

B. KINDS OF ORDERS.—Orders may be by a court or judge,³⁷ may be on motion or by consent,³⁸ and may be final or interlocutory.³⁹

C. HOW OBTAINED.—Orders are obtained by consent or stipulation of the parties,⁴⁰ or by their application.⁴¹ If the court makes an order on its own motion without notice to the parties, its action is erroneous.⁴²

D. DRAWING UP OR PREPARATION.—Generally it is the duty of the clerk to prepare and enter orders in accordance with the decision of the court.⁴³ But sometimes this duty devolves upon the party or his attorney.⁴⁴

E. FORM OF ORDER.⁴⁵—1. Generally.—It is generally required that orders of a court or judge shall be in writing,⁴⁶ and signed by the court or judge.⁴⁷ Under a statute requiring an attestation of

37. See *infra*, II, C.

38. See *infra*, II, C.

39. *Huffman v. Rhodes*, 72 Neb. 57, 100 N. W. 159; *Smith v. Sahler*, 1 Neb. 310; *Sears v. Dunbar*, 50 Ore. 36, 91 Pac. 145.

[a] Test for determining whether an order is final or interlocutory. *Huffman v. Rhodes*, 72 Neb. 57, 100 N. W. 159; *Clark v. Fitch*, 32 Neb. 511, 49 N. W. 374; *Smith v. Sahler*, 1 Neb. 310. See 2 STANDARD PROC. 166.

40. See *Kelly v. Thayer*, 34 How. Pr. (N. Y.) 163; *Crabtree v. Scheelky*, 119 N. C. 56, 25 S. E. 707; *Branch v. Walker*, 92 N. C. 87.

[a] Consent to an order being given, its entry is a matter of course. The formal approval by the judge is not necessary to its validity. Such an order is valid entered out of term on the written stipulation of the parties. *Bell v. Vernooy*, 18 Hun (N. Y.) 125.

[b] Consent Need Not Be in Writing.—*Pecos & N. T. R. Co. v. Cox*, 105 Tex. 40, 143 S. W. 606.

41. See *infra*, this section.

[a] The application for an order is called a motion, which may be made to the court or to the judge at chambers, on notice or ex parte, as the statute permits. See generally the title "Motions."

Orders to show cause as notice of motion, see *supra*, I.

As to what orders may be made at chambers, see generally the title "Judicial Officers."

42. *State v. Parker*, 7 S. C. 235 (will be set aside or vacated); *Farmers' & Mechanics' Bank v. Griffith*, 2 Wis. 443.

43. *Gerity v. Seeger*, 163 N. Y. 119, 57 N. E. 290.

44. *Thompson v. Pippitt*, 18 N. J.

L. 176 (clerk may refuse to enter rule unless applicant prepares it and furnishes a copy); *Wells v. Stackhouse*, 17 N. J. L. 355; *Gerity v. Seeger*, 163 N. Y. 119, 57 N. E. 290.

[a] If he does not do so within a limited time (1), the adverse party may draw up and file the order. *Stafford v. Ambs*, 8 Abb. N. C. (N. Y.) 237 (twenty-four hours); *Whitney v. Belden*, 4 Paige (N. Y.) 140; *Losee v. Dolan*, 74 N. Y. Supp. 685, time computed by hour instead of day where party allowed twenty-four hours to prepare order. (2) An order prepared and entered by the adverse party before the expiration of the time allowed the moving party to draw up and enter the order is merely irregular, but not void. The remedy of the party entitled to prepare such order is to move to vacate the order entered and substitute his own order. *Allen v. Becket*, 84 N. Y. Supp. 1012.

45. See generally 9 STANDARD PROC. 900.

46. *Berryhill v. Smith*, 51 Iowa 127, 50 N. W. 495; *Gerity v. Seeger*, 163 N. Y. 119, 57 N. E. 290; *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707; *Hebron v. Work*, 101 App. Div. 463, 92 N. Y. Supp. 149.

Form of order on demurrer, see 6 STANDARD PROC. 987.

47. Ky.—*Com. v. Lewis' Admr.*, 19 Ky. L. Rep. 170, 39 S. W. 438. La. *Millaudon v. Davis*, 17 La. Ann. 85, holding signature sufficient. N. J. *Perrine v. Broadway Bank*, 53 N. J. Eq. 221, 33 Atl. 404. S. D.—*Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56.

[a] A court order is not defeated by an omission of the signature, if it is proved to have been made. La.

an order by the clerk, an order does not become effective for any purpose until so attested.⁴⁸

Title of Court and Cause. — Orders should be so designated that there can be no mistake as to the cause in which they are entered.⁴⁹ Accordingly they should have a caption,⁵⁰ stating truly the time and place, when and where made,⁵¹ the names of the parties,⁵² and if it is a court order, the term of court,⁵³ or if a judge's order, the name of the judge.⁵⁴

Short Form. — Some statutes provide for a short form of order, made by indorsing or appending the determination of the motion to the motion papers.⁵⁵

Morgan v. Whitesides' Curator, 14 La. 277, when entered in the minutes. *Minn.*—*Leyde v. Martin*, 16 Minn. 38, the entry in the minutes is sufficient evidence of the fact the order was made. *Wis.*—*Baker v. Baker*, 51 Wis. 538, 8 N. W. 289, holding parol evidence of making of order conclusive.

[b] **Orders made in the progress of the trial** need not be signed. *State v. Judge*, 12 La. Ann. 455.

[c] **Signature under the formula "By the Court"** is not conclusive that the order is a court order. *Merriman v. McCormick Harvesting M. Co.*, 86 Wis. 142, 56 N. W. 743.

[d] **Signing Record.**—"The record of the proceedings of a court do not become orders, in the legal sense of that term, until they are signed by the judge, and when he signs the record the whole of that day's proceedings is thereby vitalized, and each order becomes operative at the same moment." *Revill's Heirs v. Claxon's Heirs*, 12 Bush (Ky.) 558. To same effect, see *Com. v. Lewis' Admr.*, 19 Ky. L. Rep. 170, 39 S. W. 438.

48. *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56.

49. *Telfer v. Hoskins*, 32 Ill. 165, placing full title at head of order best practice; but title may be abbreviated.

50. *Whitney v. Belden*, 4 Paige (N. Y.) 140.

[a] **But the caption is no part of the order** and may be disregarded if necessary, and the body of the order examined to determine whether or not it was made by a court or judge. *Phinney v. Broschell*, 80 N. Y. 544, 58 How. Pr. 492 (*affirming* 19 Hun 116); *In re Munson*, 95 App. Div. 23, 88 N. Y. Supp. 509. See *Oaks v. Rodgers*, 48 Cal. 197, "it appearing to me" does not prove that the order was not signed

in open court, it being entitled in court and being under its seal.

[b] **Disregarding Caption.** — If an order made by a judge out of court is entitled as made by a court or vice versa, the caption may be disregarded and the order will be sustained. *Mojarrieta v. Saenz*, 80 N. Y. 553; *Phinney v. Broschell*, 80 N. Y. 544, 58 How. Pr. 492 (*affirming* 19 Hun 116); *In re Munson*, 95 App. Div. 23, 88 N. Y. Supp. 509.

[c] **Absence of a caption** will not be conclusive that the order is a judge's order, if the circumstances show it is not such. *Lawson v. Speer*, 91 App. Div. 411, 86 N. Y. Supp. 915. 51. *Whitney v. Belden*, 4 Paige (N. Y.) 140.

52. See *infra*, this note.

[a] **Omission (1) of name** (*Jones v. Jones*, 6 Leigh [33 Va.] 167), or (2) a mistake in Christian name (*People ex rel. Boylston v. Tarbell*, 17 How. Pr. [N. Y.] 120) will not invalidate the order.

53. *In re Munson*, 95 App. Div. 23, 88 N. Y. Supp. 509; *Roncoroni v. Gross*, 92 App. Div. 366, 86 N. Y. Supp. 1113.

[a] **On stipulation to hear at chambers a motion noticed for a special term**, with the same effect as though heard at special term, the order should be entered as of the special term without referring to the stipulation or noticing that it was heard at chambers. *Kelly v. Thayer*, 34 How. Pr. (N. Y.) 163.

54. *In the Matter of Myers*, 3 How. Pr. (N. Y.) 234.

55. See the statutes, and *Consolidated Agency Co. v. Townsley*, 129 N. Y. Supp. 773.

[a] **The authorization of a "short form order"** does not excuse the omission of recitals determinative of the

2. Recitals.—In addition to the recital of the particular matters ordered or commanded,⁵⁶ some orders are required to recite the facts necessary to give jurisdiction to make the order in question,⁵⁷ and the grounds on which the motion was based.⁵⁸ It is sometimes required that the order specify all the papers used or read on the motion,⁵⁹ except scandalous matter which the court may strike out.⁶⁰ Preliminary and other formal objections taken upon the argument and ruled on by the court,⁶¹ and admissions or stipulations made, and consents given on the hearing of motions, if not reduced to writing⁶² should be incorporated in an order made on motion. And it has been held that facts appearing of record which the moving party asks to have recited in the order, should be recited.⁶³

substantive factors of the issues involved in the proceeding. *Goldsmiths & S. Co. v. Haas*, 76 Misc. 210, 135 N. Y. Supp. 639. As to rentals generally, see *infra*, I, D, 2.

[b] **Sufficient Compliance.**—*Loper v. Wading R. R. Co.*, 143 App. Div. 167, 127 N. Y. Supp. 1000.

56. See the particular titles.

57. *People v. Turner*, 1 Cal. 152, contempt order. But see *Bennett v. State*, 8 Humph. (Tenn.) 118, an order directing the attorney general to file an indictment ex-officio need not show no one would prosecute.

[a] **Notice Given Need Not Be Formally Set Out.**—*Randall v. Duff*, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754.

As to orders for executor's sale, see 6 STANDARD PROC. 562.

58. *Swepson v. Call*, 13 Fla. 337 (order transferring cause); *Melton v. Edwards*, 6 Heisk. (Tenn.) 250.

[a] **Reciting insufficient reason** does not invalidate order. *Arnold v. Kendrick*, 50 Ga. 293.

59. *Hobart v. Hobart*, 85 N. Y. 637; *Davis v. Reflex Camera Co.*, 99 App. Div. 567, 90 N. Y. Supp. 877; *Deutermann v. Pollock*, 36 App. Div. 522, 55 N. Y. Supp. 829.

[a] **What Papers.**—Papers referred to in the opposing affidavit but not submitted to the court on the hearing need not be recited. *Driscoll v. Parker Pen Co.*, 141 N. Y. Supp. 251.

[b] If the order is based on the amended instead of the original complaint, that fact should be stated. *Allen v. Becket*, 84 N. Y. Supp. 1009.

[c] **Affidavits not used on motion** cannot be recited or referred to. *Lord v. Van Gelder*, 16 Misc. 24, 37 N. Y. Supp. 693, 73 N. Y. St. 134.

[d] **Deposition read in opposition** to motion should be specified. *Farmers' Nat. Bank v. Underwood*, 12 App. Div. 269, 42 N. Y. Supp. 500.

[e] **The papers should be so definitely specified** (1) that they can be easily identified and that there may be no confusion or dispute in reference thereto. *Faxon v. Mason*, 87 Hun 139, 32 N. Y. Supp. 802. (2) A recital that the order rested on the referee's report and "all the papers and proceedings in the action" does not satisfy the rule. *Hobart v. Hobart*, 85 N. Y. 637; *Faxon v. Mason*, 87 Hun 139, 32 N. Y. Supp. 802.

60. *Deutermann v. Pollock*, 36 App. Div. 522, 55 N. Y. Supp. 829.

61. *Wollowitz v. New York C. R. Co.*, 116 App. Div. 361, 101 N. Y. Supp. 830 (showing opposition to motion); *In re Directors of Nat. G. Corp.*, 82 App. Div. 593, 81 N. Y. Supp. 853.

[a] **A statement that plaintiff asked leave to file affidavits in reply** is not essential to any right on his part and the court may refuse to insert it. *Cagney v. Fisher*, 34 Hun (N. Y.) 549.

[b] **Omission** (1) is a mere irregularity (*In re Directors of National G. Co.*, 82 App. Div. 593, 81 N. Y. Supp. 853, citing *loc. cit.*), (2) which may be corrected by resettlement. See *infra*, II, F.

62. *Smith v. Grant*, 11 Civ. Proc. 354, 3 N. Y. St. 255.

[a] **Waiver of questions of jurisdiction** to entertain the motion should be shown. *Newhall v. Appleton*, 14 Jones & S. (N. Y.) 6.

63. *Dewsnap v. Matthews*, 118 App. Div. 789, 103 N. Y. Supp. 902, recital that motion was made on behalf of certain persons.

A mere failure to employ the precise language of the statute in an order does not vitiate it, if it speaks the clear intent of the law in regard to the matter to which it relates.⁶⁴

F. SETTLEMENT AND RESETTLEMENT.—On the settlement of an order, where such is the practice, the parties may make suggestions as to the order to be entered, and the court may modify or add to the decision announced by him.⁶⁵

Resettlement.—For the purpose of inserting proper recitals omitted from the order, or of striking out improper recitals included therein, in some jurisdictions, a resettlement of the order,⁶⁶ may be had on a motion,⁶⁷ made on due notice.⁶⁸

G. FILING AND ENTRY.—1. **Necessity for.**—Orders of a judge or court generally must be filed and entered,⁶⁹ although some courts

64. *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446.

65. *Post v. Cobb*, 47 Hun 635, 13 N. Y. St. 555. See *Raymond v. Tiffany*, 115 App. Div. 350, 100 N. Y. Supp. 807.

[a] **Submitting Copy of Order to Adversary.**—If the order is special in its provisions, the party entitled to draw it up should submit a copy to his adversary so that he may propose amendments, and then the draft and the proposed amendments are delivered to the clerk to be settled. *Whitney v. Belden*, 4 Paige (N. Y.) 140. *Compare* II, D.

66. *Wollowitz v. New York C. R. Co.*, 116 App. Div. 361, 101 N. Y. Supp. 830; *In re Bostwick*, 114 App. Div. 199, 99 N. Y. Supp. 925; *Deutermann v. Pollock*, 36 App. Div. 522, 55 N. Y. Supp. 829.

[a] **Where the preliminary objections are not inserted in the order.** *Societe Anonyme D. G. N. B. v. Kahn*, 126 App. Div. 834, 110 N. Y. Supp. 980.

[b] **Where two inconsistent orders are made, a motion for a resettlement is not a proper remedy, but the party should move to vacate the order not in accordance with the decision.** *Feist v. Weingarten Bros.*, 111 N. Y. Supp. 848.

[c] **Effect of Service of Copy of Order on Right.**—*Hayes v. Borden*, 119 N. Y. Supp. 156.

[d] **Effect of Notice of Motion.** If the order which omits certain recitals was obtained on notice to the adverse party, he may move for a resettlement; but if obtained without notice he may move to set the order aside. *Brady v. Lovell*, 29 Misc. 775, 61 N. Y. Supp. 504.

[e] **An appeal will lie if the court or judge erroneously denies the motion**

for a resettlement. *Dewsnap v. Matthews*, 118 App. Div. 789, 103 N. Y. Supp. 902; *Davis v. Reflex Camera Co.*, 99 App. Div. 567, 90 N. Y. Supp. 877; *Deutermann v. Pollock*, 36 App. Div. 522, 55 N. Y. Supp. 829; *Smith v. Grant*, 11 Civ. Proc. 354, 3 N. Y. St. 255.

[f] **The resettled order takes the place of the original order.** *Feist v. Weingarten Bros.*, 111 N. Y. Supp. 848.

67. *Societe Anonyme D. G. N. B. v. Kahn*, 126 App. Div. 834, 110 N. Y. Supp. 980; *Hayes v. Borden*, 119 N. Y. Supp. 156.

68. *Feist v. Weingarten Bros.*, 111 N. Y. Supp. 848, four days' notice is required under the general statute relating to notice of motion.

As to notice of motion generally, see the title "Motions."

69. **Cal.**—*Von Schmidt v. Widher*, 99 Cal. 511, 34 Pac. 109 (it should be filed, if not entered); *Hegeler v. Henckell*, 27 Cal. 491. **Idaho.**—*Sandstrom v. Smith*, 11 Idaho 779, 84 Pac. 1060. **Ill.** *United States L. Ins. Co. v. Shattuck*, 159 Ill. 610, 43 N. E. 389; *Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74. **Ia.**—*Redhead v. Iowa Nat. Bank*, 123 Iowa 336, 340, 98 N. W. 806. **Ky.** *Watkins v. Northern Coal & Coke Co.*, 132 Ky. 700, 116 S. W. 1192 (there can be no orders not on the order book); *Boyd County v. Ross*, 95 Ky. 167, 25 S. W. 8, 44 Am. St. Rep. 210. **N. J.** *Perrine v. Broadway Bank*, 53 N. J. Eq. 221, 33 Atl. 404. **N. Y.**—*People v. Central City Bank*, 53 Barb. 412, 35 How. Pr. 428; *Smith v. Spalding*, 30 How. Pr. 339, 3 Robt. 615. **Okla.**—*St. Louis & S. F. R. Co. v. Taliaferro*, 160 Pac. 610; statute does not distinguish between orders made in court and or-

hold that many *ex parte* orders need not be entered.⁷⁰ The courts, however, differ as to the effect of a failure to enter an order, some hold it is without effect until entry,⁷¹ while others hold that an order proved to have been made is not defeated by failure to enter it of record;⁷² and some even hold that the statute directing entry of orders is directory merely.⁷³

2. When Entered.—*a. Generally.*—The time within which orders should be entered is usually prescribed by statute or rule of court.⁷⁴ It is, of course, most appropriate that orders should be entered immediately,⁷⁵ but if not then entered, they may be entered afterwards.⁷⁶ Orders of court may probably be entered in term or in vacation.⁷⁷

b. Nunc Pro Tunc Entry.—If orders, which are actually made, are not entered through accident, mistake, or neglect, the court may,

ders at chambers. **S. D.**—*Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56. **Tex.** *Blackwood v. Blackwood's Estate* (Tex. Civ. App.), 47 S. W. 483. **Wis.**—*Baker v. Baker*, 51 Wis. 538, 8 N. W. 289.

[a] No special directions are necessary to impose upon the clerk the duty to enter orders of court. *People v. Central City Bank*, 35 How. Pr. (N. Y.) 428, 53 Barb. 412.

70. *Albrecht v. Canfield*, 92 Hun 240, 36 N. Y. Supp. 940, 72 N. Y. St. 323, (but the papers should be filed); *Savage v. Relyea*, 3 How. Pr. (N. Y.) 276, such as an order enlarging time to answer.

71. **U. S.**—*Manning v. Hoeking Valley R. Co.*, 183 Fed. 133, 141. **Nev.**—*Schultz v. Winter*, 7 Nev. 130, orders in vacation have no vitality until delivered to the clerk for filing. **N. Y.** *Smith v. Spaulding*, 30 How. Pr. 339, 3 Robt. 615; *Sage v. Mosher*, 17 How. Pr. 367; *Whitaker v. Desfosse*, 7 Bosw. 678. **Tex.**—*Blackwood v. Blackwood's Estate*, 92 Tex. 478, 49 S. W. 1045.

[a] No action can be taken (1) until it is entered. *Stafford v. Ambbs*, 8 Abb. N. C. (N. Y.) 237. And (2) before entry, no appeal can be taken from it (*Pool v. Safford*, 10 Hun [N. Y.] 497; *Whitaker v. Desfosse*, 7 Bosw. [N. Y.] 678, even though there is a direction at the foot to enter the order), or (3) order to set it aside or vacate it be made. *Stafford v. Ambbs*, 8 Abb. N. C. (N. Y.) 237.

72. **Cal.**—*Niles v. Edwards*, 95 Cal. 41, 30 Pac. 134. **Neb.**—*Dean v. Saunders Co.*, 55 Neb. 759, 76 N. W. 450, before an order is formally entered it may be proved by the clerk's memorandum or the judge's minutes. **S. D.** *Jeansch v. Lewis*, 1 S. D. 609, 48 N.

W. 128, order may be proved by evidence. **Wis.**—*Baker v. Baker*, 51 Wis. 538, 8 N. W. 289.

73. *Kansas City L. R. Co. v. Langley*, 70 Kan. 453, 78 Pac. 858; *Keenan v. Chastain* (Okla.), 164 Pac. 1145 (statute requiring order made out of court to be entered); *Mutual L. Ins. Co. v. Buford* (Okla.), 160 Pac. 928; *St. Louis & S. F. R. Co. v. Taliaferro* (Okla.), 160 Pac. 610. *Contra*, *Blackwood v. Blackwood's Estate* (Tex. Civ. App.), 47 S. W. 483.

74. See the statutes, rules of court, and *infra*, this section.

[a] A failure to comply with a rule of court prescribing the time within which orders shall be entered has been held to render an order a nullity. *Jersey City v. Davis*, 80 N. J. L. 609, 76 Atl. 969; *Sage v. Mosher*, 17 How. Pr. (N. Y.) 367.

[b] **Filing Motion Papers Before Entry.**—See *Losee v. Dolan*, 74 N. Y. Supp. 685; *Albrecht v. Canfield*, 92 Hun 240, 36 N. Y. Supp. 940, 72 N. Y. St. 323; *Bronner v. Loomis*, 17 Hun (N. Y.) 439.

75. *People v. Central City Bank*, 53 Barb. (N. Y.) 412, 35 How. Pr. 428; *St. Louis & S. F. R. Co. v. Taliaferro*, (Okla.), 160 Pac. 610, statute requires orders at chambers to be entered forthwith.

[a] **Entry during session of court** is not required. *People v. Myers*, 2 Hun (N. Y.) 6.

76. **As to nunc pro tunc entries**, see *infra*, II, G, 2, b.

77. *People v. Congleton*, 44 Cal. 92 (entering order in vacation works no substantial injustice); *Schultz v. Winter*, 7 Nev. 130.

at a subsequent term, even after the lapse of considerable time, upon proper evidence of their rendition, order them to be entered nunc pro tunc when necessary to sustain proceedings had in good faith and otherwise unexceptional.⁷⁸ But a nunc pro tunc order cannot be made to supply an omission to make an order,⁷⁹ to amend or change an order actually made,⁸⁰ or to give validity to an order and the proceedings had thereunder which are void for want of jurisdiction.⁸¹ But it has been stated that where the making of an order is a mere ministerial duty or a matter of course and the duty is delayed or neglected, it may be supplied nunc pro tunc.⁸²

Proceedings To Obtain. — The court has power to correct the record

78. U. S.—*Ex parte* Buskirk, 72 Fed. 14, 20, 18 C. C. A. 410, 416. **Ala.**—*Ex parte* Humes, 130 Ala. 201, 30 So. 732. **Ariz.**—Southern Pac. Co. v. Pender, 14 Ariz. 573, 134 Pac. 289. **Ark.**—Liddell v. Bodenheimer, Landau & Co., 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42. **Cal.**—Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; *In re* Skerrett, 80 Cal. 62, 22 Pac. 85. **Ga.**—Pendergrass v. Duke, 92 S. E. 649. **Ill.**—Devine v. Gilmore, 192 Ill. App. 625; Finch v. Finch, 111 Ill. App. 481. **Ind.**—Wilson v. Vance, 55 Ind. 394. **Kan.**—Graden v. Mais, 83 Kan. 481, 112 Pac. 107. **Mass.**—Perkins v. Perkins, 225 Mass. 392, 114 N. E. 713. **Mo.**—State v. Jeffors, 64 Mo. 376; Hyde v. Curling, 10 Mo. 359. **N. J.**—Thompson v. Pippitt, 18 N. J. L. 176. **N. Y.** People v. Central City Bank, 53 Barb. 412, 35 How. Pr. 428. **Ore.**—National Council v. McGinn, 70 Ore. 457, 138 Pac. 493; Grover v. Hawthorne Est., 62 Ore. 65, 116 Pac. 100, 121 Pac. 804. **Wash.**—State *ex rel.* Gordon v. Langley, 13 Wash. 636, 43 Pac. 875. **W. Va.** Payne v. Riggs, 92 S. E. 133; Clifford v. Martinsburg, 78 W. Va. 287, 88 S. E. 845; Vance v. Ravenswood, S. & G. R. Co., 53 W. Va. 338, 44 S. E. 461.

[a] **Notwithstanding the Pendency of the Case on Writ of Error.**—Scott v. Newell, 69 W. Va. 118, 70 S. E. 1092.

[b] **Effect of Nunc Pro Tunc Order.**—A nunc pro tunc order is retroactive (Stampfle v. Bush, 71 W. Va. 659, 77 S. E. 283), (2) and eliminates the former order (Stampfle v. Bush, 71 W. Va. 659, 77 S. E. 283), but (3) the court may consider the nunc pro tunc order as of the date of its entry for certain purposes (Stampfle v. Bush, 71 W. Va. 659, 77 S. E. 283), to (4) ascertain the particulars in which it varies

from the former order, and if variant to ascertain what occurred on the day of its actual date.

79. U. S.—Klein v. Southern Pac. Co., 140 Fed. 213; *Ex parte* Buskirk, 72 Fed. 14, 20, 18 C. C. A. 410, 416. **Ariz.**—Southern Pac. Co. v. Pender, 14 Ariz. 573, 134 Pac. 289. **Ga.**—Pendergrass v. Duke, 92 S. E. 649. **Ill.**—Lindauer v. Pease, 192 Ill. 456, 61 N. E. 454; Stafford v. Vacek, 192 Ill. App. 237. **Ind.**—Wilson v. Vance, 55 Ind. 394. **Mo.**—State v. Jeffors, 64 Mo. 376; Turner v. Christy, 50 Mo. 145. **N. Y.** See Shames v. Barrett, 166 N. Y. Supp. 756. **Ore.**—White v. East Side M. & L. Co., 84 Ore. 224, 161 Pac. 969, 164 Pac. 736; National Council v. McGinn, 70 Ore. 457, 138 Pac. 493; Grover v. Hawthorne Est., 62 Ore. 65, 116 Pac. 100, 121 Pac. 804. **W. Va.**—Payne v. Riggs, 92 S. E. 133.

80. Pendergrass v. Duke (Ga.), 92 S. E. 649; White v. East Side Mill Co., 84 Ore. 224, 161 Pac. 969, 164 Pac. 736; Lombard v. Wade, 37 Ore. 426, 61 Pac. 856.

81. Davis Colliery Co. v. Charlevoix Sugar Co., 155 Mich. 228, 118 N. W. 929; Eslow v. Albion, 32 Mich. 193, to give validity to a chamber order which could be made in open court only.

82. Cal.—*In re* Skerrett, 80 Cal. 62, 22 Pac. 85. **Mass.**—Perkins v. Perkins, 225 Mass. 392, 114 N. E. 713, a function of a nunc pro tunc order is to prevent a failure of justice resulting from delay in court proceedings subsequent to a time when an order would have been entered except that the cause was then under advisement. **N. J.** See St. Vincent's Church v. Madison, 86 N. J. L. 567, 92 Atl. 348. **Wash.** State *ex rel.* Gordon v. Langley, 13 Wash. 636, 43 Pac. 875.

on its own motion;⁸³ but ordinarily the court will require notice of motion to be given to the parties interested,⁸⁴ which motion the court will determine without intervention of a jury.⁸⁵ The courts, however, are in conflict as to the evidence of the order which will authorize such an entry, some requiring some record evidence,⁸⁶ while others require only clear and convincing evidence.⁸⁷

3. Manner of Entering Orders.—Filing the order with the clerk is a sufficient entry.⁸⁸ A statute requiring a judge to enter an order is complied with where the clerk enters it,⁸⁹ and although statute requires the judge to sign the minutes at the close of the term, a failure to do so does not invalidate the orders.⁹⁰

H. SERVICE OF ORDER.⁹¹—**1. Necessity for.**—While in some jurisdictions, parties when once in court must take notice of all orders in the cause,⁹² in other jurisdictions, the party obtaining an order in

83. *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

[a] **At chambers, the court cannot order a clerk to enter nunc pro tunc an order alleged to have been made in open court.** *Hegeler v. Henckell*, 27 Cal. 491.

84. *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

85. *Lewis v. Armstrong*, 64 Ga. 645.

86. **Cal.**—*Hegeler v. Henckell*, 27 Cal. 491; *Branger v. Chevalier*, 9 Cal. 172. **Ill.**—*Wesley Hospital v. Strong*, 233 Ill. 153, 84 N. E. 205, 122 Am. St. Rep. 163; *Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242. **Ky.**—*Lancaster E. L. Co. v. Taylor*, 168 Ky. 179, 181 S. W. 967. **Mo.**—*Hansbrough v. Fudge*, 80 Mo. 307; *State v. Jeffers*, 64 Mo. 376. **Ohio.**—*Ludlow's Heirs v. Johnston*, 3 Ohio 553, 17 Am. Dec. 609.

[a] **The record should show the facts which authorize the entry.** *Hegeler v. Henckell*, 27 Cal. 491; *Turner v. Christy*, 50 Mo. 145; *Hyde v. Curling*, 10 Mo. 359.

[b] **Evidence Aliunde Cannot Be Resorted to.**—*Wesley Hospital v. Strong*, 233 Ill. 153, 84 N. E. 205, 122 Am. St. Rep. 163; *Tynan v. Weinhard*, 153 Ill. 595, 38 N. E. 1014; *State v. Jeffers*, 64 Mo. 376.

[c] **A private memorandum by counsel will not authorize the entry of the nunc pro tunc order.** *Wesley Hospital v. Strong*, 233 Ill. 153, 84 N. E. 205, 122 Am. St. Rep. 163.

87. *Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527; *Shea v. Mabry*, 1 Lea (Tenn.) 319.

[a] Which may be either (1) parol or in writing (**Ark.**—*Liddell v. Bodenheimer*, *Landau & Co.*, 78 Ark. 364, 95

S. W. 475, 115 Am. St. Rep. 42. **Kan.** *Graden v. Mais*, 83 Kan. 481, 112 Pac. 107; *Aydelotte v. Brittain & Co.*, 29 Kan. 98. **Tenn.**—*Shea v. Mabry*, 1 Lea 319, 327), or (2) the recollection of the judge. *Shea v. Mabry*, 1 Lea (Tenn.) 319, 327.

88. **Cal.**—*Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109. See *Niles v. Edwards*, 95 Cal. 41, 34 Pac. 134. **N. Y.** *Vilas v. Page*, 106 N. Y. 439, 455, 13 N. E. 743, where clerk indorsed date of filing. **Wis.**—*Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902, where the clerk entered the substance of the order in his minute book but had not yet entered it in full in the order book.

[a] **Filing with a special deputy is sufficient.** *Ehret v. George Ringler & Co.*, 144 App. Div. 480, 129 N. Y. Supp. 551.

89. *State v. Walsh*, 44 La. Ann. 1122, 11 So. 811.

90. *McCrea v. Haraszthy*, 51 Cal. 146.

91. See generally the title "Service of Process and Papers."

92. **Ala.**—*Yonge v. Broxson*, 23 Ala. 684. **Ill.**—*Smith v. Brittenham*, 98 Ill. 188. **Md.**—*Whelan v. Cook*, 29 Md. 1; *Smith's Exrs. v. Anderson*, 18 Md. 520, parties are chargeable with notice of court's orders passed in term time. **Tex.**—*Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668. **Wash.**—*Williams & Co. v. Miller & Co.*, 1 Wash. Ter. 88.

[a] **The party moving for a rule or order is chargeable with knowledge of the ruling made upon it.** *Cross v. Stevens*, 45 Kan. 443, 25 Pac. 880; *Willink v. Renwick*, 22 Wend. (N. Y.) 608; *Mottram v. Mills*, 1 Sandf. (N. Y.) 671.

an action must serve a copy of it in all cases where the rights of the other party may be affected by any proceedings under the order.⁹³

2. Manner of Service.—All orders which do not require personal service,⁹⁴ may be served by delivering, to the attorney of the adverse party,⁹⁵ a copy of the order,⁹⁶ with the affidavit on which it is based under some statutes,⁹⁷ without producing or showing the original order.⁹⁸ Statutes sometimes authorize service by mail.⁹⁹

3. Time of Service.—The service of a copy of the order should not be made before the filing of the order.¹

I. CONSTRUCTION.—The court speaks by its order, and effect must be given to it according to its terms.² The opinion filed with it may be referred to to find out on what ground the order is based.³

Right of intervener to notice of orders, see 14 STANDARD PROC. 331.

93. *Harwood v. Smethurst*, 31 N. J. L. 502 (rule to bring a case to hearing) — *v. Dill*, 6 N. J. L. 168 (rule to plead); *Johnston v. Green*, 3 Abb. Pr. N. S. (N. Y.) 342.

[a] **Even though opposite attorney is present** in court when the rule or order is made. *Harwood v. Smethurst*, 31 N. J. L. 502; — *v. Dill*, 6 N. J. L. 168.

[b] **Orders at chambers** are of no effect until served on the opposite party or his attorney. *Spaulding v. Milwaukee & H. R. Co.*, 11 Wis. 157.

[c] **But a rule of court requiring service of orders** may be suspended or particular cases may be excepted from its operation. *Sullivan v. Wallace*, 73 Cal. 307, 14 Pac. 789.

[d] **Notice of a rule which is of course** need not be given. Anonymous 3 Wend. (N. Y.) 424.

94. *Gross v. Clark*, 1 Civ. Proc. (N. Y.) 17 (such as an order on contempt); *Bridgman v. Gregory*, 19 Wend. (N. Y.) 9.

[a] **To bring a party into contempt**, the order which he is charged with violating must be personally served on him, by delivering him a copy and at the same time exhibiting to him the original. *McCauley v. Palmer*, 40 Hun 38, 9 Civ. Proc. (N. Y.) 390.

As to orders on contempt, see 5 STANDARD PROC. 394.

95. *Flynn v. Bailey*, 50 Barb. (N. Y.) 73; *Johnston v. Green*, 3 Abb. Pr. N. S. (N. Y.) 342; *Merritt v. Annan*, 7 Paige (N. Y.) 151.

[a] **Service on a person in charge of an attorney's office**, the latter being absent or in an adjacent room, is suffi-

cient, especially where the attorney actually receives the copy of the order. *Gross v. Clark*, 1 Civ. Proc. (N. Y.) 17.

96. *Perrine v. Broadway Bank*, 53 N. J. Eq. 221, 33 Atl. 404; *Bridgman v. Gregory*, 19 Wend. (N. Y.) 9 (order for bill of particulars); *Cheetham v. Lewis*, 2 Johns. (N. Y.) 104; *Johnston v. Green*, 3 Abb. Pr. N. S. (N. Y.) 342.

[a] **Service of notice of order** merely is not sufficient. *Cheetham v. Lewis*, 2 Johns. (N. Y.) 104.

[b] **Certified copy** must be served. *Snediker v. Quick*, 13 N. J. L. 245; *Perrine v. Broadway Bank*, 53 N. J. Eq. 221, 33 Atl. 404; *New York v. Conover*, 5 Abb. Pr. (N. Y.) 244.

97. See the statutes.

[b] **Failure to deliver the affidavit** does not authorize a disobedience of the order. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204.

98. *Gross v. Clark*, 1 Civ. Proc. (N. Y.) 17.

99. See the statutes, and *Stacy v. Jefferson*, 69 Wis. 215, 34 N. W. 87 (holding that the wrapper contained no direction for return in case of non-delivery as required was sufficiently proved); *Wallace v. Wallace*, 13 Wis. 224; also generally the title "**Service of Process and Papers**."

1. *Aetna Ins. Co. v. Swift*, 12 Minn. 437, irregularity which may be waived.

2. *Fisher v. Gould*, 81 N. Y. 228.

[a] **Orders which grant a party a favor** or give him leave to do some act on prior performance of some condition, are permissive and conditional and not mandatory. *Neill v. Wuest*, 17 Abb. Pr. (N. Y.) 319.

3. *Fisher v. Gould*, 81 N. Y. 228.

[a] **But not to qualify its operation and effect.** *Fisher v. Gould*, 81

J. EFFECT AND CONCLUSIVENESS. — 1. Generally. — Interlocutory orders, within the jurisdiction of a court, are binding authority so long as they remain in force as to all matters embraced therein.⁴

An order which is not void, but merely irregular, is binding until vacated or set aside;⁵ but a void order is without effect.⁶

2. Conclusiveness of Recitals. — Recitals in an order are presumptive evidence of their truth;⁷ but are not conclusive.⁸

3 Application of Doctrine of Res Judicata. — The doctrine of res judicata in its strict sense does not apply to interlocutory orders of a court or judge.⁹ But orders affecting substantial rights of the

N. Y. 228; *Hewlett v. Wood*, 67 N. Y. 394. As to effect, see generally *infra*, 11, J.

4. *Ryon v. Thomas*, 104 Ind. 59, 3 N. E. 653; *Lawton v. Perry*, 45 S. C. 319, 23 S. E. 53.

[a] **Final (1) as between the parties on another application** on the same state of facts (**U. S.**—*Akerly v. Vilas*, 3 Biss. 332, 1 Fed. Cas. No. 120. *Kan.*—*Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594. *Minn.*—*Griffin v. Jorgenson*, 22 Minn. 92. **N. Y.**—*Simson v. Hart*, 14 Johns. 63, 76; *Jay v. DeGroot*, 2 Hun 205, 4 Thomp. & C. 670; *Banks v. American Tract Society*, 4 Sandf. Ch. 438), (2) unless leave be granted or obtained to present the same matters again for reconsideration and decision. As to renewal of motion see the title “**Motions.**” (3) But it does not conclude persons who are not parties or privies to the proceeding in which the order is rendered (*Clark’s Case*, 15 Abb. Pr. [N. Y.] 227; *Acker v. Ledyard*, 8 Barb. [N. Y.] 514. See generally the title “**Res Judicata**”), (4) though it will bind any person allowed to appear and be heard as if he had been named a party. *Schrauth v. Dry Dock Sav. Bank*, 8 Daly (N. Y.) 106; *Jay v. DeGroot*, 2 Hun (N. Y.) 205, 4 Thomp. & C. 670. *Contra*, *Acker v. Ledyard*, 8 Barb. (N. Y.) 514.

[b] **A consent order binds only** those consenting to it. *Hergel v. Laitenberger*, 2 Tenn. Ch. 251.

[c] **How Long Order Continues in Force.**—(1) All orders made on interlocutory applications are superseded by the judgment in the case. *Wood v. Wood*, 7 Lans. (N. Y.) 204. (2) It has been held that an order which does not limit the time within which the act directed must be done, continues in force so long as the cause for making it exists and the thing directed remains unaccomplished. *State v. Cross*,

2 *Humph. (Tenn.)* 301. (3) But an order directing a certain act within a stated time is in force for the time limited and not afterward. *Pflaum v. Grinberg*, 5 Heisk. (Tenn.) 215 citing local cases.

5. **Cal.**—*Rowe v. Blake*, 112 Cal. 637, 44 Pac. 1084. **D. C.**—*Anderson v. Smith*, 2 Mackey 1. **N. Y.**—*Hunt v. Wallis*, 6 Paige 371; *Wilcox v. Harris*, 59 How. Pr. 262. **S. C.**—*Earle v. Stokes*, 5 S. C. 336.

6. *Blanchard v. Williamson*, 70 Ill. 647; *Kelner v. Cowden* (W. Va.), 55 S. E. 649, cannot be made valid by lapse of time.

7. **N. Y.**—*Smith v. Grant*, 11 Civ. Proc. 354, 3 N. Y. St. 255. **N. C.**—*Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130. **Wis.**—*Priest v. Varney*, 64 Wis. 500, 25 N. W. 551, recitals must be regarded as verities in the absence of a bill of exceptions showing otherwise.

[a] **A recital that an order is made by consent** binds the appellate court. *Henry v. Hilliard*, 120 N. C. 479, 484, 27 S. E. 130.

8. *Smith v. Grant*, 11 Civ. Proc. 354, 3 N. Y. St. 255. *Compare American W. & P. Co. v. Superior Court*, 19 Cal. App. 497, 126 Pac. 497, a general order on a motion of a court of general jurisdiction imports absolute verity. The plain import of its language cannot be contradicted.

[a] **A recital “by this court”** in an order signed by the judge may be treated as surplusage. *In re Newman’s Est.*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

9. **U. S.**—*Akerly v. Vilas*, 3 Biss. 332, 1 Fed. Cas. No. 120. **Cal.**—*Bowers v. Cherokee Bob*, 46 Cal. 279; *Ford v. Doyle*, 44 Cal. 635; *Lawson v. Lawson*, 15 Cal. App. 496, 115 Pac. 461, 464; *German Sav. & L. Society v. Alldrich*, 5 Cal. App. 215, 89 Pac. 1063.

parties, from which an appeal lies, are as conclusive on the issue decided as final judgments if the matter in question is fully tried.¹⁰

K. AMENDMENT AND VACATION OF ORDERS.—1. Of Orders on Motion.—a. In General.—A trial court has complete control over its orders with power to vacate or modify them during the term at which they are made;¹¹ but as a general rule it has no such power

Colo.—Reeves & Co. v. Best, 13 Colo. App. 225, 56 Pac. 985. **Kan.**—Comrs. of Wilson County v. McIntosh, 30 Kan. 234, 1 Pac. 572; Benz v. Hines, 3 Kan. 390, 89 Am. Dec. 594. **Minn.**—Carlson v. Carlson, 49 Minn. 555, 52 N. W. 214. **Neb.**—Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151; Tiernan v. Miller, 69 Neb. 764, 96 N. W. 661; Perry v. Baker, 61 Neb. 841, 86 N. W. 692, overruling Marvin v. Weider, 31 Neb. 774, 48 N. W. 825. **N. Y.**—Easton v. Pickersgill, 75 N. Y. 599 (orders on special motions); Belmont v. Erie R. Co., 52 Barb. 637. **N. D.**—Clopton v. Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749. **S. C.**—Gregory v. Perry, 66 S. C. 455, 45 S. E. 4. **S. D.**—Fisk v. Hicks, 29 S. D. 399, 137 N. W. 424, Ann. Cas. 1914D, 971.

See the title “Res Judicata.”

[a] Although (1) an order on a contested motion is not regarded as conclusive in the same sense as judgments, yet the court should not disregard such orders when called upon to pass upon substantially the same question at another time in the same action. Dawson v. Parsons, 16 Misc. 190, 38 N. Y. Supp. 1000. (2) But rules to prevent repeated applications on the same point are for orderly conduct of business and are not founded on the principal of res judicata. Simson v. Hart, 14 Johns. (N. Y.) 63, 76; Smith v. Spaulding, 30 How. Pr. (N. Y.) 339, 3 Robt. 615.

10. **Ga.**—Gwinn v. Gwinn, 145 Ga. 481, 89 S. E. 574, the motion was not heard on the merits and was not res judicata. **Kan.**—Comrs. of Wilson County v. McIntosh, 30 Kan. 234, 1 Pac. 572. **Minn.**—Halvorsen v. Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320; Fitterling v. Weleh, 76 Minn. 441, 79 N. W. 500. **Neb.**—Sheibley v. Cooper, 79 Neb. 236, 113 N. W. 626. **N. Y.** See Riggs v. Pursell, 74 N. Y. 370. **Okla.**—See Rogers v. McCord-Collins M. Co., 19 Okla. 115, 91 Pac. 864, where an order is made denying a motion to quash service of summons and a final judgment is rendered, the order

becomes res judicata. **S. D.**—Fisk v. Hicks, 29 S. D. 399, 137 N. W. 424, Ann. Cas. 1914D, 971. **Wis.**—See Merriam v. McCormick H. M. Co., 86 Wis. 142, 56 N. W. 743, a court order not appealed from is res judicata.

11. **U. S.**—In re Rochester Sanitarium & Baths Co., 222 Fed. 22, 137 C. C. A. 560; Standard S. & L. Assn. v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393, at any time before the close of the term at which the final decree is enrolled. **Cal.**—Page v. Page, 77 Cal. 83, 19 Pac. 183 (of order of dismissal before entry of final judgment); Dent v. Superior Court, 7 Cal. App. 683, 95 Pac. 672. **Ga.**—McCandless v. Conley, 115 Ga. 48, 41 S. E. 256. **Ill.**—Estate of Seiter v. Mowe, 182 Ill. 351, 55 N. E. 526; People v. Colvin, 165 Ill. 67, 46 N. E. 14; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133. **Ia.** Holtz v. Smith-Morgan Print. Co., 150 Iowa 91, 129 N. W. 328. **Kan.**—Mudge v. Hull, 56 Kan. 314, 43 Pac. 242. **Minn.** Weiser v. St. Paul, 86 Minn. 26, 90 N. W. 8; Beckett v. Northwestern Masonic Aid Assn., 67 Minn. 298, 69 N. W. 923, before expiration of time to appeal. **Mo.**—State v. Webb, 74 Mo. 333; Mitchell v. Greeley, 174 Mo. App. 250, 156 S. W. 754. **N. Y.**—Bigelow v. Heaton, 2 How. Pr. 207; Belmont v. Erie R. Co., 52 Barb. 637. **N. D.**—Clopton v. Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749. **Okla.**—Philip Carey Co. v. Vickers, 38 Okla. 643, 134 Pac. 851. **S. C.**—Cummings v. Wingo, 31 S. C. 427, 10 S. E. 107. **Tex.**—Henningsmeyer v. First State Bank, 195 S. W. 1137; Bartley v. Conn, 4 Tex. Civ. App. 299, 23 S. W. 382; Seaton v. Brooking, 1 White & W. Civ. Cas., §1041. **Wis.**—Servatius v. Pickel, 30 Wis. 507; Hungerford v. Cushing, 2 Wis. 416.

[a] Independently of Statute.—Dietz v. Farish, 11 Jones & S. (N. Y.) 87.

[b] Power Is Broad.—Price v. Price, 22 Abb. N. C. 299, 50 Hun 603, 2 N. Y. Supp. 796.

after the term.¹² If there are no terms of court, this limitation will not apply.¹³ If the statute limits the time within which an order may be set aside, the court has no power to set it aside after a lapse of the time specified.¹⁴

b. *Effect of Remedy by Appeal.*—It has been held that the remedy by appeal precludes a motion to set aside an order;¹⁵ but some courts hold them alternative remedies.¹⁶

Orders as res judicata, see *supra*, II, J, 3.

As to renewal of motions, see the title "Motions."

As to rehearing of order, see *infra*, II, L.

Vacating orders changing venue in criminal cases, see 4 STANDARD PROC. 993.

12. **U. S.**—Born *v. Schneider*, 128 Fed. 179. **Ark.**—Walsh *v. Hampton*, 96 Ark. 427, 132 S. W. 214. **Ky.**—Turner *v. Johnson*, 18 Ky. L. Rep. 202, 35 S. W. 923. **Mo.**—State *ex rel. Lentz v. Fort*, 178 Mo. 518, 77 S. W. 741. **Ohio.**—Van Camp *v. McCulley*, 89 Ohio St. 1, 104 N. E. 1004. **S. C.**—Cummings *v. Wingo*, 31 S. C. 427, 10 S. E. 107. **Va.**—Brown *v. Carolina, C. & O. R. Co.*, 116 Va. 597, 83 S. E. 981.

But see *In re Fisher*, 15 Wis. 511, holding a county court sitting as a court of probate may, "at any time," revoke an order made irregularly or procured by fraud.

[a] An attempt to reserve power over an order after the expiration of the term is a nullity. Turner *v. Johnson*, 18 Ky. L. Rep. 202, 35 S. W. 923.

[b] **Exceptions.**—(1) If the case has not been finally disposed of at the prior term (**U. S.**)—Calaf *v. Fernandez*, 239 Fed. 795, 152 C. C. A. 531. **Conn.**—Purdy *v. Watts*, 91 Conn. 214, 99 Atl. 496. **Ind.**—Ryon *v. Thomas*, 104 Ind. 59, 3 N. E. 653. **Mass.**—Park *v. Johnson*, 7 Allen 673. **Mich.**—Hews *v. Hews*, 145 Mich. 247, 108 N. W. 604. **Miss.**—Pattison *v. Josselyn*, 43 Miss. 373. **Mo.**—Mitchell *v. Greeley*, 174 Mo. App. 250, 156 S. W. 754. **Neb.**—Follmer *v. State*, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151. **N. H.**—Freeze *v. Marston*, 5 N. H. 220. **N. C.**—Welch *v. Kingsland*, 89 N. C. 179; Shinn *v. Smith*, 79 N. C. 310; Long *v. Cole*, 74 N. C. 267. **S. C.**—Tindal *v. Tindal*, 1 S. C. 111. **Tenn.**—Connor *v. Prierson*, 98 Tenn. 193, 38 S. W. 1031. Compare McCandless *v. Conley*, 115 Ga. 48, 41 S. E. 256), or (2) the order is

void (Walsh *v. Hampton*, 96 Ark. 427, 132 S. W. 214; Kerns *v. Morgan*, 11 Idaho 572, 581, 83 Pac. 954), or (3) there is a statute authorizing it (see generally the statutes, and Hawkins *v. Hawkins* [Okla.] 153 Pac. 844, substantial compliance essential. Compare Godfrey *v. Cunningham*, 77 Neb. 462, 109 N. W. 765; Huffman *v. Rhodes*, 72 Neb. 57, 100 N. W. 159, an interlocutory order may be set aside at a subsequent term by the same court without a compliance with the statute), the order may be set aside after the term.

[c] **Where the motion is continued to the next term**, the court has power to act on it and vacate the order. Mitchell *v. Greeley*, 174 Mo. App. 250, 156 S. W. 754.

13. *In re Rochester Sanitarium & Baths Co.*, 222 Fed. 22, 137 C. C. A. 560.

[a] **In bankruptcy**, there are no separate terms, and any order made in the progress of the cause may be subsequently set aside, provided rights have not become vested under it which will be disturbed by its vacation. Sandusky *v. National Bank*, 23 Wall. (U. S.) 289, 23 L. ed. 155; *In re Rochester Sanitarium & Baths Co.*, 222 Fed. 22, 137 C. C. A. 560. See generally the title "Bankruptcy."

14. **Cal.**—Dunsmuir *v. Coffey*, 148 Cal. 137, 82 Pac. 682. **Minn.**—Griffin *v. Jorgenson*, 22 Minn. 92. **Mont.**—State *ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 32 Mont. 20, 79 Pac. 410. **Wash.**—Greene *v. Williams*, 13 Wash. 674, 43 Pac. 938.

15. San Jose *v. Fulton*, 45 Cal. 316.

[a] **The rule in the text** applies only to orders regularly made. It does not apply to ex parte orders taken at the instance of an intruder in the case. San Jose *v. Fulton*, 45 Cal. 316.

16. West Side Bank *v. Pugsley*, 47 N. Y. 368; Wilkinson *v. Tiffany*, 4 Abb. Pr. (N. Y.) 98; Clifton *v. Clifton*, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749.

[a] **An appeal from the order does**

c. *What Court or Judge May Vacate or Amend.* — Unless a statute provides otherwise,¹⁷ one judge has no power ordinarily to review and reverse an order of a coordinate judge.¹⁸ An order made by a court, however, is the order of the court, not of the particular judge, and it may be later reviewed by the court although its personnel may have changed.¹⁹

d. *Proceedings.* — (I.) *In General.* — The statutes providing for vacation and amendment of orders should be complied with.²⁰ A court may usually vacate or modify its orders on its own motion,²¹ or it may do so on application of a party by motion,²² although a

not deprive the court of jurisdiction to amend it. *Kelly v. Chicago & N. W. Ry. Co.*, 70 Wis. 335, 35 N. W. 538.

17. See generally the statutes and *infra*, II, K, 1, e.

Vacation by court of orders made by a judge, see *infra*, II, K, d, (I).

[a] Under a statute authorizing a court to relieve from orders taken against a party through his mistake, or neglect, any court may grant relief. *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153.

18. *Mont.*—State *ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753, especially where order may be reviewed on appeal. *N. Y.*—*Bolles v. Duff*, 56 Barb. 567; *Dinkelspiel v. Levy*, 12 Hun 130; *Elias v. Coleman*, 89 Misc. 289, 153 N. Y. Supp. 573. *S. C.*—*Beckwith v. Martin*, 98 S. C. 183, 82 S. E. 414; *Devereux v. McCrady*, 53 S. C. 387, 31 S. E. 294. *Compare Williams, Black & Co. v. Connor*, 14 S. C. 621.

[a] *Exception (1) to this rule exists* where the particular order was made without jurisdiction (*State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753; *Kamp v. Kamp*, 59 N. Y. 212), or (2) where the order is a mere default order. *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y.) 253. See also *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153.

19. *Conn.*—*Purdy v. Watts*, 91 Conn. 214, 99 Atl. 496. *Neb.*—*Follmer v. State*, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151; *Tiernan v. Miller*, 69 Neb. 764, 96 N. W. 661; *Perry v. Baker*, 51 Neb. 841, 86 N. W. 692. *N. Y.*—*Belmont v. Erie Ry. Co.*, 52 Barb. 637, 652; *Selden v. Christophers*, 1 Abb. Pr. 272; *Price v. Price*, 22 Abb. N. C. 299, 50 Hun 603, 2 N. Y. Supp. 796. *S. C.*—*Perry v. Williams*, 1 Bailey L. 10.

Compare State ex rel. Mannix v. District Court, 51 Mont. 310, 152 Pac. 753.

[a] A judge cannot amend an order by incorporating matters not passed upon by the court making it, however. *Wingrove v. German Sav. Bank*, 2 App. Div. 479, 37 N. Y. Supp. 1092, 74 N. Y. St. 273.

20. *Hawkins v. Hawkins* (Okla.), 153 Pac. 844. *Compare Godfrey v. Cunningham*, 77 Neb. 462, 109 N. W. 765; *Huffman v. Rhodes*, 72 Neb. 57, 100 N. W. 159.

[a] *Leave of Court.*—A motion to vacate a rule denying a motion is in effect a renewal of the motion and leave of court is required. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, 646; *Mitchell v. Allen*, 12 Wend. (N. Y.) 290. As to renewal of motions generally, see the title "Motions."

21. *Ark.*—*Killian v. State*, 72 Ark. 137, 78 S. W. 766, order granting license to attorney to practice law. *Cal. Ex parte Hartman*, 44 Cal. 32; *Hall v. Polack*, 42 Cal. 218, order prematurely made before submission of motion. *Ind. Ryon v. Thomas*, 104 Ind. 59, 3 N. E. 653. *Okla.*—*St. Louis, I. M. & S. Ry. Co. v. Lowrey*, 160 Pac. 716.

[a] *Without the presence of the parties*, especially the party to be bound by the change, the court cannot modify its order on its own motion. *Simmons v. Simmons*, 32 Hun (N. Y.) 551.

[b] A void order may be vacated by the court on its own motion. *Kerns v. Morgan*, 11 Idaho 572, 581, 83 Pac. 954; *Persing v. Reno Stock B. Co.*, 30 Nev. 342, 96 Pac. 1054.

22. *Cal.*—*Ex parte Hartman*, 44 Cal. 32. *N. Y.*—*Adams v. Ash*, 46 Hun 105, 11 N. Y. St. 618. *Ohio.*—*Fowble v. Walker*, 4 Ohio 64. *Tenn.*—*Connor v. Frierson*, 98 Tenn. 183, 38 S. W. 1031.

And see *infra*, this section.

[a] *On the denial of a motion to set aside a judgment*, a court cannot insert a clause in its order vacating an

formal application and order of vacation is not always necessary.²³

Statutes sometimes provide that an order made out of court without notice may be vacated or modified without notice by the judge who made it,²⁴ or on motion after notice by the court or judge;²⁵ but no order made on notice shall be vacated or modified but by the court.²⁶ And it is sometimes provided that the court may on such terms as are just, after notice to the adverse party, relieve a party from an order taken against him through his mistake, inadvertence, surprise or excusable neglect on timely application.²⁷ An affidavit of merits is sometimes required.²⁸

(II.) **Hearing and Determination.** — The general rules regarding the hearing and decision of motions apply to motions to vacate and amend orders.²⁹ It is within the sound discretion of the court or judge hearing the motion whether or not an application to vacate or modify an order shall be granted.³⁰ But only such relief should be granted

ex parte order extending the time of performance of the judgment. This order is not before the court. *Adams v. Ash*, 46 Hun 105, 11 N. Y. St. 618.

[b] **Asking Relief Beyond Vacation.**—It is not improper in a motion to open an order to ask also for such other relief as the party deems himself entitled to. *Andrews v. Cross*, 17 Abb. N. C. (N. Y.) 92, citing local cases. As to relief granted, see *infra*, II, K, 1, d, (II).

23. *Bacon v. Bicknell*, 17 Wis. 523.

[a] **Granting leave to amend a demurrer** is a revocation of a former order overruling the original demurrer. *Dent v. Superior Court*, 7 Cal. App. 683, 95 Pac. 672.

24. *Coburn v. Pacific Lumb. & M. Co.*, 46 Cal. 31; *Van Kleeck v. Nichols*, 63 How. Pr. (N. Y.) 403; *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y.) 439.

25. *West Side Bank v. Pugsley*, 47 N. Y. 368; *Van Kleeck v. Nichols*, 63 How. Pr. (N. Y.) 403; *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y.) 439; *Morse v. Stockman*, 65 Wis. 36, 26 N. W. 176; *Eaton v. Gillett*, 16 Wis. 546; *Moore v. Cord*, 13 Wis. 413.

[a] **An application to another judge** to vacate an order must be made to the court on notice, not on ex parte motion. *Van Kleeck v. Nichols*, 63 How. Pr. (N. Y.) 403; *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y.) 439.

26. See generally the statutes.

27. Cal.—*People v. Curtis*, 113 Cal. 68, 45 Pac. 180; *Dent v. Superior Court*, 7 Cal. App. 683, 95 Pac. 672. N. C. *Long v. Cole*, 74 N. C. 267. S. C.

Dunton v. Harper, 64 S. C. 338, 42 S. E. 153.

[a] **A proceeding under this statute is an original proceeding.** *In re Blackwell*, 48 App. Div. 230, 62 N. Y. Supp. 793.

[b] **Adverse party defined**, see *Kerns v. Morgan*, 11 Idaho 572, 581, 83 Pac. 954.

[c] **Orders which are void** are not embraced within this statute. *Kerns v. Morgan*, 11 Idaho 572, 580, 83 Pac. 954.

[d] **The mistake, surprise, etc., of the court** is not referred to in the statute; it is the mistake of the party himself. *State ex rel. Boston & M. C. C. & S. M. Co. v. District Court*, 32 Mont. 20, 79 Pac. 410.

[e] **Mistakes of law** are mistakes within this section. *Dent v. Superior Court*, 7 Cal. App. 683, 95 Pac. 672. *Contra*, *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118.

28. *Holmes v. Heywood*, 1 Mich. N. P. 292.

[a] **A general affidavit of merits** is not sufficient. The party must set up the facts. *Holmes v. Heywood*, 1 Mich. N. P. 292.

As to affidavits of merit generally, see the title "**Affidavits of Merits and Defense**."

29. See generally the title "**Motions**."

30. Conn.—*Purdy v. Watts*, 91 Conn. 214, 99 Atl. 496. Ia.—*Holtz v. Smith-Morgan Print Co.*, 150 Iowa 91, 129 N. W. 328. Kan.—*Mudge v. Hull*, 56 Kan. 314, 43 Pac. 242. Miss.—*Pattison v. Josselyn*, 43 Miss. 373. N. Y.

in the order as is specified in the motion.³¹

e. *Effect of Ruling on Motion To Vacate.*—With some exceptions,³² the general rule is that where a court, in the exercise of its jurisdiction, directs an order previously made by it to be stricken out, it is the same as if such order had never existed.³³ An order denying a motion to set aside a void order does not give the latter any vitality, however.³⁴ Nor is the refusal to vacate an unauthorized order of a court commissioner an adoption of it as a court order, so as to give it validity.³⁵

f. *Renewal of Original Motion After Vacation of Order.*—Where a rule taken by default is opened, it must be heard on the same papers on which it was moved for originally.³⁶

2. **Of Consent Orders.**—An order made by consent cannot be vacated or modified even at the term at which it is rendered without the assent or acquiescence of all the parties thereto,³⁷ unless their

Place v. Hayward, 100 N. Y. 626, 3 N. E. 199; *In re* Directors of National G. Corp., 82 App. Div. 593, 81 N. Y. Supp. 853 (citing local cases); *In re* Blackwell, 48 App. Div. 230, 62 N. Y. Supp. 793. Ohio—Fowble v. Walker, 4 Ohio 64. S. C.—Dunton v. Harper, 64 S. C. 338, 42 S. E. 153.

[a] **The trial court has a larger discretion** in vacation of its orders while the trial is pending than it has after the case is finally disposed of. Pending trial its power to change or set aside a previous ruling is presumptively equal to its power to make it in the first instance. Holtz v. Smith-Morgan Print. Co., 150 Iowa 91, 129 N. W. 328. See also Belmont v. Erie R. Co., 52 Barb. (N. Y.), 637.

b] **Vacation of rules granted in a full court on argument** will be refused on very slight grounds by a less number. Day v. Wilber, 2 Caines (N. Y.), 251, *Colem & C. Cas.* 400.

31. Smith v. Spaulding, 30 How. Pr. (N. Y.), 339, 3 Robt. 615.

[a] **Fact that order to show cause includes an application for other relief** will not authorize entirely distinct relief. Smith v. Spaulding, 30 How Pr. (N. Y.), 339, 3 Robt. 615, holding an order reducing bail improper on the hearing of an order to vacate an order of arrest, and followed in Heyman v. Mittelstaedt, 41 Hun 641, 2 N. Y. St. 645. But compare Ives v. Ives, 80 Hun 136, 29 N. Y. Supp. 1053, 61 N. Y. St. 657.

32. See the notes below.

[a] **The vacation of an order vacating a judgment does not revive or**

reinstate the judgment. Wheeler v. Garrett, 13 Colo. 140, 21 Pac. 1021; Owen v. Going, 7 Colo. 85, 1 Pac. 229. Contra, People ex rel. Kochersperger v. Colvin, 165 Ill. 67, 46 N. E. 14.

[b] **The vacation of an order which discharges a trustee in bankruptcy does not ipso facto restore the trustee to his trusteeship.** There is a vacancy in the office and it is necessary to proceed as in the first instance. *In re* Rochester Sanitarium & Baths Co., 222 Fed. 22, 137 C. C. A. 560. As to proceedings on reopening estate, see 3 STANDARD PROC. 912.

33. U. S.—*In re* Rochester Sanitarium & Baths Co., 222 Fed. 22, 137 C. C. A. 560. Conn.—Purdy v. Watts, 91 Conn. 214, 99 Atl. 496. Ill. People ex rel. Kochersperger v. Colvin, 165 Ill. 67, 46 N. E. 14. N. C. Williams v. Floyd, 27 N. C. 649.

34. Smith v. Los Angeles & P. R. Co., 99 Cal. xix, 34 Pac. 242.

35. Balkins v. Baldwin, 84 Wis. 212, 54 N. W. 403.

36. Knowlton v. Bowrason, 8 Cow. (N. Y.), 135.

[a] **The party cannot enlarge the ground of the motion by way of replying to the motion of his adversary to open the rule.** Knowlton v. Bowrason, 8 Cow. (N. Y.), 135.

As to renewal of motions generally, see the title "Motions."

37. Ky.—First Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856. N. Y. Leitch v. Cumpston, 4 Paige 476. N. C. Deaver v. Jones, 114 N. C. 649, 19 S. E. 637.

rendition is procured by mistake³⁸ or fraud.³⁹

L. **REHEARING.**—An order made on motion is not a proper subject for a rehearing, but it may be discharged by application by motion to the court.⁴⁰

M. **COLLATERAL ATTACK.**⁴¹—Orders within the jurisdiction of the court, which are erroneous merely, but not void, are not subject to collateral attack;⁴² but all orders which are absolutely void are subject to such attack.⁴³ On such an attack, the orders of a court or judge are protected and sustained by the same presumptions of regularity as attach to judgments when similarly attacked.⁴⁴

N. **REVIEW.**—Final orders are generally appealable;⁴⁵ but interlocutory orders are not generally directly appealable, in the absence of express statute so providing,⁴⁶ although they are reviewable by certiorari.⁴⁷

O. **ENFORCEMENT.**—A court may enforce its lawful orders by attachment for contempt,⁴⁸ by restricting the right of the party to prosecute and defend the action,⁴⁹ and sometimes by execution.⁵⁰ But

38. **Ky.**—First Nat. Bank v. Bickel, 154 Ky. 11, 156 S. W. 856. **Mich.** Hews v. Hews, 145 Mich. 247, 108 N. W. 694 (unilateral mistake); Hammond v. Place, Harr. 438, unless it appears the rules were entered into "under a mistake." **N. C.**—Deaver v. Jones, 114 N. C. 649, 19 S. E. 637, by mutual mistake of the parties.

39. Hammond v. Place, Harr. (Mich.), 438; Deaver v. Jones, 114 N. C. 649, 19 S. E. 637.

40. Belmont v. Erie R. Co., 52 Barb. (N. Y.), 637, 651; Livingston's Petition, 34 N. Y. 555, 2 Abb. Pr. N. S. (N. Y.), 1, 21, 32 How. Pr. 20.

As to vacation of orders, see *supra*, II, K.

As to renewal of motions, see the title "Motions."

41. As to collateral attack of judgments, see 15 STANDARD PROC. 377.

42. **Cal.**—Dunsmuir v. Coffey, 148 Cal. 137, 82 Pac. 682; Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491. **Ind.**—Winer v. Mast, 146 Ind. 177, 45 N. E. 66. **Kan.** Randolph v. Simon, 29 Kan. 406. **Wis.** Ashland Nat. Bank v. Gregory, 94 Wis. 455, 69 N. W. 168.

43. **Cal.**—Smith v. Los Angeles & P. R. Co., 99 Cal. xix, 34 Pac. 242. **Ga.**—Callaway v. Irvin, 123 Ga. 344, 51 S. E. 477. **Wis.**—McIntosh v. Bowers, 143 Wis. 74, 126 N. W. 548; Ashland Nat. Bank v. Gregory, 94 Wis. 455, 69 N. W. 168.

44. **U. S.**—Dallas v. McKenzie, 110 U. S. 686, 4 Sup. Ct. 184, 23 L. ed.

285. **Cal.**—Rowe v. Blake, 112 Cal. 637, 44 Pac. 1084; Clark v. Sawyer, 48 Cal. 133. **Neb.**—Jones v. Miller, 2 Neb. (Unof.), 581, 89 N. W. 598. **S. C.** Earle v. Stokes, 5 S. C. 336.

As to presumptions on collateral attack of judgments, see 15 STANDARD PROC. 468.

45. See 2 STANDARD PROC. 165, 171.

46. See 2 STANDARD PROC. 169, 171.

47. See 4 STANDARD PROC. 956.

48. **Cal.**—*Ex parte* Robinson, 71 Cal. 608, 12 Pac. 794. **Ky.**—Jones v. Morehead, 3 B. Mon. 377. **N. H.** Robinson v. Owen, 46 N. H. 38. **S. C.** Earle v. Stokes, 5 S. C. 336; Watson v. Citizens Sav. Bank, 5 S. C. 159, 166. **S. D.**—Freeman v. Huron, 8 S. D. 435, 66 N. W. 928. **Wis.**—Sellers v. Union Lumb. Co., 36 Wis. 398. **Eng.**—Wentworth v. Bullen, 9 Barn. v. C. 840, 17 E. C. L. 372, 9 L. J. K. B. O. S. 33, 109 Eng. Reprint 313.

Enforcement of order to pay alimony by contempt proceedings, see 7 STANDARD PROC. 830.

[a] **Void Orders Cannot Be So Enforced.**—McHenry v. State, 91 Miss. 562, 44 So. 831, 16 L. R. A. (N. S.), 1062.

49. Robinson v. Owen, 46 N. H. 38; Holland v. Seaver, 21 N. H. 386; Gross v. Clark, 1 Civ. Proc. (N. Y.) 464. See 7 STANDARD PROC. 829, in divorce actions.

50. **Ky.**—Jones v. Morehead, 3 B. Mon. 377, an order which is in substance a decree. **Md.**—United Lines Tel. Co. v. Stevens, 67 Md. 156, 8 Atl.

another court will not grant a writ of mandamus to compel obedience to the orders of the court.⁵¹

908. **N. Y.**—Hulsaver *v.* Wiles, 11 How. Pr. 446, orders of court. **Ore.** Rostel *v.* Morat, 19 Ore. 181, 23 Pac. 900, order for payment of money. **Wis.** Sellers *v.* Union Lumb. Co., 36 Wis. 398, order requiring defendant to satisfy plaintiff's claim.

See generally 15 STANDARD PROC. 725.

[a] On an order directing money to be paid into court to be paid to a party, a fi. fa. cannot issue. But if the order directs payment to the party himself, a fi. fa. may issue. United Lines Tel. Co. *v.* Stevens, 67 Md. 156, 8 Atl. 908.

51. See the title, "Mandamus."

ORDER TO SHOW CAUSE. — See **Motions; Orders.**

ORDINANCES. — See **Municipal Corporations; Statutes.**

ORDINARY CARE. — See **Negligence.**

ORDINARY, COURTS OF. — See **Jurisdiction; Probate Courts.**

ORIGINAL BILL. — See **Bills and Answers; Equity Jurisdiction and Procedure.**

ORIGINAL WRIT. — See **Process.**

ORPHANS' COURT. — See **Probate Courts.**

OUSTER. — See **Assistance, Writs of; Ejectment; Trespass To Try Title; Write of Entry.**

OWNERSHIP. — See **Title.**

OYER AND PROFERT

By the Editorial Staff.

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II. OYER, 836

A. *Generally*, 836

B. *Proceedings After Demand of Oyer*, 837

CROSS-REFERENCES:

Exhibits;

Implied and Express Agreements.

As affecting bonds, see 4 STANDARD PROC. 498.

Profert of letters testamentary, or of administration, see 8 STANDARD PROC. 742, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROFERT.—Profert is the term applied to an allegation in a pleading that the pleader brings into court a written instrument.¹ The practice of making profert and allowing oyer has always been confined to the common-law courts.² Its purpose was to enable the court to inspect the instrument pleaded, and so that the adverse party, if he so desired, might crave oyer thereof.³

Profert has been abolished in England,⁴ and in most jurisdictions in the United States.⁵ But in the absence of a statute abolishing the

1. Standard Loan & Acc. Ins. Co. v. Thornton, 97 Tenn. 1, 40 S. W. 136. See also Andrew Stephen's Pl., p. 475, § 256. Germain v. Wilgus, 67 Fed. 597, 14 C. C. A. 561; Linder v. Monroe's Exrs., 33 Ill. 388.

2. Hamilton v. Downer, 152 Ill. 651, 38 N. E. 733, unknown in courts of equity.

Discovery occupied an analogous place in the courts of chancery. See 7 STANDARD PROC. 498, et seq.

3. Del.—Polk v. Mitchell, 1 Harr. 433. N. C.—Berry's Admrs. v. Pull-

iam, 2 N. C. 16. Vt.—Austin v. Dills, 1 Tyler 308. Eng.—Wymark's Case, 5 Coke 74a, 77 Eng. Reprint 165; Gould Pl. 421.

[a] It operated to make the deed a part of the pleadings of the party producing it. Tucker v. State, 11 Md. 322.

As to oyer, see *infra*, II.

4. Com. L. Pr. Act. 1852.

5. See generally the statutes and the following: Cal.—People v. De La Guerra, 24 Cal. 73. Ill.—Lester v. People, 150 Ill. 408, 23 N. E. 387, 37

same, the general rule is that when a party alleges the existence of a deed upon which he bases his claim or defense, he must make profert thereof,⁶ unless a legitimate excuse for not making the same exists,⁷ and is shown by specially pleading same.⁸ If the party omits to make profert where necessary and pleads no sufficient excuse there-

N. E. 1004, 41 Am. St. Rep. 375. **Ind.**—Brown v. State, 44 Ind. 222. **Ia.**—Vannice v. Green Traer & Co., 14 Iowa 262. **Mass.**—Clary v. Thomas, 103 Mass. 44. **N. Y.**—Kellogg v. Baker, 15 Abb. Pr. 286.

[a] **Knowledge of the contents of the instrument** (1) upon which a claim or defense is based is secured to the adverse party by statutes requiring the original instrument or a copy thereof to be attached to the pleading as an exhibit (see generally 8 STANDARD PROC. 793, *et seq.*), and (2) by the equitable bill of discovery and analogous statutory proceedings. Lester v. People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375. (3) As to discovery and analogous statutory proceedings, see 7 STANDARD PROC. 498 *et seq.*

6. See the following: **Ark.**—Duncan v. Clements, 17 Ark. 279, defendant. **Ill.**—Dugger v. Oglesby, 99 Ill. 405; Linder v. Monroe's Exrs. 33 Ill. 388. **N. J.**—Patten v. Heustis, 26 N. J. L. 293, plaintiff.

[a] **A stranger to a deed need not make profert thereof.** Birney v. Haim, 2 Litt. (Ky.) 262.

[b] **When Profert Unnecessary.**—(1) When there was no occasion to mention the deed in the pleading, even though it may be in fact, the foundation of the claim or defense. (Nashville v. Potomac Ins. Co., 2 Baxt. [Tenn.] 296), or (2) where the pleader does not rely upon its direct and intrinsic operation (New London City Nat. Bank v. Ware River R. Co., 41 Conn. 542; Banfill v. Leigh, 8 T. R. 571, 101 Eng. Reprint 1552; Read v. Brockman, 3 T. R. 151, 156, 100 Eng. Reprint 504), (3) to establish his claim or defense, as where it is pleaded merely as a matter of inducement. (Banfill v. Leigh, 8 T. R. 571, 101 Eng. Reprint 1552), profert need not be made. (4) So also, profert need not be made of writings which are not under seal. (**Conn.**—Hinsdale v. Miles, 5 Conn. 331. **Ill.**—Gatton v. Dimmitt, 27 Ill. 400; Mason v. Buckmaster, 1 Ill. 27. **Ind.**—Pumphrey v. Coleman, 1 Blackf. 199. **W.**

Va.—Riley v. Yost, 58 W. Va. 213, 52 S. E. 46, 1 L. R. A. [N. S.] 777) nor (5) with the exception of letters testamentary and letters of administration (Thatcher v. Lyman, 5 Mass. 260; Vickery v. Beir, 16 Mich. 50. See also 8 STANDARD PROC. 742, *et seq.*), (6) of any instrument, even though it be one under seal, which does not fall within the technical definition of a deed. Lester v. People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375. Thus, (7) profert need not be made of a will (Thatcher v. Lyman, 5 Mass. 260), nor (8) of a public record. **Ark.**—Adams v. State, 6 Ark. 497. **D. C.**—United States v. Ritchie, 3 Mackey 162. **Ill.**—Deem v. Crume, 46 Ill. 69. **Ind.**—Capp v. Gilman, 2 Blackf. 45. **Md.**—Butler v. State, 5 Gill & J. 511. **Mass.**—Guild v. Richardson, 6 Pick. 364. **Miss.**—McNutt v. Lancaster, 9 Smed. & M. 570. (9) A bond filed is a public record within the latter rule. United States v. Ritchie, 3 Mackey (D. C.) 162.

7. See *infra*, this note.

[a] As (1) where an instrument of which profert would be otherwise necessary has been lost or destroyed (**U. S.**—Rockhill v. Hanna, 4 McLean 200, 20 Fed. Cas. No. 11,979. **Ala.**—Robinson v. Curry, 6 Ala. 842. **Ark.**—Beebe v. Real Estate Bank, 4 Ark. 124. **Ill.**—People *ex rel.* Mt. Vernon v. Pace, 57 Ill. App. 674. **Ind.**—State v. Stewart, 7 Blackf. 9. **Ky.**—Birney v. Haim, 2 Litt. 262. **Mass.**—Powers v. Ware, 2 Pick. 451. See generally the title, "Lost Instruments," and 1 STANDARD PROC. 817), or (2) is in possession of a third party. Francis v. Hazlerigg's Exrs., 1 A. K. Marsh. (Ky.) 93, Barbour's Admrs. v. Archer, 3 Bibb (Ky.) 8.

[b] **A person who is not presumed to have the custody of an instrument need not make profert thereof.** Van Rensselaer v. Poucher, 24 Wend. (N. Y.) 316. Anderson v. Allison, Anderson & Co., 2 Head (Tenn.) 122.

8. Dugger v. Oglesby, 99 Ill. 405; Powers v. Ware, 2 Pick. (Mass.) 451.

for, the pleading is fatally defective.⁹ But there is authority to the effect that a failure to make profert may be cured by an amendment;¹⁰ and, if profert was made of an instrument which it subsequently develops cannot be produced, the excuse for failure to produce it may be set up in the same manner.¹¹

II. OYER.—A. GENERALLY.—To crave oyer of an instrument originally meant to demand to have it read;¹² but, since the advent of written pleadings, it means that the party demands that a copy of the instrument be furnished him,¹³ or that the instrument be filed for his inspection.¹⁴ When profert was actually made in open court the practice was for the party craving oyer to demand to hear the deed read.¹⁵ That a complaint or declaration makes profert does not make the writing a part of the record unless oyer is demanded;¹⁶ and unless the party who would take advantage of it sets it out in the record.¹⁷

Oyer is not demandable of any instrument other than the one upon which the adverse party claims or justifies.¹⁸

9. *McCormick v. Kenyon*, 13 Mo. 131.

[a] **Oyer not demandable in such a case.** The proper practice is to demur to the declaration, and after amendment thereof, to demand oyer. *Andrews' Steph. Pl.*, p. 205, § 111.

10. *Ligon v. Bishop*, 43 Miss. 527; *Bowles' Exr. v. Elmore's Admx.*, 7 Gratt. (48 Va.) 385.

Amendments generally, see 1 *STANDARD PROC.* 844, *et seq.*

11. *Meriam v. State*, 7 Blackf. (Ind.) 245; *Jansen v. Ball*, 6 Cow. (N. Y.) 628, amendment after verdict permitted.

12. *Renner v. Reed*, 3 Ark. 339; *Chicago Bldg. & Mfg. Co., v. Talbotton C. & Mfg. Co.*, 106 Ga. 84, 31 S. E. 809; *Andrews' Steph. Pl.*, p. 203, § 111; *Gould Pl.* 421; *Smith, Actions at Law*, p. 99.

13. *Renner v. Reed*, 3 Ark. 339.

14. *Chicago Bldg. & Mfg. Co. v. Talbotton C. & Mfg. Co.*, 106 Ga. 84, 31 S. E. 809; *Anderson v. Barry*, 2 J. J. Marsh. (Ky.) 265.

15. *Andrews' Steph. Pl.*, p. 203, § 111.

[a] But the modern practice is for the party demanding oyer to serve the adverse party with a written demand before he pleads. *Andrews' Steph. Pl.*, p. 204, § 111.

16. *U. S.*—*Nybladh v. Herterius*, 41 Fed. 120. *Fla.*—*Comerford v. Cobb*, 2 Fla. 418. *Ky.*—*King v. McLean*, 1 J. J. Marsh. 32. *S. C.*—*Charleston v. Mortimer*, 4 Rich. L. 271. *Tenn.*

Standard Loan & Acc. Ins. Co. v. Thornton, 97 Tenn. 1, 40 S. W. 136. *W. Va.*—*Riley v. Yost*, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. (N. S.) 777.

As to profert, see *supra*, I.

17. *Del.*—*Polk v. Mitchell*, 1 Harr. 433. *Ill.*—*Young v. Campbell*, 10 Ill. 80. *Md.*—*Coulter v. Western Theological Seminary*, 29 Md. 69; *Tucker v. State*, 11 Md. 322. *N. Y.*—*Allen v. Bishop's Exrs.*, 25 Wend. 414.

18. *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375 (if it is set out as matter of inducement oyer cannot be had); *Chetwind v. Marnell*, 1 B. & P. 271, 126 Eng. Reprint 900.

[a] **Nor of a document not in the custody of the adverse party.** *Judge of Probate v. Merrill*, 6 N. H. 256.

[b] **Instrument Not Under Seal.**—(1) Under the early common law, oyer could not be demanded of an instrument not under seal. *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375, inspection had on an order of court to inspect. (2) Statutes have extended this rule to all instruments declared on, whether under seal or not. See the statutes and *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375.

Profert of an instrument not under seal was unnecessary. See *supra*, I.

[c] **Profert made of an instrument which is unnecessary does not entitle defendant to oyer.** *Atherton Mach. Co. v. Atwood-Morrison Co.*, 102 Fed. 949, 43 C. C. A. 72.

Oyer of record cannot be demanded.¹⁹

Demand of oyer must be made before the close of the term at which profert was made,²⁰ and before the party demanding it pleads further.²¹

B. PROCEEDINGS AFTER DEMAND OF OYER.—The demand of oyer is entered in the record;²² and the adverse party may counterplead thereto that a decision of the court may be had as to whether or not oyer is, in the instant case, demandable.²³ Where the defendant is entitled to oyer, and a proper demand is made, the court will stay further proceedings until it is complied with.²⁴

Under the ancient practice, oyer was had by reading the instrument aloud in open court.²⁵ But in modern practice a copy of the deed is given to the person demanding oyer before that party pleads and this is considered as oyer.²⁶

A variance between the declaration and the instrument sued upon is taken advantage of by a demurrer.²⁷

19. **U. S.**—*Nybladh v. Herterius*, 41 Fed. 120. **Ill.**—*Gatton v. Dimmitt*, 27 Ill. 400; *Giles v. Shaw*, 1 Ill. 219. **Ind.** *Capp v. Gilman*, 2 Blackf. 45. **Mass.** *Slayton v. Chester*, 4 Mass. 478; *Guild v. Richardson*, 6 Pick. 364. **Ohio** *Bettle v. Wilson*, 14 Ohio 257. **Tenn.** *Searcey v. Whitesides*, 5 Hayw. 120. **Vt.**—*Story v. Kimball*, 6 Vt. 541.

20. *Andrews' Steph. Pl.*, p. 205, § 111. **U. S.**—*Mason v. Lawrason*, 1 Cranch C. C. 190, 16 Fed. Cas. No. 9, 242. **Mo.**—*McKnight v. Wilkins & Co.*, 1 Mo. 308. **Eng.**—*Rex v. Amery*, 1 T. R. 149, 99 Eng. Reprint 1023.

21. *Auditor v. Woodruff*, 2 Ark. 73, 33 Am. Dec. 368; *Dufau v. Wright*, 25 Wend. (N. Y.) 636.

22. *Pendleton v. Bank of Kentucky*, 1 Mon. (Ky.), 171.

23. *Pendleton v. Bank of Kentucky*, 1 Mon. (Ky.), 171.

24. *Polk v. Mitchell*, 1 Harr. (Del.), 433.

[a] If party pleads, he waives right to oyer. *Auditor v. Woodruff*, 2 Ark., 73, 33 Am. Dec. 368; *Eason v. Fisher*, 1 Ark. 90. Compare *Goodricke v. Tur-*

ley, 2 C. M. & R. (Eng.) 694, where it is said that a waiver will not result unless the plea was to the instrument of which oyer was demanded.

[b] Failure to crave oyer may be cured by an amendment. *University of Alabama v. Winston*, 5 Stew. & P. (Ala.) 17.

25. *Andrews' Steph. Pl.*, p. 203, § 111; *Smith, Actions at Law*, p. 99.

26. *Andrews' Steph. Pl.*, p. 204, § 111.

[a] Copy Must Be a Full and Complete One.—*Osborne v. Reed*, 1 Blackf. (Ind.) 126; *Smith v. Alworth*, 18 Johns. (N. Y.) 445.

[b] Objection to insufficient compliance with demand of oyer should be made at the time of trial. *Brooks' Exr. v. Brook's Exrs.*, 6 N. J. L. 404.

27. **U. S.**—*Hobson v. McArthur*, 3 McLean 241, 12 Fed. Cas. No. 6,554. **Ill.**—*Harlow v. Boswell*, 15 Ill. 56. **Ky.** *Jones v. Cromwell*, 1 Dana 385; *Shepherd v. Hubbard*, 1 Bibb 494. **Mo.** *Gathwright v. Callaway*, 10 Mo. 663. **Va.**—*Duval v. Malone*, 14 Gratt. (55 Va.) 24.

OYSTER. — See Game and Fish.

PAPER BOOK. — See Appeals; Writ of Error.

PAPERS. — See Discovery; Filing; Newspapers; Service of Process and Papers.

PARAPHERNALIA. — See Husband and Wife.

PARDON

By the Editorial Staff.

I. PLEADING OR PRESENTING PARDON AS DEFENSE, 838

- A. *Necessity for*, 838
- B. *Manner of*, 838
- C. *Time for*, 839

II. OPERATION AND EFFECT OF PLEA OF PARDON, 839

CROSS-REFERENCES:

Arraignment and Plea; Nolle Prosequi; Sentence and Judgment.

For form of plea of pardon, see 9 STANDARD PROC. 91.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PLEADING OR PRESENTING PARDON AS DEFENSE. — A.

NECESSITY FOR. — A pardon, to be available as a defense, must be specially pleaded,¹ except where it is granted by the public act of the legislative department of the government,² or by a public proclamation of the executive,³ the courts taking judicial notice in such cases.⁴

B. MANNER OF. — It is generally sufficient to call the attention of the court to the fact that a pardon has been granted,⁵ the particular manner of doing so depending upon the stage of proceedings at which the defense of pardon is presented.⁶ If there are exceptions or con-

1. **U. S.**—United States *v.* Wilson, 7 Pet. 150, 8 L. ed. 640; Fries' Case, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5,126, Whart. St. Tr. 458. **Ala.** Michael *v.* State, 40 Ala. 361. **Ga.** Dominick *v.* Bowdoin, 44 Ga. 357. **Mass.** Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699. **N. Y.**—Merritt's Case, 4 City Hall Rec. 58. **N. C.**—State *v.* Keith, 63 N. C. 140; State *v.* Blalock, 61 N. C. 242. **Ohio**—*Ex parte* Lockhart, 1 Disn. 105, 12 Ohio Dec. 515; Sutton *v.* McIlhany, 5 West L. J. 356, 1 Ohio Dec. (Reprint). 235. **Okla.** Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.
[a] A pardon granted by private legislative act must be pleaded. United States *v.* Wilson, 7 Pet. (U. S.) 150, 8 L. ed. 640; Michael *v.* State, 40 Ala. 361.

2. **U. S.**—Jones *v.* United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. ed. 691; Armstrong *v.* United States, 13 Wall. 154, 20 L. ed. 614; United States *v.* Wilson, 7 Pet. 150, 163, 8 L. ed. 640. **Ala.**—Michael *v.* State, 40 Ala. 361. **Ky.**—Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A.

245. **Mo.**—State *v.* Eby, 170 Mo. 497, 71 S. W. 52. **N. C.**—State *v.* Keith, 63 N. C. 140; State *v.* Blalock, 61 N. C. 242. **Ohio.**—*Ex parte* Lockhart, 1 Disn. 105. **Okla.**—Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440. **P. I.**—Villa *v.* Allen, 2 Phil. Isl. 436. 3. Jenkins *v.* Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. ed. 812.

4. See the cases cited in the preceding notes, and 7 ENCY. OF EV. 969.

5. **U. S.**—*In re* Greathouse, 2 Abb. 382, 4 Sawy. 487, 10 Fed. Cas. No. 5,741; *In re* De Puy, 3 Ben. 307, 7 Fed. Cas. No. 3,814. **Mo.**—*Ex parte* Reno, 66 Mo. 266, 27 Am. Rep. 337. **N. Y.** *In re* Edymoin, 8 How. Pr. 478. **Ohio.** *Ex parte* Lockhart, 1 Disn. 105. **Okla.** Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440. **Wyo.** *In re* Moore, 4 Wyo. 98, 31 Pac. 980. **Eng.**—Rex *v.* Salisbury, 1 Show. K. B. 100, Carth. 131, 89 Eng. Reprint 476.

6. Villa *v.* Allen, 2 Phil. Isl. 436, where the pardon is obtained before issue joined, it must be pleaded as other matters in confession and avoidance, under the particular jurisdiction; if after the issue is joined, the pardon

ditions contained in the act or proclamation of pardon, the accused must show that he has brought himself within its terms.⁷ When the law requires a pardon to be sealed, the party pleading it must aver that it has a seal.⁸

If, after defendant has been committed to prison, the warden or keeper refuses to discharge him, the pardon may be availed of by a petition for a writ of habeas corpus and in answer to the return made thereto.⁹

C. TIME FOR.—A pardon may be pleaded or presented as a defense to the crime for which it has been granted at any stage of the proceedings.¹⁰

II. OPERATION AND EFFECT OF PLEA OF PARDON.—A pardon for a particular offense cannot operate as a bar or discharge of any other distinct offense.¹¹

should be brought to the attention of the court in some manner suitable to the advanced stage of the proceedings.

[a] A formal motion may be made to the court having custody of a prisoner to discharge him on the ground that he had been granted a pardon. *Spafford v. Benzie* Cir. Judge, 136 Mich. 25, 98 N. W. 741.

[b] May Be Stated as Reason Why Sentence Should Not Be Pronounced. *Okla.—Territory v. Richardson*, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440. *P. I.—Villa v. Allen*, 2 Phil. Isl. 436. *Va.—Blair v. Com.*, 25 Gratt. (66 Va.) 850.

[c] When the case is on appeal, the pardon may be properly called to the attention of the appellate court either by the suggestion of the state's attorney that the defendant has been pardoned or by application of the person pardoned. *Villa v. Allen*, 2 Phil. Isl. 436.

[d] Habeas corpus may be used to call court's attention to pardon. *Com. ex rel. Crosse v. Holloway*, 44 Pa. 210, 84 Am. Dec. 431, 2 Am. L. Reg. (N. S.) 474.

7. See the following: *U. S.—St. Louis Street Foundry v. United States*, 6 Wall. 770, 18 L. ed. 884. *N. C. State v. Keith*, 63 N. C. 140; *State v. Cook*, 61 N. C. 535. *P. I.—Villa v. Allen*, 2 Phil. Isl. 436. *Eng.—Rex v. Ratcliffe*, 1 Wils. 150, 95 Eng. Reprint 543; *Swayne v. Rogers*, Cro. Car. 32, 79 Eng. Reprint 632; *Bell's Case*, Cro. Car. 449, 79 Eng. Reprint 991.

8. *Sutton v. McIlhany*, 5 West. L. J. 356, 1 Ohio Dec. (Reprint) 235.

9. *U. S.—In re Greathouse*, 2 Abb. 382, 4 Sawy. 487, 10 Fed. Cas. No. 5,741; *In re De Puy*, 3 Ben. 307, 7 Fed. Cas. No. 3,514. *Mo.—Ex parte Reno*,

66 Mo. 266, 27 Am. Rep. 337. *N. Y. In re Edymoin*, 8 How. Pr. 478. *Ohio. Ex parte Lockhart*, 1 Disn. 105, 12 Ohio Dec. 515. *Wyo.—In re Moore*, 4 Wyo. 98, 31 Pac. 980.

See generally the title "Habeas Corpus."

10. *Mass.—Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699, holding that a pardon may be properly called to the attention of the appellate court where the case is pending on appeal. *Mich.—Spafford v. Benzie* Circ. Judge, 136 Mich. 25, 98 N. W. 741. *N. C. State v. Alexander*, 76 N. C. 231, 22 Am. Rep. 675. *Okla.—Territory v. Richardson*, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440. *State v. White*, 26 Ore. 605, 40 Pac. 229. *Va.—Blair v. Com.*, 25 Gratt. (66 Va.) 850. *Eng. Rex v. Haines*, 1 Wills. 214, 95 Eng. Reprint 580 (pardon granted after issue joined, but before conviction); *Marshall's Case*, Cro. Eliz. 4, 78 Eng. Reprint 271, holding that a general pardon may be assigned as error to reverse an outlawry, if the party had not an opportunity of pleading it.

[a] On appeal at suggestion of attorney for state that defendant has been pardoned, the appeal will be dismissed. *Territory v. Richardson*, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440; *State v. White*, 26 Ore. 605, 40 Pac. 229.

11. *U. S.—Fries' Case*, 3 Dall. 515, 1 L. ed. 701, 9 Fed. Cas. No. 5,126. *Ala.—State v. Richardson*, 18 Ala. 109; *Hawkins v. State*, 1 Port. 475, 27 Am. Dec. 641. *Cal.—People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148. *Mass.—Perkins v. Stevens*, 24 Pick. 277. *Nev.—State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458. *S. C.—State v. McCarty*, 1 Bay 334.

PARENT AND CHILD

By the Editorial Staff.

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CROSS-REFERENCES:

Abduction;	Infants;
Apprentices;	Kidnaping;
Bastardy Proceedings;	Master and Servant;
Death by Wrongful Act;	Negligence;
Divorce;	Principal and Agent;
Habeas Corpus;	Seduction.

For forms, see 9 STANDARD PROC. 910, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROCEEDINGS TO DETERMINE CUSTODY OF CHILD. — A. IN GENERAL. — Unless deprived of the right to a minor child's custody by a valid decree of court, the parents are entitled to prosecute and defend suits in respect to such custody.¹

Form of Action. — The custody of minor children is usually determined in habeas corpus,² or divorce³ proceedings, but these remedies do not prevent resort to an ordinary action for that purpose.⁴

B. JURISDICTION.⁵ — Statutes exist in most of the states designating the particular courts empowered to award custody of children,⁶ as well as the residential and other jurisdictional requisites.⁷ Aside from stat-

1. *Ex parte Smith*, 197 Mo. App. 200, 193 S. W. 288. See also *Waters v. Gray* (Mo. App.), 193 S. W. 33.

Effect of foreign divorce decrees awarding custody, see 15 STANDARD PROC. 676.

Parties to such proceedings, see *infra*, I, C.

2. See 10 STANDARD PROC. 922.

3. See 7 STANDARD PROC. 852.

4. *Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169; *Kirkland v. Matthews* (Tex. Civ. App.), 174 S. W. 830, 162 S. W. 375; *Green v. Green* (Tex. Civ. App.), 146 S. W. 567.

[a] Where the parents are living apart, without being divorced, custody of the children may be awarded on application of either parent without bringing an action in the technical

sense of the word. *Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169.

5. See generally the title "Jurisdiction."

6. See the statutes, and the following: Ala.—*Bryan v. Bryan*, 34 Ala. 516. Ark.—*State v. Grisby*, 38 Ark. 406. Cal.—*Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169. Ga.—*Moore v. Moore*, 66 Ga. 336. La.—*State v. Thompson*, 117 La. 102, 41 So. 367. N. Y.—*People ex rel. Parr v. Parr*, 121 N. Y. 679, 24 N. E. 481, (*affirming* 49 Hun 473, 2 N. Y. Supp. 263); *People ex rel. Wilcox v. Wilcox*, 22 Barb. 178, *affirmed*, 14 N. Y. 575. Tex.—*Walker v. Finney* (Tex. Civ. App.), 157 S. W. 948; *Green v. Green* (Tex. Civ. App.), 146 S. W. 567. Eng.—*In re Goldsworthy*, 2 Q. B. Div. 75.

7. See the statutes, and the fol-

utory regulations, courts of equity generally have jurisdiction of cases relating to the custody and control of infants.⁸

C. **PARTIES.**⁹—The action is prosecuted in the name of the parent¹⁰ or other person¹¹ entitled to the child's custody.

D. **PLEADING** matters relative to custody of children in habeas corpus,¹² and divorce¹³ proceedings is treated elsewhere in this work.

E. **TRIAL.**¹⁴—From the very nature of these proceedings, a large discretion must rest in the court as to the conduct of the trial, more particularly in respect to whether it shall be public or private,¹⁵ the presence of the child,¹⁶ reference to a master,¹⁷ and matters of evidence in regard to the welfare of the child.¹⁸

II. PROCEEDINGS FOR CHILD'S SUPPORT.¹⁹—A. **TO COMPEL PARENT TO SUPPORT CHILD.**—1. **In General.**—The statutory obligation imposed upon parents or those standing in loco parentis to support minor children is enforceable by an action brought for that purpose,²⁰

lowing: **Cal.**—*Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169. **La.**—*State ex rel. Norris v. Graham*, 141 La. 73, 74 So. 635. **N. H.**—*White v. White*, 77 N. H. 26, 86 Atl. 353. **N. J.**—*Dixon v. Dixon*, 77 N. J. Eq. 313, 76 Atl. 1042. **N. Y.**—*People v. Dewey*, 23 Misc. 267, 50 N. Y. Supp. 1013. **P. R.**—*In re Archinard*, 4 Porto Rico Fed. 174. **Tex.**—*Lanning v. Gregory*, 100 Tex. 310, 99 S. W. 542, 123 Am. St. Rep. 809, 10 L. R. A. (N. S.) 690. **Eng.**—*Hope v. Hope*, 4 De G., M. & G. 328, 23 L. J. Ch. 682, 2 Wkly. Rep. 698, 43 Eng. Reprint 534. **Can.**—*In re Chisholm*, 47 Nova Scotia 250.

8. See the following: **Ala.**—*McGough v. McGough*, 136 Ala. 170, 33 So. 860; *Bryan v. Bryan*, 34 Ala. 516. **Ark.**—*State v. Grisby*, 38 Ark. 406. **Ill.**—*In re Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *Hamerick v. People ex rel. Real*, 126 Ill. App. 491. **N. J.**—*Ex parte Flynn* (N. J. Eq.), 100 Atl. 861; *Rossell v. Rossell*, 64 N. J. Eq. 21, 53 Atl. 821; *Baird v. Baird*, 21 N. J. Eq. 384. **N. Y.**—*Matter of Tierney*, 128 App. Div. 835, 112 N. Y. Supp. 1039; *People ex rel. Beaudoin v. Beaudoin*, 126 App. Div. 505, 110 N. Y. Supp. 592. **Okla.**—*Allison v. Bryan*, 26 Okla. 520, 109 Pac. 934, 138 Am. St. Rep. 988, 30 L. R. A. (N. S.) 146. **Eng.**—*Ex parte Warner*, 4 Bro. Ch. 101, 29 Eng. Reprint 799; *Wellesley v. Wellesley*, 2 Bligh N. S. 124, 4 Eng. Reprint 1078. **Can.**—*Gray v. Balkwill*, 6 Terr. L. Rep. 283.

See also 12 STANDARD PROC. 861.

9. See generally the title "Parties."

10. **Ala.**—*Pearce v. Pearce*, 136 Ala. 188, 33 So. 883; *McGough v. McGough*, 136 Ala. 170, 33 So. 860. **Cal.**—*Cole*

v. Superior Court, 28 Cal. App. 1, 151 Pac. 169. **Idaho.**—See *Ex parte Martin*, 29 Idaho 716, 161 Pac. 573.

11. *Ex parte Flynn* (N. J. Eq.), 100 Atl. 861, one who stands in loco parentis can maintain the action as against strangers.

[a] Joinder of second husband not necessary in an action by the mother. *Sancho v. Martin* (Tex. Civ. App.), 64 S. W. 1015.

12. See 10 STANDARD PROC. 922.

13. See 7 STANDARD PROC. 853.

14. See generally the title "Trial."

15. **Ill.**—*Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708. **Ky.**—*Ellis v. Jesup*, 11 Bush 403. **Mass.**—*Dumain v. Gwynne*, 10 Allen 270. **N. Y.**—*In re McDowle*, 8 Johns. 328. **Can.**—*Reg. v. Redner*, 6 Brit. Col. 73.

16. *Dumain v. Gwynne*, 10 Allen (Mass.) 270.

17. *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708.

18. *Dumain v. Gwynne*, 10 Allen (Mass.) 270; *Harrison v. Harker*, 44 Utah 541, 142 Pac. 716.

19. **As to proceedings against a parent for abandonment or neglect to support his minor child**, see *infra*, III.

20. **Ala.**—*Englehardt v. Yung's Heirs*, 76 Ala. 534. **Conn.**—*Shields v. O'Reilly*, 68 Conn. 256, 36 Atl. 49. **Del.**—*State v. Miller*, 3 Penne. 518, 52 Atl. 262. **D. C.**—*Holtzman v. Castleman*, 2 MacArthur 555. **Ind.**—*Leibold v. Leibold*, 158 Ind. 60, 62 N. E. 627. **Ia.**—*Porter v. Powell*, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176. **Ky.**—*Tanner v. Skinner*, 11 Bush 120. **La.**—*Gates v. Renfroe*, 7 La. Ann. 569. **Me.**—*Gilley v. Gilley*,

by persons having a peculiar or special interest in the matter such as a wife,²¹ a minor child,²² an invalid adult child under some statutes,²³ the state,²⁴ or a children's welfare society.²⁵ It proceeds against the delinquent parent whether the father,²⁶ the mother,²⁷ or both,²⁸ or against one who stands in loco parentis.²⁹

2. Jurisdiction. — The particular forum in which the action should be brought is generally designated by statute.³⁰ Aside from statutory provisions, equity has jurisdiction in such cases.³¹

3. Judgment or Decree.³² — A judgment by a court of equity in an

79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307. **Md.**—Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132. **Mass.**—Brow v. Brightman, 136 Mass. 187. **N. H.**—Litchfield v. Londonderry, 39 N. H. 247. **N. J.**—Wright v. Leupp, 70 N. J. Eq. 130, 62 Atl. 464. **Ohio**—State v. Stouffer, 65 Ohio St. 47, 60 N. E. 985; **Pa.**—Henkel's Est., 13 Pa. Super. 337. **R. I.**—Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73. **S. C.**—Exchange Bkg. & Tr. Co. v. Finley, 73 S. C. 423, 53 S. E. 649. **Tex.**—Linskie v. Kerr (Tex. Civ. App.), 34 S. W. 765. **Vt.**—Sequin v. Peterson, 45 Vt. 255, 12 Am. Rep. 194. **Wis.**—McGoon v. Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

21. **Ind.**—Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627. **Kan.**—Cheever v. Kelly, 96 Kan. 269, 150 Pac. 529. **Vt.**—Stockwell v. Stockwell, 87 Vt. 424, 89 Atl. 478.

22. Huke v. Huke, 44 Mo. App. 308.

23. Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083.

24. **Ill.**—Steele v. People, 88 Ill. App. 136. **Ind.**—Spade v. State, 44 Ind. App. 529, 89 N. E. 604. **La.**—State v. Tujague, 134 La. 576, 64 So. 417. **Pa.**—Com. v. Edgar, 44 Pa. Super. 496; Com. v. Brown, 28 Pa. Co. Ct. 180.

25. People ex rel. Balch v. Strickland, 13 Abb. N. C. (N. Y.) 473.

26. **Ala.**—Englehardt v. Yung's Heirs, 76 Ala. 534. **Conn.**—Shields v. O'Reilly, 68 Conn. 256, 36 Atl. 49. **Del.**—State v. Miller, 3 Penne. 518, 52 Atl. 262. **D. C.**—Holtzman v. Castleman, 2 McArthur 555. **Ill.**—McMillen v. Lee, 78 Ill. 443. **Ind.**—Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627. **Ia.**—Porter v. Powell, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176. **Ky.**—Tanner v. Skinner, 11 Bush 120. **La.**—Gates v. Renfroe, 7 La. Ann. 569. **Me.**—Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307. **Md.**—Alvey v. Hartwig, 106 Md.

254, 67 Atl. 132, 11 L. R. A. (N. S.) 678. **Mass.**—Brow v. Brightman, 136 Mass. 187. **N. H.**—Litchfield v. Londonderry, 39 N. H. 247. **N. J.**—Wright v. Leupp, 70 N. J. Eq. 130, 62 Atl. 464. **N. Y.**—Cromwell v. Benjamin, 41 Barb. 558. **Ohio.**—State v. Stouffer, 65 Ohio St. 47, 60 N. E. 985. **Pa.**—Henkel's Estate, 13 Pa. Super. 337. **R. I.**—Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73. **S. C.**—Exchange Bkg. & Tr. Co. v. Finley, 73 S. C. 423, 53 S. E. 649. **Tex.**—Linskie v. Kerr (Tex. Civ. App.), 34 S. W. 765. **Vt.**—Sequin v. Peterson, 45 Vt. 255, 12 Am. Rep. 194. **Wis.**—McGoon v. Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

27. **Ala.**—Englehardt v. Yung's Heirs, 76 Ala. 534. **Ill.**—Mowbry v. Mowbry, 64 Ill. 383. **Mass.**—Dedham v. Natick, 16 Mass. 135. **Mo.**—Girls' Industrial Home v. Fritchey, 10 Mo. App. 344. **Neb.**—Missouri Pac. R. Co. v. Palmer, 55 Neb. 559, 76 N. W. 169. **Ohio.**—Wing v. Hibbert, 8 Ohio Dec. 65.

28. Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083, case of an invalid adult child.

29. Schrimpf v. Settegast, 36 Tex. 296.

30. See generally the statutes, and the title "Jurisdiction."

[a] **County Court.**—Steele v. People, 88 Ill. App. 186; Stockwell v. Stockwell, 87 Vt. 424, 89 Atl. 478.

[b] **Juvenile Court.**—Spade v. State, 44 Ind. App. 529, 89 N. E. 604; State v. Tujague, 134 La. 576, 64 So. 417.

31. **Cal.**—Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083. **Ill.**—Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708. **Ind.**—Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627; Spade v. State, 44 Ind. App. 529, 89 N. E. 604. **Kan.**—Cheever v. Kelly, 96 Kan. 269, 150 Pac. 529.

32. See generally the titles "Decrees;" "Judgments."

action by a child against its parents to enforce its right to maintenance may be entered with a reservation of power to modify it if warranted by changed conditions in the future.³³

B. TO RECOVER FOR NECESSARIES.³⁴—1. **In General.**—Statutes providing a remedy by which a parent may be compelled to support his minor child,³⁵ usually provide that an action for necessities furnished a minor child may be maintained against a parent,³⁶ or one who stands in loco parentis.³⁷

2. **Pleading.**—The declaration or complaint should set out facts showing that the supplies were necessities,³⁸ and an express or implied promise on the part of the defendant to pay for the same.³⁹ The fact of minority need not be disclosed where same is regarded as a matter of defense.⁴⁰

3. **Trial.**⁴¹—The parent's liability to pay for necessities supplied a minor child, when surrounded by dubious circumstances, such as a claim of the child's emancipation,⁴² or the necessity of the supplies furnished,⁴³ is a question for the jury.⁴⁴

C. TO CHARGE CHILD'S ESTATE.—The general rules which apply to any guardian, in relation to charging a ward's estate for its support, control a parent in the disposition of a child's estate.⁴⁵

33. *Paxton v. Paxton*, 150 Cal. 667, 89 Pac. 1083. See also *Com. v. Brown*, 28 Pa. Co. Ct. 180, in which an order is made changing the judgment because of changed conditions warranting it.

As to amendment of judgments generally, see 15 STANDARD PROC. 98, and 6 STANDARD PROC. 789.

34. **Recovery for things not necessities**, see the title "Principal and Agent."

35. See *supra*, II, A.

36. See the statutes, and the following: Ill.—*Bedford v. Bedford*, 32 Ill. App. 460, *affirmed*, 136 Ill. 354, 26 N. E. 662. Ia.—*Anderson v. Lemker*, 162 N. W. 7; *Porter v. Powell*, 79 Iowa 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176. Md.—*Thompson v. Dorsey*, 4 Md. Ch. 149. Mo.—*Walters v. Niederstadt* (Mo. App.), 194 S. W. 514; *Huke v. Huke*, 44 Mo. App. 208. Neb.—*Missouri Pac. Ry. Co. v. Palmer*, 55 Neb. 559, 76 N. W. 169. N. J.—*Tomkins v. Tomkins*, 11 N. J. Eq. 512. N. Y.—*Van Valkinburgh v. Watson*, 13 Johns. 480, 7 Am. Dec. 395. Ohio.—*Quigley v. Murphy*, 5 Ohio Dec. 680, 4 Ohio N. P. 1. Eng.—*Baker v. Keen*, 2 Stark. 501, 3 E. C. L. 505.

37. *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301.

38. *Cousins v. Boyer*, 114 App. Div. 787, 100 N. Y. Supp. 290.

39. *Everitt v. Walker*, 109 N. C. 129,

13 S. E. 860; *McLaughlin v. McLaughlin*, 159 Pa. 489, 28 Atl. 302.

40. *Humphreys v. Bush*, 118 Ga. 628, 45 S. E. 911.

41. See generally the title "Trial."

42. *Kubic v. Zemke*, 105 Iowa 269, 74 N. W. 748.

43. *Parker v. Tillinghast*, 19 Abb. N. C. 190, 9 N. Y. St. 510.

44. Ala.—*Owen v. White*, 5 Port. 435, 30 Am. Dec. 572. Ohio.—*Quigley v. Murphy*, 5 Ohio Dec. 680, 4 Ohio N. P. 1. Eng.—*Law v. Wilkin*, 6 Ad. & El. 718, 6 L. J. K. B. 166, 1 N. & P. 697, 33 E. C. L. 378, 112 Eng. Rep. 276; *Baker v. Keen*, 2 Stark. 501, 3 E. C. L. 505.

45. See generally 10 STANDARD PROC. 821.

[a] Thus (1) a parent, before appropriating any part of a child's estate for its support, must petition a court having jurisdiction of the estate (*Perkins v. Westcoat*, 3 Colo. App. 338, 33 Pac. 139), (2) for authority to do so (Ala.—*Alston v. Alston*, 34 Ala. 15. Fla.—*Fuller v. Fuller*, 23 Fla. 236, 2 So. 426. N. J.—*McKnight's Exrs. v. Walsh*, 23 N. J. Eq. 136, *affirmed* in 24 N. J. Eq. 498. N. C.—*Burke v. Turner*, 85 N. C. 500. Can.—*In re Adkins' Infants*, 33 Ont. L. 110, 7 Ont. W. N. 654), and, (3) while a prior appropriation may be affirmed (*Alling v. Alling*, 52 N. J. Eq. 92, 27 Atl. 655), (4) the

III. PROSECUTIONS FOR ABANDONMENT OR NEGLECT TO SUPPORT CHILD.⁴⁶—A. IN GENERAL.—The abandonment of, or neglect to support, one's minor child, is sometimes made an offense, subjecting the delinquent to a criminal prosecution.⁴⁷

B. JURISDICTION AND VENUE.⁴⁸—The offense is triable in the juvenile,⁴⁹ the municipal,⁵⁰ or other court designated by the statute.⁵¹ It must be prosecuted in the state where the abandonment occurs,⁵² and in the place where the child lives at the time of or during the abandonment, not where the father was during the period complained of,⁵³ though under some statutes the venue of such offense is properly laid in the county where the father resides.⁵⁴

practice is irregular and will be followed only on a showing of very good reasons for doing so. **Fla.**—Fuller v. Fuller, 23 Fla. 236, 2 So. 426. **N. Y.** Matter of Kane, 2 Barb. Ch. 375; Smith v. Geortner, 40 How. Pr. 185. **Va.**—Evans v. Pearce, 15 Gratt. (56 Va.) 513, 78 Am. Dec. 635.

[b] **Necessary Showing.**—It is a father's duty to support his minor child, and therefore a petition to charge a child's estate for its maintenance should show the father's inability to do so, the nature of the estate and income derived from it, and the manner of living to which the child has been accustomed. Norton v. Sillocks, 4 Dem. Surr. (N. Y.) 145.

[c] **The burden of proof is on the father** to establish the necessity of charging the child's estate for its support. Bedford v. Bedford, 32 Ill. App. 455, affirmed, 136 Ill. 354, 26 N. E. 662.

46. **As to actions to compel support**, see *supra*, II.

47. See generally the statutes, and the cases cited *infra*, this section.

[a] **Time for Commencing Prosecution.**—Abandonment is generally regarded as a continuing offense and the laying of the indictment need not be within any stated period of time from the actual desertion. People v. Stanley, 33 Cal. App. 624, 166 Pac. 596.

[b] **Conditions Precedent.**—A criminal action against a father for failure to provide for an illegitimate child may, under some statutes, be commenced before his duty to so provide is established in a civil action. People v. Stanley, 33 Cal. App. 624, 166 Pac. 596.

48. See generally the titles "Jurisdiction;" "Venue."

49. **D. C.**—Moss v. United States, 29 App. Cas. 188. **La.**—State v. Vogt, 141 La. 764, 75 So. 674; State v. Barilleau,

128 La. 1033, 55 So. 664. **Tenn.**—Poindexter v. State, 137 Tenn. 386, 193 S. W. 126.

50. Donaghy v. State (Del.), 100 Atl. 696; Watke v. State (Wis.), 163 N. W. 258.

51. See generally the statutes.

[a] **Jurisdiction is not affected by an order for alimony and support of the child**, issuing from a higher court in a divorce proceeding of their minor child. Watke v. State (Wis.), 163 N. W. 258. See also State v. Vogt, 141 La. 764, 75 So. 674, juvenile court.

52. **Ga.**—Jemmerson v. State, 80 Ga. 111, 5 S. E. 131. **Kan.**—*In re* Fowles, 89 Kan. 430, 131 Pac. 598, 47 L. R. A. 227. **Ohio.**—*In re* Poage, 87 Ohio St. 72, 100 N. E. 125.

53. **Ga.**—Bennetfield v. State, 80 Ga. 107, 4 S. E. 869. **Ind.**—State v. Yocum, 182 Ind. 478, 106 N. E. 705. **Kan.** *In re* Fowles, 89 Kan. 430, 131 Pac. 598, 47 L. R. A. (N. S.) 227. **Mich.** *Ex parte* Price, 168 Mich. 527, 134 N. W. 721, Ann. Cas. 1913C, 594. **N. Y.** People *ex rel.* Armstrong v. Quigley, 75 Misc. 151, 134 N. Y. Supp. 953. **Ohio.**—*In re* Poage, 87 Ohio St. 72, 100 N. E. 125. **R. I.**—State v. Peabody, 25 R. I. 544, 56 Atl. 1028. **Wis.**—Adams v. State, 164 Wis. 223, 159 N. W. 726.

54. **La.**—State v. Baurens, 117 La. 136, 41 So. 442. **Mass.**—Com. v. Acker, 197 Mass. 91, 83 N. E. 312, 125 Am. St. Rep. 328. **Tenn.**—Poindexter v. State, 137 Tenn. 386, 193 S. W. 126.

[a] **The difference as to venue is due to a difference in construing the statutes.** Where the statute is held to be for the purpose of preventing the wife and child from becoming a public charge, the venue should be laid in the county where they reside; but when its purpose is primarily the protection of the wife and child and pun-

C. **INDICTMENT OR INFORMATION.**—In accordance with the general rules controlling the drawing of an indictment or information,⁵⁵ the pleading should charge with sufficient certainty⁵⁶ every element of the offense,⁵⁷ such as the duty of the accused to support the child,⁵⁸ the name of the child,⁵⁹ and the facts concerning the abandonment.⁶⁰ The general rules as to negating defenses⁶¹ and following the language of the statute,⁶² apply.

IV. **PROCEEDINGS TO COMPEL SUPPORT OF PARENT BY CHILD.**⁶³—At common law, an action cannot be maintained against a child to compel it to provide care and support for its parent;⁶⁴ but statutes have changed the rule so as to permit an action for the parent's support,⁶⁵ at the instance of the county, township, or overseers

ishment of the delinquent husband and father, the venue should be laid in the county where he resides. *Poindexter v. State*, 137 Tenn. 386, 193 S. W. 126.

55. See generally 12 STANDARD PROC. 53, et seq.

56. *State v. Gipson*, 92 Wash. 646, 159 Pac. 792.

[a] **Disjunctive Allegations.**—Under a statute which prohibits abandonment or neglect of a minor child by its father, an indictment which charges the defendant with abandonment and neglect is not duplicitous. *State v. Gipson*, 92 Wash. 646, 159 Pac. 792.

57. *McDaniel v. Campbell*, 78 Ga. 188.

58. *Shannon v. People*, 5 Mich. 71.

[a] **That defendant is the child's father**, should appear where the statute limits the liability to the father. *Rimes v. State*, 7 Ga. App. 556, 67 S. E. 223.

59. *Donaghy v. State* (Del.), 109 Atl. 696 (unless it is otherwise identified); *Irving v. State* (Tex. Crim.), 166 S. W. 1166.

60. *Daniels v. State*, 8 Ga. App. 469, 69 S. E. 588.

[a] **That the child is destitute** (1) need not be alleged under a statute which creates the liability for merely abandoning the child and leaving it dependent upon another (*Daniels v. State*, 8 Ga. App. 469, 69 S. E. 588); but (2) where the statute may be invoked only when such child may become a public charge that fact must be alleged in the indictment. *Gedney v. Day*, 44 N. J. L. 576.

61. See 12 STANDARD PROC. 442.

[a] **Not necessary to negative defenses**, see *State v. Kerby*, 110 N. C. 558, 14 S. E. 856.

62. See 12 STANDARD PROC. 458.

[a] **Sufficient to charge in language of statute**, see: *Mo.*—*State v. Block* (Mo. App.), 82 S. W. 1103. *N. Y.* *People ex rel. Armstrong v. Quigley*, 75 Misc. 151, 134 N. Y. Supp. 953. *N. C.*—*State v. Kerby*, 110 N. C. 558, 14 S. E. 856. *Pa.*—*Com. v. Stewart*, 2 Pa. Dist. 43, 12 Pa. Co. Ct. 151.

[b] **If the language of the statute is not sufficient** to advise the defendant of the particular offense with which he is charged, then additional facts in sufficient detail to so advise the defendant are necessary. *Richie v. Com.*, 23 Ky. L. Rep. 1237, 64 S. W. 979.

63. **Conditions subsequent in deeds to support parent**, see the title "Lands and Land Transfers."

64. See the following: *Conn.*—*Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79. *Ind.*—*Becker v. Gibson*, 70 Ind. 239. *Ia.*—*Dawson v. Dawson*, 12 Iowa 512. *Mich.*—*Pinel v. Rapid Ry. System*, 184 Mich. 169, 150 N. W. 897; *Schwanz v. Wujek*, 163 Mich. 492, 128 N. W. 731. *N. H.*—*Gray v. Spalding*, 58 N. H. 345; *Lebanon v. Griffin*, 45 N. H. 558. *N. Y.*—*Edwards v. Davis*, 16 Johns. 281; *Herendeen v. De Witt*, 49 Hun 53, 1 N. Y. Supp. 467. *N. C.* *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294. *Ore.*—*Belknap v. Whitmire*, 43 Ore. 75, 72 Pac. 539. *Pa.*—*Frank's Estate*, 18 Pa. Dist. 212.

65. See the statutes, and the following: *Cal.*—*Duffy v. Yordi*, 149 Cal. 140, 84 Pac. 838, 117 Am. St. Rep. 125, 4 L. R. A. (N. S.) 1159. *Conn.*—*Stone v. Stone*, 32 Conn. 142. *Ill.*—*Schwerdt v. Schwerdt*, 235 Ill. 386, 85 N. E. 613; *Mercer v. Jackson*, 54 Ill. 397. *Ia.*—*Jasper v. Osborn*, 59 Iowa 208, 13 N. W. 104; *Dawson v. Dawson*, 12 Iowa 512. *La.*—*Latour v. Guillory*, 134 La.

of the poor,⁶⁶ or, under some statutes, the parent.⁶⁷

The liability being entirely statutory, the remedy provided by the statute is the only one that may be resorted to.⁶⁸

V. ACTIONS BETWEEN PARENT AND CHILD.—An unemancipated minor child cannot maintain an action for damages against a parent for the latter's tort.⁶⁹

VI. ACTIONS FOR SERVICES OF MINOR CHILD.—A. IN GENERAL.—The parents of an unemancipated child⁷⁰ may sue for its

232, 64 So. 120; Guidry's Succession, 40 La. Ann. 671, 4 So. 893. **Mich.** Schwanz v. Wujek, 163 Mich. 492, 128 N. W. 731; Howe v. Hyde, 88 Mich. 91, 50 N. W. 102. **N. H.**—Lebanon v. Griffin, 45 N. H. 558. **N. Y.**—Edwards v. Davis, 16 Johns. 281; *In re* Conklin, 78 Misc. 269, 139 N. Y. Supp. 449. **Ore.**—Belknap v. Whitmire, 43 Ore. 75, 72 Pac. 589. **Pa.**—*In re* O'Donnell, 126 Pa. 155, 19 Atl. 42; West Perry Tp. Overseers v. Shrawder, 18 Pa. Dist. 872. **S. D.**—Tobin v. Bruce, 162 N. W. 933; McCook v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 58 Am. St. Rep. 854, 31 L. R. A. 461. **Vt.**—Tinmouth v. Warren, 17 Vt. 606. **Eng.**—Allen v. Coster, 1 Beav. 202, 9 L. J. Ch. (N. S.) 131, 48 Eng. Reprint 917.

[a] **Step parents** not included. Nichols v. Sherman, 1 Root (Conn.) 361; Sherman v. Nichols, 1 Root (Conn.) 250; Mack v. Parsons, 1 Kirby (Conn.) 155, 1 Am. Dec. 17; Rex v. Munden, 1 Str. 190, 93 Eng. Reprint 465. See also Jasper v. Osborn, 59 Iowa 208, 13 N. W. 104; West Perry Tp. Overseers v. Shrawder, 18 Pa. Dist. 872.

66. See the statutes, and Darlington v. Darlington, 5 Pa. Co. Ct. 132; McCook v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 58 Am. St. Rep. 854, 31 L. R. A. 461.

67. See Duffy v. Yordi, 149 Cal. 140, 84 Pac. 838, 117 Am. St. Rep. 125, 4 L. R. A. (N. S.) 1159. But see Schwerdt v. Schwerdt, 141 Ill. App. 386, statute does not extend right in favor of parent.

68. **Cal.**—Duffy v. Yordi, 149 Cal. 140, 84 Pac. 838, 117 Am. St. Rep. 125, 4 L. R. A. (N. S.) 1159. **Conn.** Gilbert v. Lynes, 2 Root 168; Waterbury v. Hurlburt, 1 Root 60. **Ill.** Schwerdt v. Schwerdt, 141 Ill. App. 386. **Mich.**—Pinel v. Rapid Ry. System, 184 Mich. 169, 150 N. W. 897; Schwanz v. Wujek, 163 Mich. 492, 128 N. W. 731. **N. Y.**—Edwards v. Davis,

16 Johns. 281. **Ore.**—Belknap v. Whitmire, 43 Ore. 75, 72 Pac. 589.

69. **Ill.**—Foley v. Foley, 61 Ill. App. 577. **Miss.**—Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. **Tenn.**—McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 102 Am. St. Rep. 787, 64 L. R. A. 991. **Wash.** Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 107 Am. St. Rep. 805, 68 L. R. A. 893.

[a] **Punishment of a parent for parental violence or wrongdoing** is a matter for the state's cognizance. **Ill.** Foley v. Foley, 61 Ill. App. 577. **Miss.** Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 683. **Neb.**—Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640.

[b] **Against former foster parent**, see Foley v. Foley, 61 Ill. App. 577; Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640.

70. **U. S.**—Plummer v. Webb, 4 Mason 380, 19 Fed. Cas. No. 11,233; McGinnis v. The Grand Turk, 16 Fed. Cas. No. 8,800; Gifford v. Kolloch, 3 Ware 45, 10 Fed. Cas. No. 5,409. **Ala.** Tilley v. Harrison, 91 Ala. 295, 8 So. 802. **Ark.**—Biggs v. St. Louis, I. M. & S. R. Co., 91 Ark. 122, 120 S. W. 970. **Conn.**—Smith v. Smith, 30 Conn. 111; Bradley v. Bassett, 13 Conn. 560. **Ga.**—Cox v. Adams & Co., 5 Ga. App. 296, 63 S. E. 60, labor's lien for child's wages may be foreclosed by parents. **Ill.**—Dufield v. Cross, 12 Ill. 397; Barrett v. Riley, 42 Ill. App. 258. **Ia.** Darling v. Noyes, 32 Iowa 96; Everett v. Sherfey, 1 Iowa 356. **Me.**—Fuller v. Blair, 104 Me. 469, 72 Atl. 182; Keen v. Sprague, 3 Greenl. 77. **Mass.** Clapp v. Green, 10 Mete. 439; Bishop v. Shepherd, 23 Pick. 492. **Neb.**—Inness v. Meyer, 93 Neb. 43, 139 N. W. 836. **N. J.**—Brown v. Ramsay, 29 N. J. L. 117. **N. Y.**—Shute v. Dorr, 5 Wend. 204; Simpson v. Buck, 5 Lans. 337; Letts v. Brooks, Lator's Supp. 36. **N. C.**—Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943. **Pa.**

services; a minor child itself cannot maintain the action,⁷¹ unless it has been emancipated, or the parents have relinquished their right to his services.⁷²

The parent entitled to sue may proceed in his own name.⁷³ An emancipated minor may bring an action for his services, without joining the parent.⁷⁴

B. PLEADING.—The declaration or complaint in an action by a

Kauffelt v. Moderwell, 21 Pa. 222. **S. C.**—*Valentine v. Bladen*, Harp. L. 9. **Tenn.**—*Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. **Vt.** *Mason v. Hutchins & Co.*, 32 Vt. 780; *Cahill v. Patterson*, 30 Vt. 592. **Wis.** *Monaghan v. School Dist. No. 1*, 38 Wis. 100.

[a] **Though Child Is Working on Its Own Contract.**—*Smith v. Smith*, 50 Conn. 111; *Darling v. Noyes*, 32 Iowa 96.

[b] **Wages paid to third party not recoverable.** *Herrick v. Fritcher*, 47 Barb. (N. Y.) 589.

[c] **The father (1) takes precedence over the mother** (*Barrett v. Riley*, 42 Ill. App. 258), unless (2) through disability of the father by death or otherwise, the mother becomes the head of the household. **Ark.**—*Biggs v. St. Louis*, I. M. & S. R. Co., 91 Ark. 122, 120 S. W. 970. **Ill.**—*Briscoe v. Price*, 275 Ill. 63, 113 N. E. 881. **Mass.**—*Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101. **R. I.**—*McGarr v. National & P. Worsted Mills*, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122. See also *Brown v. Smith*, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680.

71. *Roby v. Lyndall*, 4 Cranch C. C. 351, 20 Fed. Cas. No. 11,972; *Fuller v. Blair*, 104 Me. 469, 72 Atl. 182.

72. **Ark.**—*Biggs v. St. Louis*, I. M. & S. R. Co., 91 Ark. 122, 120 S. W. 970; *Vance v. Calhoun*, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111. **Ill.**—*Scott v. White*, 71 Ill. 287; *Aulger v. Badgely*, 29 Ill. App. 336. **Ind.** *Haugh, Ketcham & Co. Iron Wks. v. Duncan*, 2 Ind. App. 264, 28 N. E. 334. **Ia.**—*Gooden v. Rayl*, 85 Iowa 592, 52 N. W. 506. **Kan.**—*Strong v. Marey*, 33 Kan. 109, 5 Pac. 366. **Mass.**—*Wood v. Coreoran*, 1 Allen 405; *Stiles v. Granville*, 6 Cush. 458; *Corey v. Corey*, 19 Pick. 29, 31 Am. Dec. 117. **Mich.** *Bell v. Bumpus*, 63 Mich. 375, 29 N.

W. 862; *Osborn v. Farr*, 42 Mich. 134, 3 N. W. 299. **Mo.**—*McMorrow v. Dowell*, 116 Mo. App. 289, 90 S. W. 728. **N. H.**—*Jenness v. Emerson*, 15 N. H. 486. **N. J.**—*Snediker v. Everingham*, 27 N. J. L. 143. **N. Y.**—*Canovar v. Cooper*, 3 Barb. 115. **S. C.**—*Eubanks v. Peak*, 2 Bailey 497. **Tenn.**—*Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. **Vt.**—*Atkins v. Sherbino*, 58 Vt. 248, 4 Atl. 703. **Va.**—*Jackson's Admr. v. Jackson*, 96 Va. 165, 31 S. E. 78. **Eng.**—*Dutton v. Pool*, 1 Vent. 318, 332, 2 Lev. 210, 86 Eng. Reprint 205, 215.

But see *Gunter v. Mooney*, 72 Ga. 205; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Dickinson v. Talmage*, 138 Mass. 249.

[a] **That either may maintain the action**, see *Benziger v. Miller*, 50 Ala. 206.

73. **Ala.**—*Tilley v. Harrison*, 91 Ala. 295, 8 So. 802. **Ark.**—*Biggs v. St. Louis*, I. M. & S. R. Co., 91 Ark. 122, 120 S. W. 970. **Conn.**—*Smith v. Smith*, 30 Conn. 111. **Ill.**—*Dufield v. Cross*, 12 Ill. 397. **Ia.**—*Darling v. Noyes*, 32 Iowa 96. **Me.**—*Fuller v. Blair*, 104 Me. 469, 72 Atl. 182. **Neb.**—*Inness v. Meyer*, 93 Neb. 43, 139 N. W. 836. **N. J.**—*Brown v. Ramsay*, 29 N. J. L. 117. **N. Y.**—*Simpson v. Buck*, 5 Lans. 337. **Pa.**—*Kauffelt v. Moderwell*, 21 Pa. 222. **S. C.**—*Valentine v. Bladen*, Harp. L. 9. **Tenn.**—*Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. **Vt.**—*Mason v. Hutchins & Co.*, 32 Vt. 780. **Wis.**—*Monaghan v. School Dist. No. One*, 38 Wis. 100.

74. *Haugh, Ketcham & Co. Iron Wks. v. Duncan*, 2 Ind. App. 264, 28 N. E. 334.

[a] **Knowledge of emancipation by employer is not necessary** to entitle the child to sue in its own name for its wages. *Corey v. Corey*, 19 Pick. (Mass.) 29, 31 Am. Dec. 117.

As to the necessity of an emanci-

parent for the services of a minor child follows in the main the general rules governing such pleadings.⁷⁵

C. TRIAL.⁷⁶—Emancipation of a minor child is generally a question of fact to be determined by the jury.⁷⁷

VII. ACTIONS FOR INJURIES TO CHILD AND LOSS OF SERVICES.—A. IN GENERAL.—For any injury to a child, an action may be brought either by the parent,⁷⁸ or by one in loco

pated infant being represented by next friend, see 10 STANDARD PROC. 711.

75. See generally the titles "Declaration and Complaint;" "Pleading."

[a] In an action by a mother for the earnings of her minor child, her authority to sue, as that she is its guardian, supports it, and is entitled to its services, should appear from the complaint. *Ala.*—*Jones v. Buckley*, 19 *Ala.* 604. *Conn.*—*Burk v. Phips*, 1 *Root* 487. *Pa.*—*Franz v. Riehl*, 4 *Pa.* *Dist.* 627.

76. See generally the title "Trial."

77. *Ark.*—*Biggs v. St. Louis*, 1 *M. & S. R. Co.*, 91 *Ark.* 122, 120 *S. W.* 970. *Fla.*—*Jackson v. Citizens' Bank & Tr. Co.*, 53 *Fla.* 265, 44 *So.* 516. *Ia.*—*Bristor v. Chicago*, etc. *R. Co.*, 128 *Iowa* 479, 104 *N. W.* 487. *Mich.*—*Freeman v. Shaw*, 173 *Mich.* 262, 139 *N. W.* 66. *Mo.*—*Brosius v. Barker*, 154 *Mo. App.* 657, 136 *S. W.* 18. *N. H.*—*Crowley v. Crowley*, 72 *N. H.* 241, 56 *Atl.* 190. *N. J.*—*Brown v. Ramsay*, 29 *N. J. L.* 117. *Okla.*—*Webb v. Harris*, 32 *Okla.* 491, 121 *Pac.* 1082, *Ann. Cas.* 1914A, 602. *Pa.*—*Delaware County Nat. Bank v. Headley*, 1 *Sad.* 499, 4 *Atl.* 464; *Beaver, Bare & Co. v. Bare*, 104 *Pa.* 58, 49 *Am. Rep.* 567. *Tenn.*—*Cloud v. Hamilton*, 11 *Humph.* 104, 53 *Am. Dec.* 778. *Vt.*—*Baker v. Baker*, 41 *Vt.* 55.

Province of judge and jury generally, see the title "Province of Judge and Jury."

78. *U. S.*—*Netherland-American Steam Nav. Co. v. Hollander*, 59 *Fed.* 417, 8 *C. A.* 169. *Ala.*—*Durden v. Barnett*, 7 *Ala.* 169. *Cal.*—*Karr v. Parks*, 44 *Cal.* 46. *Colo.*—*Bailey v. College of Sacred Heart*, 52 *Colo.* 116, 119 *Pac.* 1067. *Ga.*—*Shields v. Yonge*, 15 *Ga.* 349, 60 *Am. Dec.* 698. *Ill.*—*Mercer v. Jackson*, 54 *Ill.* 397; *Chicago City Ry. Co. v. Schaefer*, 121 *Ill. App.* 334. *Ind.*—*Louisville, N. A. & C. Ry. Co. v. Goodykoontz*, 119 *Ind.* 111, 21 *N. E.* 472, 12 *Am. St. Rep.* 371; *Binford v. Johnston*, 82 *Ind.* 426, 42 *Am. Rep.* 508; *Citizens' St. R. Co. v. Willoby*,

15 *Ind. App.* 312, 43 *N. E.* 1058. *Ia.*—*Nelson v. Illinois Cent. R. Co.*, 173 *Iowa* 161, 155 *N. W.* 169. *Kan.*—*Henry v. Missouri, K. & T. R. Co.*, 98 *Kan.* 567, 158 *Pac.* 857. *Ky.*—*Louisville*, etc. *R. Co. v. Lyons*, 156 *Ky.* 222, 160 *S. W.* 942, 48 *L. R. A.* (N. S.) 674; *Meers v. McDowell*, 110 *Ky.* 926, 62 *S. W.* 1013, 96 *Am. St. Rep.* 475, 53 *L. R. A.* 789. *Me.*—*Kennard v. Burton*, 25 *Me.* 39, 43 *Am. Dec.* 249. *Mass.*—*Wilton v. Middlesex R. Co.*, 125 *Mass.* 230; *McCarthy v. Guild*, 12 *Metc.* 291. *Minn.*—*Nyman v. Lynde*, 93 *Minn.* 257, 101 *N. W.* 163. *Mo.*—*Klingman v. Holmes*, 54 *Mo.* 304. *N. J.*—*Van Horn v. Freeman*, 6 *N. J. L.* 322. *N. Y.*—*Cuning v. Brooklyn City R. Co.*, 109 *N. Y.* 95, 16 *N. E.* 65; *Valenti v. Mesinger*, 175 *App. Div.* 398, 162 *N. Y. Supp.* 30. *N. C.*—*Gurley v. Southern Power Co.*, 172 *N. C.* 690, 90 *S. E.* 943. *Pa.*—*Wilt v. Vickers*, 8 *Watts* 227. *Tenn.*—*Blackwell v. Memphis St. R. Co.*, 124 *Tenn.* 517, 137 *S. W.* 486; *Tennessee Cent. R. Co. v. Doak*, 115 *Tenn.* 720, 92 *S. W.* 853. *Tex.*—*Texas*, etc. *R. Co. v. Brick*, 83 *Tex.* 526, 18 *S. W.* 947, 29 *Am. St. Rep.* 675; *Ft. Worth St. Ry. Co. v. Witten*, 74 *Tex.* 202, 11 *S. W.* 1091; *Rishworth v. Moss* (*Tex. Civ. App.*), 191 *S. W.* 843. *Wash.*—*Otey v. Bradley*, 63 *Wash.* 500, 115 *Pac.* 1045.

[a] The action is based on the parent's right to the child's services or earnings. *U. S.*—*Netherland-American Steam Nav. Co. v. Hollander*, 59 *Fed.* 417, 8 *C. C. A.* 169. *R. I.*—*McGarr v. National & P. Worsted Mills*, 24 *R. I.* 447, 53 *Atl.* 320, 96 *Am. St. Rep.* 749, 60 *L. R. A.* 122. *Vt.*—*Trow v. Thomas*, 70 *Vt.* 580, 41 *Atl.* 652.

[b] *Step Parent.*—*Eickhoff v. Sedalia*, etc. *R. Co.*, 106 *Mo. App.* 541, 80 *S. W.* 966; *Wessel v. Gerken*, 36 *Misc.* 221, 73 *N. Y. Supp.* 192.

[c] A parent's consent to illegal service is a bar to the maintenance of an action by the parent based on the negligence of the employer through which the child was injured. *Hetzl*

parentis,⁷⁹ or by the child,⁸⁰ where it has been emancipated,⁸¹ or becomes of age,⁸² or where the injury is purely personal to the child.⁸³ The two actions should not be joined,⁸⁴ unless joinder is required by

v. Wasson Piston Ring Co., 89 N. J. L. 205, 98 Atl. 308.

[d] **Under Employers' Liability and Workmen's Compensation Acts**, see **Kan.**—*Gibson v. Kansas City Packing Box Co.*, 85 Kan. 346, 116 Pac. 502, Ann. Cas. 1912D, 1103. **Mass.**—*Jordan v. New Eng. Structural Co.*, 197 Mass. 43, 83 N. E. 332. **Mich.**—*Mackin v. Detroit-Timken Axle Co.*, 187 Mich. 8, 153 N. W. 49. **N. J.**—*Hetzel v. Wasson Piston Ring Co.*, 89 N. J. L. 205, 98 Atl. 308; *Tonsellito v. New York, etc. Ry. Co.*, 87 N. J. L. 651, 94 Atl. 864. **N. Y.**—*Balke v. Otis Elevator Co.*, 177 App. Div. 499, 164 N. Y. Supp. 287.

Injury Caused by Defect in Street. See 11 STANDARD PROC. 208.

As to parent's right of action for a child's death by wrongful act, see 6 STANDARD PROC. 386.

79. *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302.

[a] But one who stands merely temporarily in loco parentis cannot sue. *Ft. Worth St. Ry. Co. v. Witten*, 74 Tex. 202, 11 S. W. 1091.

80. **Ala.**—*Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751. **Cal.**—*Durkee v. Central Pac. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59; *Karr v. Parks*, 44 Cal. 46. **Ill.**—*Ballentine v. Illinois Cent. R. Co.*, 157 Ill. App. 295. **Ind.**—*Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *Boyd v. Blaisdell*, 15 Ind. 73. **Ky.**—*Louisville, etc. R. Co. v. Lyons*, 156 Ky. 222, 160 S. W. 942, 48 L. R. A. (N. S.) 674; *Akers v. Fulkerson*, 153 Ky. 228, 154 S. W. 1101. **Mass.**—*Thompson v. United Laboratories Co.*, 221 Mass. 276, 108 N. E. 1042. **Minn.**—*Gardner v. Kellogg*, 23 Minn. 463. **N. Y.**—*Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 16 N. E. 65. **Tenn.**—*Tennessee Cent. R. Co. v. Doak*, 115 Tenn. 720, 92 S. W. 853; *Forsythe v. Central Mfg. Co.*, 103 Tenn. 497, 53 S. W. 731. **Tex.**—*Evansich v. Gulf, etc. Ry. Co.*, 57 Tex. 123; *Houston & G. N. R. Co. v. Miller*, 49 Tex. 322; *Freeman v. Harrison* (Tex. Civ. App.), 143 S. W. 686.

[a] **Not for Loss of Services.**—*Cole v. Searfoss*, 49 Ind. App. 334, 97 N. E. 345; *National Biscuit Co. v. Scott* (Tex. Civ. App.), 142 S. W. 65.

81. **U. S.**—*The Etna*, 1 Ware 462, 8 Fed. Cas. No. 4,542. **Conn.**—*Kenure v. Brainerd, etc. Co.*, 88 Conn. 265, 91 Atl. 185. **Ky.**—*Chesapeake & O. R. Co. v. De Atley*, 151 Ky. 109, 151 S. W. 363. **Mass.**—*McCarthy v. Boston & L. R. Corp.*, 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608; *Dumain v. Gwynne*, 10 Allen 270; *Wodell v. Coggeshall*, 2 Mete. 89, 35 Am. Dec. 391. **Okla.**—*Harris Irby Cotton Co. v. Duncan*, 157 Pac. 746. **Pa.**—*Stansbury v. Bertron*, 7 Watts & S. 362. **Tex.**—*Pecos & N. T. R. Co. v. Blasengame*, 42 Tex. Civ. App. 66, 93 S. W. 187.

[a] **Dividing Wages Not Emancipation.**—*Texas & P. R. Co. v. Adkins* (Tex. Civ. App.), 126 S. W. 954.

[b] **Emancipation Implied.**—*Donk Bros. Coal & Coke Co. v. Retzlaff*, 133 Ill. App. 277.

[c] **Conduct Amounting to Emancipation.**—*Chesapeake & O. R. Co. v. De Atley*, 151 Ky. 109, 151 S. W. 363.

82. *Mercer v. Jackson*, 54 Ill. 397.

83. **La.**—*Pattison v. Gulf Bag Co.*, 116 La. 963, 41 So. 224, 114 Am. St. Rep. 570, libel. **N. Y.**—*Murray v. Gast Litho. & Eng. Co.*, 8 Misc. 36, 31 Abb. N. C. 266, 28 N. Y. Supp. 271, 58 N. Y. St. 811 (*affirmed*, 10 Misc. 365, 31 N. Y. Supp. 17, 63 N. Y. St. 431), publication of portrait **S. C.**—*Heast v. Sybert*, Cheves 177, assault and battery.

[a] **By Parent for Benefit of Child.**

(1) *Brunette v. Minneapolis, St. P. & S. S. M. R. Co.*, 117 Minn. 444, 137 N. W. 172 (holding the statute applies to the case of a nonresident minor child); *Hess v. Adamant Mfg. Co.*, 66 Minn. 79, 68 N. W. 774; *Lathrop v. Schutte*, 61 Minn. 196, 63 N. W. 493; *Buecher v. Columbia Shoe Co.*, 60 Minn. 477, 62 N. W. 817. (2) But not if the statute does not expressly authorize him to do so. *Durkee v. Central Pac. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59.

84. *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *Lockett v. Ft. Worth, etc. Ry. Co.*, 78 Tex. 211, 14 S. W. 564.

Joinder of actions in general, see 14 STANDARD PROC. 625.

[a] But where the parent is also injured by the same negligent act, he may join his claim for damages for

statute.⁸⁵

Estoppel. — A recovery by the parent in such an action is not a bar to the child's action for personal injuries;⁸⁶ nor is the child's recovery, by his father as next friend, a bar to a subsequent action by the father for loss of services,⁸⁷ though under the statute in some jurisdictions the father in such case is estopped.⁸⁸

B. FORM OF ACTION. — At common law, case is the proper form of action for an injury to a minor child resulting from neglect;⁸⁹ but when the injury is caused by a wrongful act, the remedy is trespass per quod servitium amisit.⁹⁰

C. PARTIES.⁹¹ — The action is brought in the name of the parent in whom the cause of action exists, whether the father⁹² or the mother.⁹³ Under some statutes it may be prosecuted in the name of both father

loss of services of the child with his personal injury claim. *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297.

85. *American Steel & Wire Co. v. Tynan*, 183 Fed. 949, 106 C. C. A. 289; *Cook v. Conestoga Traction Co.*, 13 Pa. Dist. 271, 20 Lanc. Rev. 317.

86. *Durkee v. Central Pac. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59.

87. *Karr v. Parks*, 44 Cal. 46; *Forstye v. Central Mfg. Co.*, 103 Tenn. 497, 53 S. W. 731.

[a] **A parent is estopped by acquiescing** in a suit and settlement by the infant, which includes compensation for loss of services, when he acts in the capacity of guardian and receives as such for the infant the sum agreed upon and approves the settlement. *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014. See also *Lieberman v. Third Ave. R. Co.*, 25 Misc. 296, 54 N. Y. Supp. 574.

88. *Pla v. San Juan L. & T. Co.*, 3 Porto Rico Fed. 216; *Garcia v. Ponce R. & L. Co.*, 3 Porto Rico Fed. 106.

89. *Ala.*—*Durden v. Barnett*, 7 Ala. 169. *N. J.*—*Van Horn v. Freeman*, 6 N. J. L. 322. *Pa.*—*Wilt v. Vickers*, 8 Watts 227.

90. *Hammer v. Pierce*, 5 Harr. (Del.) 171; *Wilt v. Vickers*, 8 Watts (Pa.) 227; *Hoover v. Heim*, 7 Watts (Pa.) 62.

91. See generally the title "**Parties.**"

92. *Ga.*—*King v. Southern R. Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544. *Ind.*—*Louisville, N. A. & C. Ry. Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; *Citizens' St. R. Co. v. Willoeby*, 15 Ind. App. 312, 43 N. E. 1058. *Minn.*—*Ackeret v. Minneapolis*, 129 Minn. 190,

151 N. W. 976, Ann. Cas. 1916E, 897, L. R. A. 1915D, 1111. *Mo.*—*Keller v. St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391. *P. R.*—*Pla v. San Juan L. & T. Co.*, 3 Porto Rico Fed. 216. *Tex.*—*Hillsboro Cotton Mills v. King*, 51 Tex. Civ. App. 518, 112 S. W. 132.

93. *Ga.*—*King v. Southern R. Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544; *Savannah, etc. R. Co. v. Smith*, 93 Ga. 742, 21 S. E. 157. *Ind.*—*Louisville, N. A. & C. Ry. Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; *Ohio & M. Ry. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Citizens' St. R. Co. v. Willoeby*, 15 Ind. App. 312, 43 N. E. 1058. *Ky.*—*Adams v. Louisville & N. R. Co.*, 153 Ky. 42, 154 S. W. 392; *Union News Co. v. Morrow*, 20 Ky. L. Rep. 302, 46 S. W. 6. *Mass.*—*Tornroos v. R. H. White Co.*, 220 Mass. 336, 107 N. E. 1015; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504. *Mich.*—*Yost v. Grand Trunk R. Co.*, 163 Mich. 564, 128 N. W. 784, Ann. Cas. 1912A, 988, 31 L. R. A. (N. S.) 519. *Mo.*—*Keller v. St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; *Franklin v. Butcher*, 144 Mo. App. 660, 129 S. W. 428; *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504, 77 S. W. 1021. *N. Y.*—*Sorenson v. Balaban*, 11 App. Div. 164, 42 N. Y. Supp. 654, 4 N. Y. Ann. Cas. 7; *Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403. *Pa.*—*Crowley v. Pennsylvania R. Co.*, 231 Pa. 286, 80 Atl. 175; *O'Brien v. Philadelphia*, 215 Pa. 407, 64 Atl. 551. *P. R.*—*Pla v. San Juan L. & T. Co.*, 3 Porto Rico Fed. 216. *R. I.*—*McGarr v. National & Prov. Worsted Mills*, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep.

and mother.⁹⁴ If the child sues, it must do so in accordance with the general rules respecting suits by children.⁹⁵

D. PLEADING.⁹⁶ — **1. Declaration and Complaint.** — The declaration or complaint should state facts showing plaintiff's right to the child's services;⁹⁷ the negligent act of the defendant;⁹⁸ that such negligent act deprived the plaintiff of the child's services;⁹⁹ and the resultant damages.¹

2. Plea or Answer. — The general rules governing such pleadings obtain in such actions.²

749, 60 L. R. A. 122. **Tenn.**—Tennessee Cent. R. Co. v. Doak, 115 Tenn. 720, 92 S. W. 853; Forsythe v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731. **Wash.** Magnuson v. O'Dea, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1915B, 1230, 48 L. R. A. (N. S.) 327.

[a] **No Right of Action in Absence of Statute.**—Kelly v. P. & B. Traction Co., 204 Pa. 623, 54 Atl. 482.

94. Thomas v. St. Louis, I. M. & S. R. Co. (Mo. App.), 180 S. W. 1030.

[a] **But a joinder of the parents is not necessary** under such a statute. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976, Ann. Cas. 1916E, 897, L. R. A. (N. S.) 1915D, 1111.

95. **As to actions by and against infants generally,** see 12 STANDARD PROC. 727.

By Next Friend or Guardian.—See 10 STANDARD PROC. 708.

96. **As to pleadings in actions by infants generally,** see 12 STANDARD PROC. 727.

97. Dunn v. Cass Ave., etc. R. Co., 21 Mo. App. 188.

[a] **The parent's consent** (1) to the child's employment need not be alleged (Alabama Midland Ry. Co. v. McDonald, 112 Ala. 216, 20 So. 472); (2) but such consent, which is generally presumed, must be negatived when the service in which the injured child was engaged is prohibited by law. Hetzel v. Wasson Piston Ring Co., 89 N. J. L. 205, 98 Atl. 308.

[b] **When the action is by the child's mother** (1), the facts stated in the declaration should show the right to the child's services in herself instead of in the father. Citizens' St. R. Co. v. Willooby, 15 Ind. App. 312, 43 N. E. 1058; Louisville, E. & St. L. C. R. Co. v. Lohges, 6 Ind. App. 288, 33 N. E. 449; Goins v. Chicago, etc. R. Co., 47 Mo. App. 173. (2) It has been held that a direct averment by the mother is necessary. Matthews v.

Missouri Pac. R. Co., 26 Mo. App. 75; Geraghty v. New, 7 Misc. 30, 27 N. Y. Supp. 403.

[c] **That the child was its parent's servant** need not be alleged, nor is such an allegation proper. Buck v. People's St. Ry., etc. Co., 46 Mo. App. 555.

98. Ekman v. Minneapolis S. Ry. Co., 34 Minn. 24, 24 N. W. 291; San Antonio St. R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

As to pleading negligence generally, see the title "Negligence."

[a] **Injury Resulting in Death.**—In an action by a parent for loss of services caused by an injury to a minor child, the allegation of facts which show that the injury resulted in the child's death does not change the nature of the action or render the declaration defective. Chick v. Southwestern R. Co., 57 Ga. 357.

99. Burton v. Missouri Pac. Ry. Co., 32 Mo. App. 455.

1. Wennell v. Dowson, 88 Conn. 710, 92 Atl. 663; Collins v. Godwin, 65 Fla. 283, 61 So. 632.

[a] **To recover for prospective loss of services during minority,** the plaintiff should allege such loss in his declaration. **Conn.**—Wennell v. Dowson, 88 Conn. 710, 92 Atl. 663. **Fla.**—Collins v. Godwin, 65 Fla. 283, 61 So. 632. **N. Y.** Gilligan v. New York, etc. R. Co., 1 E. D. Smith 453. **Ohio.**—Cincinnati Omnibus Co. v. Kuhnell, 9 Ohio Dec. (Reprint) 197, 11 Wkly. L. Bul. 189.

2. See generally the title "Answers;" "Pleas."

[a] **A plea of contributory negligence** (1) of the child without an averment of capacity is insufficient, when the facts alleged in the declaration make a prima facie showing of incapacity. Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751. (2) When contributory negligence of the parent, as well as

E. TRIAL.³—The usual rule obtains that where the evidence is conflicting, it is for the jury to determine issues as to the negligence of defendant;⁴ the proximate cause of the injury;⁵ the child's emancipation;⁶ contributory negligence of the parents;⁷ and of the child,⁸ or its immediate custodian.⁹

VIII. PROCEEDINGS FOR ENTICING AWAY OR HARBORING CHILD.¹⁰—**A. CRIMINAL PROCEEDINGS.**—The unlawful enticing away and harboring of a minor child against the will of its parents may be redressed, under the statutes of some states, by a criminal prosecution against the wrongdoer.¹¹

B. CIVIL REMEDIES.—1. In General.—A civil action¹² for dam-

that of the child, is relied upon it must, as a general rule, be pleaded; it is not enough to plead merely the contributory negligence of the child. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N. W. 440. As to pleading contributory negligence generally, see the title "Negligence."

[b] **A plea of permission by the mother** to do the act which, without fault on defendant's part, resulted in the injury to the child is bad, where the custody of the child rests primarily in the father, unless accompanied by an averment of authorization by the mother. *Pierce v. Millay*, 62 Ill. 133.

3. See generally the title "Trial."

4. **U. S.**—*American Steel & Wire Co. v. Tynan*, 183 Fed. 949, 106 C. C. A. 289. **Ill.**—*Louisville, N. A. & C. Ry. Co. v. Red*, 154 Ill. 95, 39 N. E. 1086. **N. Y.**—*Ryan v. New York Cent. & R. R. Co.*, 37 Hun 186.

See generally the titles "Negligence;" "Province of Judge and Jury."

5. *South & N. A. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142.

6. *Arnold v. Norton*, 25 Conn. 92; *Shawnee-Tecumseh Tract. Co. v. Campbell* (Okla.), 155 Pac. 697.

7. **Cal.**—*Bygum v. Southern Pac. Co.*, 102 Cal. xvii, 36 Pac. 415. **Ill.**—*Chicago & A. R. Co. v. Logue*, 158 Ill. 621, 42 N. E. 53 (*affirming* 58 Ill. App. 142); *Louisville, N. A. & C. Ry. Co. v. Red*, 154 Ill. 95, 39 N. E. 1086. **Ind.**—*Cleveland, etc. R. Co. v. Means*, 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375. **Kan.**—*Atchison, T. & S. F. Ry. Co. v. Calvert*, 52 Kan. 547, 34 Pac. 173. **Ky.**—*Passamanek's Admr. v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620. **Mass.**—*Powers v. Quiney & B. St. Ry. Co.*, 163 Mass. 5, 39 N. E.

345; *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653. **Mich.**—*Baker v. Flint, etc. R. Co.*, 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154. **Mo.**—*Sern v. Southern R. Co.*, 124 Mo. 621, 28 S. W. 66; *Jensen v. Kansas City*, 181 Mo. App. 359, 168 S. W. 827. **N. Y.**—*Huerzeler v. Central Cross-Town R. Co.*, 139 N. Y. 490, 34 N. E. 1101, *affirming* 1 Misc. 136, 20 N. Y. Supp. 676. **Ore.**—*Hedin v. Suburban Ry. Co.*, 26 Ore. 155, 37 Pac. 540. **Pa.**—*Herron v. Pittsburgh*, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798; *Glassey v. Hestonville, etc. P. Ry. Co.*, 57 Pa. 172. **Tex.**—*Texas Midland R. Co. v. Herbeck*, 60 Tex. 602. **Wis.**—*Dahl v. Milwaukee City Ry. Co.*, 62 Wis. 652, 22 N. W. 755.

[a] **The parents' knowledge and consent** to the child's employment in a dangerous service. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54; *Weaver v. Iselin*, 161 Pa. 386, 29 Atl. 49.

8. *Ryan v. New York Cent. & H. R. R. Co.*, 37 Hun (N. Y.) 186; *Ottersbach v. Philadelphia*, 161 Pa. 111, 28 Atl. 991.

9. *Parish v. Eden*, 62 Wis. 272, 22 N. W. 399.

10. **Abduction**, see 1 STANDARD PROC. 77.

11. **Mass.**—*Com. v. Nickerson*, 5 Allen 518. **N. C.**—*State v. Rice*, 76 N. C. 194. **Tex.**—*Cockrell v. State* (Tex. Crim.), 160 S. W. 343, 48 L. R. A. (N. S.) 1001; *Cummins v. State*, 36 Tex. Crim. 398, 37 S. W. 435. **Can.**—*Rex v. Hamilton*, 22 Ont. L. 484.

12. **Ia.**—*Everett v. Sherfey*, 1 Iowa 356. **Ky.**—*Washburn v. Abram*, 122 Ky. 53, 90 S. W. 997; *Soper v. Igo*, 121 Ky. 550, 89 S. W. 538, 1 L. R. A. (N. S.) 362. **Mass.**—*Stowe v. Heywood*, 7

ages, based upon the loss of services,¹³ is also a proper remedy. The father,¹⁴ or the mother, when entitled to the child's services,¹⁵ or sometimes both,¹⁶ may bring the action, as may also one who stands in loco parentis.¹⁷

2. Form of Action.—The common law action for enticing or harboring a minor child against the will of its parents is usually trespass vi et armis;¹⁸ but trespass on the case is sometimes available.¹⁹

3. Pleading.—In an action of trespass on the case for enticing and harboring a minor child, the declaration should contain two counts, one for enticing and one for harboring.²⁰ It is essential to aver knowledge on the part of the defendant that the minor owed service to the plaintiff;²¹ that the plaintiff has been deprived of the child's services by the defendant's wrongful act;²² and, if the action

Allen 118; *Butterfield v. Ashley*, 6 Cush. 249. **Mo.**—*Arnold v. St. Louis, etc. R. Co.*, 100 Mo. App. 470, 74 S. W. 5. **N. Y.**—*Hopf v. United States Baking Co.*, 6 Misc. 158, 27 N. Y. Supp. 217.

[a] **Enticing for purpose of marriage** not actionable. **Ky.**—*Jones v. Tevis*, 4 Litt. 25, 14 Am. Dec. 98. **Mass.**—*Hervey v. Moseley*, 7 Gray 479, 66 Am. Dec. 515. **N. H.**—*Aldrich v. Bennett*, 63 N. H. 415, 56 Am. Rep. 529.

[b] **Where child leaves voluntarily** no action maintainable. **Ky.**—*Soper v. Crutcher*, 29 Ky. L. Rep. 1080, 96 S. W. 907. **Md.**—*Kenney v. Baltimore & O. R. Co.*, 101 Md. 490, 61 Atl. 58, 1 L. R. A. (N. S.) 205. **Mass.**—*Butterfield v. Ashley*, 6 Cush. 249. **N. Y.**—*Caughy v. Smith*, 47 N. Y. 244.

[c] **A parent may waive the tort and sue for loss of services** in a case of enticing away and harboring a minor child, but if he does so he is estopped from later maintaining an action for enticing the child from home. **Mich.**—*Thompson v. Howard*, 31 Mich. 309. **Neb.**—*Wolf v. Vannoy*, 98 Neb. 637, 154 N. W. 215. **N. Y.**—*Hopf v. United States Baking Co.*, 6 Misc. 158, 27 N. Y. Supp. 217.

13. Ky.—*Washburn v. Abram*, 122 Ky. 53, 90 S. W. 997; *Soper v. Igo*, 121 Ky. 550, 89 S. W. 538, 1 L. R. A. (N. S.) 362. **Me.**—*Hare v. Dean*, 90 Me. 308, 38 Atl. 227. **Md.**—*Kenney v. Baltimore & O. R. Co.*, 101 Md. 490, 61 Atl. 581, 1 L. R. A. (N. S.) 205. **N. J.**—*Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341. **N. Y.**—*Caughy v. Smith*, 47 N. Y. 244; *Miles v. Cuthbert*, 122 N. Y. Supp. 703. **Ohio.**—*Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593. **S. C.**—*Kirkpatrick v. Lockhart*, 2 Brev. 276.

[a] **If the child has been emancipated** the action cannot be maintained. *Wodell v. Coggeshall*, 2 Mete. (Mass.) 89, 35 Am. Dec. 391; *Worcester v. Marchant*, 14 Pick. (Mass.) 510.

14. Soper v. Igo, 121 Ky. 550, 89 S. W. 538, 1 L. R. A. (N. S.) 362; *Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

15. Washburn v. Abram, 122 Ky. 53, 90 S. W. 997.

16. Hare v. Dean, 90 Me. 308, 38 Atl. 227.

17. Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; *Moritz v. Garnhart*, 7 Watts (Pa.) 302, 32 Am. Dec. 762.

18. U. S.—*Somboy v. Loring*, 2 Cranch 318, 22 Fed. Cas. No. 13,168, holding that in trespass vi et armis actual force or a knowledge of minority is a necessary element to be proved. **R. I.**—*Wheeler v. Price*, 21 R. I. 99, 41 Atl. 894. **S. C.**—*Vaughan v. Rhodes*, 2 McCord 227, 13 Am. Dec. 713; *Kirkpatrick v. Lockhart*, 2 Brev. 276.

19. Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98, holding that where no force is employed the action may be case.

20. Butterfield v. Ashley, 6 Cush. (Mass.) 249.

[a] **A declaration for enticing away a minor child may be amended** by adding a count for harboring and persuading it to remain away. *Stowe v. Heywood*, 7 Allen (Mass.) 118.

21. Butterfield v. Ashley, 6 Cush. (Mass.) 249; *Caughy v. Smith*, 47 N. Y. 244.

[a] **Inferable From Knowledge of Minority.**—*Caughy v. Smith*, 47 N. Y. 244.

22. Washburn v. Abram, 122 Ky. 53, 90 S. W. 997.

be by the child's mother, she must allege her authority for maintaining the action.²³

IX. ADOPTION.—A. **IN GENERAL.**—Adoption was unknown to the common law;²⁴ but exists by virtue of statutes in practically all the states.²⁵

B. **PROCEEDINGS FOR ADOPTION.**—1. **In General.**—The statutes setting out the steps to be taken in adopting a child are strictly construed in some states;²⁶ but in others substantial compliance with the essential provisions of the statute is sufficient.²⁷

23. *Washburn v. Abram*, 122 Ky. 53, 90 S. W. 997.

24. *Ala.*—*Abney v. De Loach*, 84 Ala. 393, 4 So. 757. *Cal.*—*In re McComb's Estate*, 174 Cal. 211, 162 Pac. 897; *In re Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214. *Ill.*—*Bartholow v. Davies*, 276 Ill. 505, 114 N. E. 1017. *Mich.*—*Morrison v. Sessions' Estate*, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500. *Mo.*—*Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480. But see *Lindsley v. Patterson*, 177 S. W. 826, L. R. A. 1915F, 680. *Neb.*—*Ferguson v. Herr*, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542. *N. Y.*—*In re Ziegler*, 82 Misc. 346, 143 N. Y. Supp. 562. *Pa.*—*Benson v. Nicholas*, 246 Pa. 229, 92 Atl. 139, Ann. Cas. 1916D, 1109; *Luccareni's Estate*, 14 Pa. Dist. 296. *Tenn.*—*In re Knott*, 138 Tenn. 349, 197 S. W. 1097. *Tex.*—*Harle v. Harle* (Tex. Civ. App.), 166 S. W. 674.

25. See the statutes and the following: *Ala.*—*Abney v. De Loach*, 84 Ala. 393, 4 So. 757. *Ark.*—*Morris v. Dooley*, 59 Ark. 483, 28 S. W. 30, 430. *Cal.*—*In re Jobson's Est.*, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. (N. S.) 1062. *Conn.*—*Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453. *Haw.*—*In re Wilhelm*, 13 Hawaii 206. *Ill.*—*Butterfield v. Sawyer*, 187 Ill. 598, 58 N. E. 602, 79 Am. St. Rep. 246, 52 L. R. A. 75. *Ind.*—*Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788. *Ia.*—*Chehak v. Battles*, 133 Iowa 107, 110 N. W. 330, 12 Ann. Cas. 140, 8 L. R. A. (N. S.) 1130. *Kan.*—*Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207. *Ky.*—*Villier v. Watson's Admx.*, 168 Ky. 631, 182 S. W. 869, L. R. A. 1918A, 820; *Power v. Haffey*, 85 Ky. 671, 4 S. W. 683. *Md.*—*Hillers v. Taylor*, 108 Md. 148, 69 Atl. 715. *Mass.*—*Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. *Mich.*—*Albring v. Ward*, 137 Mich. 352, 100 N. W. 609. *Mo.*—*Clarkson v. Hatton*, 143 Mo. 47,

44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748. *Neb.*—*Ferguson v. Herr*, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542. *N. H.*—*Clark v. Clark*, 76 N. H. 551, 85 Atl. 758. *N. Y.*—*Smith v. Allen*, 161 N. Y. 478, 55 N. E. 1056. *Ore.*—*Long v. Dufur*, 58 Ore. 162, 113 Pac. 59. *Pa.*—*Evans' Estate*, 47 Pa. Super. 196. *S. D.*—*Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266. *Tenn.*—*In re Knott*, 138 Tenn. 349, 197 S. W. 1097; *Helms v. Elliott*, 39 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535. *Tex.*—*Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372. *Vt.*—*Batchelder v. Walworth*, 82 Atl. 7. *Wash.*—*In re Renton's Est.*, 10 Wash. 533, 39 Pac. 145. *Wyo.*—*Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

[a] From the civil law, it found its way into the statutes of the various states. *Hockaday v. Lynn*, 200 Mo. 456, 463, 98 S. W. 585, 118 Am. St. Rep. 672, 8 L. R. A. (N. S.) 117.

26. *Cal.*—*In re McComb's Estate*, 174 Cal. 211, 162 Pac. 897; *In re Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214; *In re Kelly*, 25 Cal. App. 651, 145 Pac. 156. But see *In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; *In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; *In re Johnson's Est.*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380. *Mass.*—*Purinton v. Jamrock*, 195 Mass. 187, 80 N. E. 802, 18 L. R. A. (N. S.) 926. *N. Y.*—*In re Ziegler*, 82 Misc. 346, 143 N. Y. Supp. 562. But see *People ex rel. Burns v. Bloedel*, 4 N. Y. Supp. 110. *Ohio.*—*Upson v. Noble*, 35 Ohio St. 655. *Ore.*—*Long v. Dufur*, 58 Ore. 162, 113 Pac. 59; *Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

27. *Ala.*—*Prince v. Prince*, 188 Ala. 559, 66 So. 27; *Cofer v. Scroggins*, 93 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; *Abney v. De Loach*, 84 Ala. 393, 4 So. 757. *Ark.*—*Willis v. Bell*, 86 Ark.

2. **By Deed or Agreement.** — a. *In General.* — Adoption by agreement, which the statutes of some jurisdictions permit, is evidenced by a written declaration, signed, acknowledged, and recorded, or filed in the proper court of the county where the parties reside.²⁸ In addition thereto, the statutes of some states provide for an examination of the parties and approval of the adoption by a judicial officer.²⁹ The

473, 111 S. W. 808; *Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733. **Ill.** *Warner v. King*, 267 Ill. 82, 107 N. E. 837; *Flannigan v. Howard*, 200 Ill. 396, 65 N. E. 782, 93 Am. St. Rep. 201, 59 L. R. A. 664. But see *Watts v. Dull*, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Keegan v. Geraghty*, 101 Ill. 26. **Ind.** — *Dunn v. Means*, 48 Ind. App. 383, 95 N. E. 1015; *Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526; *Bray v. Miles*, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510. **Ia.** — *Sires v. Melvin*, 135 Iowa 460, 113 N. W. 106; *Hopkins v. Antrobus*, 120 Iowa 21, 94 N. W. 251. But see *Bresser v. Saarman*, 112 Iowa 720, 84 N. W. 920; *McCollister v. Yard*, 90 Iowa 621, 57 N. W. 447; *Shearer v. Weaver*, 56 Iowa 578, 9 N. W. 907. **Kan.** — *Malaney v. Cameron*, 98 Kan. 620, 159 Pac. 19; *Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621; *Cubitt v. Cubitt*, 74 Kan. 353, 86 Pac. 475. **Mo.** *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585, 118 Am. St. Rep. 672, 8 L. R. A. (N. S.) 117, holding the rule of strict construction applies to the statute, but not to the act of adoption. But see *Sarazin v. Union R. Co.*, 153 Mo. 479, 55 S. W. 92. **Neb.** — *Milligan v. McLaughlin*, 94 Neb. 171, 142 N. W. 675, 46 L. R. A. (N. S.) 1134; *Ferguson v. Herr*, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542. **Pa.** — *Brown's Adoption*, 25 Pa. Super. 259. **Vt.** — *Baneroft v. Baneroft's Heirs*, 53 Vt. 9. **Wis.** — *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894. **Wyo.** — *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

28. See the statutes and the following: **Ala.** — *Murphree v. Hanson*, 197 Ala. 246, 72 So. 437; *Cofer v. Scroggins*, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54. **Kan.** — *Malaney v. Cameron*, 98 Kan. 620, 159 Pac. 19. **La.** *Dupre's Succession*, 116 La. 1090, 41 So. 324. **Mo.** — *Clarkson v. Hutton*, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748. **Pa.** — *Benson v. Nicholas*, 246 Pa. 229, 92 Atl. 139, Ann. Cas. 1916D, 1109.

[a] **Signature (1) before a judge**

is sometimes required. *Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636; *People ex rel. Burns v. Bloedel*, 16 N. Y. Supp. 837. (2) Signing in the presence of the judge does not mean that he must witness the signature. *People ex rel. Burns v. Bloedel*, 16 N. Y. Supp. 837.

[b] **This is a ministerial (1) not a judicial act or proceeding (Ala.** — *Murphree v. Hanson*, 197 Ala. 246, 72 So. 437; *Abney v. De Loach*, 84 Ala. 393, 4 So. 757. **Cal.** — *In re Camp's Est.*, 131 Cal. 469, 63 Pac. 736, 82 Am. St. Rep. 371. **Haw.** — *In re Wilhelm*, 13 Hawaii 206. **La.** — *Vollmer's Succession*, 40 La. Ann. 593, 4 So. 254. **Pa.** *In re Peterson*, 212 Pa. 453, 61 Atl. 1005), (2) and the acknowledgment before, or approval of, a court or judge does not make it a judicial decree. **Ala.** *Murphree v. Hanson*, 197 Ala. 246, 72 So. 437. **Cal.** — *In re Camp's Est.*, 131 Cal. 469, 63 Pac. 736, 82 Am. St. Rep. 371. **N. Y.** — *Von Beck v. Thompson*, 167 N. Y. 601, 60 N. E. 1121, *affirming* 44 App. Div. 373, 60 N. Y. Supp. 1094, 7 N. Y. Ann. Cas. 33. See also *Maughan's Estate*, 3 Hawaii 262.

[c] **For forms of agreement to adopt**, see **Ala.** — *Abney v. De Loach*, 84 Ala. 393, 4 So. 757. **Cal.** — *In re Evans*, 106 Cal. 562, 39 Pac. 860. **Ia.** *Sires v. Melvin*, 135 Iowa 460, 113 N. W. 106; *Bresser v. Saarman*, 112 Iowa 720, 84 N. W. 920. **Mich.** — *Fisher v. Gardnier*, 183 Mich. 660, 150 N. W. 358; *Morrison v. Sessions*, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500. **Mo.** — *Sarazin v. Union R. Co.*, 153 Mo. 479, 55 S. W. 92; *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201. **Neb.** — *Martin v. Long*, 53 Neb. 694, 74 N. W. 43. **Ohio.** — *Bird v. Young*, 56 Ohio St. 210, 46 N. E. 819. **Pa.** *Ballard v. Ward*, 89 Pa. 358, 7 Wkly. N. C. 254. **Vt.** — *Baneroft v. Baneroft's Heirs*, 53 Vt. 9.

29. *In re Camp's Est.*, 131 Cal. 469, 63 Pac. 736, 82 Am. St. Rep. 371.

[a] **Approval of judge required.** *Malaney v. Cameron*, 98 Kan. 620, 159 Pac. 19.

court, however, is not limited to information derived from the record and examination of the parties.³⁰

The order of approval is not a judgment,³¹ and need not be in any particular form.³²

b. *Remedies Upon Contract To Adopt.*—Upon breach of a contract to adopt the child may sue for damages,³³ or resort to equity for appropriate relief,³⁴ such as specific performance.³⁵

[b] **Failure to examine parties** not fatal. *Estate of McKeag*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80, statute directory.

[c] **Examination of a child under the age of consent** is not necessary. *In re Johnson's Est.*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380.

[d] **Separate examination of the parties** is not necessary. *In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

30. *In re Bewley*, 167 Cal. 8, 138 Pac. 689, but should, in the exercise of its discretion, examine fully into the circumstances of the case from whatever source its information may properly be derived.

31. *In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; *In re Johnson's Est.*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; *In re Stevens*, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; *Bird v. Young*, 56 Ohio St. 210, 46 N. E. 819, though signed by the judge of the court.

32. *In re Evans' Est.*, 106 Cal. 562, 39 Pac. 860.

[a] **But it should declare** (1) the status of the child, that is, whose child it is to be considered (See *In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163), (2) and the name of the adoptive parent or parents (*Ex parte Clark*, 87 Cal. 638, 25 Pac. 967); (3) though not necessarily the residence of such parents (*In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163), or (4) the fact of their examination as required by statute. *In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

[b] **For forms of order of approval of an adoption agreement**, see: Cal. *In re Evans' Est.*, 106 Cal. 562, 39 Pac. 860; *In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146. Mich.—*Fisher v. Gardner*, 183 Mich. 660, 150 N. W. 358; *Morrison v. Sessions*, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

Neb.—*Martin v. Long*, 53 Neb. 694, 74 N. W. 43. N. Y.—*People ex rel. Burns v. Bloedel*, 4 N. Y. Supp. 110. Ohio. *Bird v. Young*, 56 Ohio St. 210, 46 N. E. 819.

33. *Sandham v. Grounds*, 94 Fed. 83, 36 C. C. A. 103.

34. *Van Duyne v. Vreeland*, 12 N. J. Eq. 142.

35. U. S.—*Hood v. McGehee*, 189 Fed. 205; *Jaffee v. Jacobson*, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352. Cal. See *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756. Ga.—*Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773. Haw.—*Beckley v. Lucas*, 8 Hawaii 40. Ia.—*Webb v. McIntosh*, 159 N. W. 637; *Horne v. Maxwell*, 170 Iowa 660, 153 N. W. 331; *Anderson v. Blakesly*, 155 Iowa 430, 136 N. W. 210; *Chehak v. Battles*, 133 Iowa 107, 110 N. W. 330, 12 Ann. Cas. 140, 8 L. R. A. (N. S.) 1130. Kan.—*Anderson v. Anderson*, 75 Kan. 117, 129, 88 Pac. 743, 748, 9 L. R. A. (N. S.) 229, *distinguishing* *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71. Minn. *Odenbreit v. Utheim*, 131 Minn. 56, 154 N. W. 741, oral contract enforced. Mo. *Fisher v. Davidson*, 271 Mo. 195, 195 S. W. 1024; *Lindsley v. Patterson*, 177 S. W. 826, L. R. A. 1915F, 680. Neb. *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207. N. J.—*Van Tine v. Van Tine* (N. J. Eq.), 15 Atl. 249, 1 L. R. A. 155. N. Y.—*Merchant v. White*, 77 App. Div. 539, 79 N. Y. Supp. 1, 12 N. Y. Ann. Cas. 233; *Gates v. Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454. Vt. *Durkee v. Durkee*, 59 Vt. 70, 8 Atl. 490. Wis.—*Heath v. Cuppel*, 163 Wis. 62, 157 N. W. 527, enforcement of lost contract. See also *Winke v. Olson*, 164 Wis. 427, 160 N. W. 164.

See generally the title "**Specific Performance.**"

[a] The matter is discretionary with the court. *Anderson v. Anderson*, 75 Kan. 117, 129, 88 Pac. 743, 748, 9 L. R. A. (N. S.) 229, *distinguishing* *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71.

3. By Judicial Proceedings. — a. *In General.* — In the majority of states, the method provided for adopting a child is a judicial proceeding, in the nature of a proceeding in rem,³⁶ in which a petition is filed, a hearing had, and a decree entered as in civil actions generally.³⁷

b. *Jurisdiction and Venue.*³⁸ — Under some statutes, adoption proceedings are brought in the probate court of the county where the adopting parents reside.³⁹ Other statutes provide for bringing the proceeding in the probate court of the county of the child's residence.⁴⁰ When a certain court is named by the statute for the purpose of entertaining adoption proceedings, that court has exclusive jurisdiction,⁴¹ but when two or more courts are named they have concurrent jurisdiction.⁴²

c. *Conditions Precedent.* — (I.) *In General.* — All the statutory conditions must exist before a court may have jurisdiction to make a decree of adoption.⁴³

(II.) Notice of adoption proceedings must be served, in the manner

36. *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665.

[a] **Either method**, by judicial proceeding, or by agreement signed, acknowledged and filed in the probate court, is permissible in some states. *Ferguson v. Herr*, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542. See *Malaney v. Cameron*, 98 Kan. 620, 159 Pac. 19 (approved by the probate judge); *Benson v. Nicholas*, 246 Pa. 229, 92 Atl. 139, Ann. Cas. 1916D, 1109. As to proceeding by deed or agreement, see *supra*, IX, B, 2.

37. **Conn.**—*Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453. **Ind.**—*Leonard v. Honisfager*, 43 Ind. App. 607, 88 N. E. 91. **N. H.**—*Wilson v. Otis*, 71 N. H. 483, 53 Atl. 439, 93 Am. St. Rep. 564. **Pa.**—*Benson v. Nicholas*, 246 Pa. 229, 92 Atl. 139, Ann. Cas. 1916D, 1109. **Tenn.**—*In re Knott*, 138 Tenn. 349, 197 S. W. 1097.

[a] **Voluntary Proceeding.**—*Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 626.

[b] **Quasi-Judicial Proceeding.**—*In re Camp's Est.*, 131 Cal. 469, 63 Pac. 736, 82 Am. St. Rep. 371.

38. See generally titles "Jurisdiction;" "Venue."

39. See generally the statutes, and the following: **Ill.**—*Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665. **Mass.**—*Foster v. Waterman*, 124 Mass. 592, New Hampshire statute. **Neb.**—*Milligan v. McLaughlin*, 94 Neb. 171, 142

N. W. 675, 46 L. R. A. (N. S.) 1134. **Pa.**—*McComeskey's Adoption*, 14 Pa. Dist. 420. **Wash.**—*Knigh v. Gallaway*, 42 Wash. 413, 85 Pac. 21.

See also the title "Probate Courts."

[a] **If such parents are nonresidents**, providing the statute gives a nonresident the right to adopt, then in the proper court of the county where the child resides. *Caldwell's Succession*, 114 La. 195, 38 So. 140, 108 Am. St. Rep. 341, construing Massachusetts statutes.

40. *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441; *Foster v. Waterman*, 124 Mass. 592 (under New Hampshire statute); *Rosekrans v. Rosekrans*, 163 App. Div. 730, 148 N. Y. Supp. 954.

[a] **Legal residence (1) is not always necessary** (*Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453 [construing Wisconsin statute]), (2) providing the child is subject to the jurisdiction of the court at the time the proceedings are held. *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441.

41. *Rives v. Sneed*, 25 Ga. 612; *Weinhard v. Tynan*, 153 Ill. 598, 38 N. E. 1014, affirming 53 Ill. App. 17.

42. *In re Ward's Est.*, 59 Misc. 328, 112 N. Y. Supp. 282; *In re Trimm*, 30 Misc. 493, 63 N. Y. Supp. 952, 7 N. Y. Ann. Cas. 293.

43. *Keeler's Adoption*, 40 Pa. Co. Ct. 46; *Breakiron's Adoption*, 25 Pa. Dist. 851.

prescribed by the statute,⁴⁴ on the child's natural parents, when their consent to the adoption is necessary.⁴⁵ But parents of an abandoned child are not generally entitled to notice;⁴⁶ nor as a rule are parents who are not entitled to the custody of the child entitled to notice.⁴⁷

44. *Omaha Water Co. v. Schamel*, 147 Fed. 502, 78 C. C. A. 68.

[a] **Failure to give notice** (1) as required by the statute will as a rule render the proceeding irregular and void as to the party to whom notice should have been given (*Cal.*—*Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874. *Ill.* *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695. *Ind.*—*Lee v. Back*, 30 Ind. 148. *Me.*—*Taber v. Douglass*, 101 Me. 363, 64 Atl. 653. *Wash.*—*Beatty v. Davenport*, 45 Wash. 555, 88 Pac. 1109, 122 Am. St. Rep. 937, 13 Ann. Cas. 585. *Wis.*—*Schiltz v. Roenitz*, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483), (2) but not as to third persons. *Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453. See also *In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

[b] **No particular form of notice** required. *In re Knott*, 138 Tenn. 349, 197 S. W. 1097.

[c] **A sufficient notice** is one which will clearly advise the parent of the pendency of the adoption proceeding within such time as to afford him an opportunity to be present. *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441.

[d] **Notice by publication** is generally provided for when the facts bring the case within the provisions of the statute. *Omaha Water Co. v. Schamel*, 147 Fed. 502, 78 C. C. A. 68 (parents unknown); *Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620, parents nonresidents.

45. *Cal.*—*Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. *Idaho.* *Jain v. Priest*, 30 Idaho 273, 164 Pac. 264. *Ill.*—*Sullivan v. People*, 224 Ill. 468, 79 N. E. 695. *Ind.*—*Lee v. Back*, 30 Ind. 148. *Kan.*—*In re Carter*, 77 Kan. 765, 93 Pac. 584. *Mass.*—*In re Humphrey*, 137 Mass. 84. *Ore.*—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. *Tenn.*—*In re Knott*, 138 Tenn. 349, 197 S. W. 1097. *Wash.*—*Beatty v. Davenport*, 45 Wash. 555, 88 Pac. 1109, 122 Am. St. Rep. 937, 13 Ann. Cas. 585. *Wis.*—*Schiltz v. Roenitz*, 86 Wis.

31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483.

46. *People ex rel. Cornelius v. Callan*, 69 Misc. 187, 124 N. Y. Supp. 1074; *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

[a] **The fact of abandonment** itself may be determined only upon actual or constructive notice to the natural parent. An order of adoption based on a mere claim of abandonment, without giving the natural parent an opportunity to be heard in defense of the charge, will not be upheld. *Ill.* *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695. *N. Y.*—*In re Livingston*, 151 App. Div. 1, 135 N. Y. Supp. 328; *In re Moore*, 72 Misc. 644, 132 N. Y. Supp. 249. *Wis.*—*Schiltz v. Roenitz*, 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873, 21 L. R. A. 483.

47. *Cal.*—*Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. *N. Y.*—*In re Antonopoulos*, 171 App. Div. 659, 157 N. Y. Supp. 587. *Wash.*—*In re Beer's Adoption*, 78 Wash. 576, 139 Pac. 629.

[a] **Judicially Deprived of Custody.** Under a statute providing that notice to a parent of an adoption proceeding is unnecessary when the parent has been judicially deprived of the custody of the child on account of cruelty or neglect, where an investigation results in taking away the child from the control and influence of the delinquent parent and committing it to an institution, such parent has been judicially deprived of custody, within the meaning of the statute; it is not necessary that the parent be first convicted of the offense of cruelty or neglect. *In re Antonopoulos*, 171 App. Div. 659, 157 N. Y. Supp. 587.

[b] **In case of a divorce** (1) on grounds other than that of cruelty, or adultery, where the custody of the child has been awarded to the mother, the father is entitled to notice of a proceeding to adopt his minor child, under a statute which expressly takes away his right to such notice if divorced for cruelty or adultery. *Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874. (2) Under some statutes the divorced par-

The father of an illegitimate child is not entitled to notice.⁴⁸ Unless the statute requires it, notice to the child is not necessary.⁴⁹

(III.) **Consent to Adoption.**—(A.) **IN GENERAL.**—The consent of certain persons to the adoption, if required, must be given in the form and manner prescribed by statute.⁵⁰ It may be necessary to have the consent of the adoptive parents,⁵¹ or of the natural parents.⁵² But under certain circumstances such consent is dispensed with,⁵³ as when the child has been abandoned;⁵⁴ or is illegitimate, when the mother's

ent, on whatever grounds the divorce may be granted, from whom is taken the custody of the child, is not entitled to notice. *In re Beer's Adoption*, 78 Wash. 576, 139 Pac. 629.

48. *In re Gibson*, 154 Mass. 378, 28 N. E. 296. But see *Swartwood's Adoption*, 19 Pa. Dist. 819.

49. *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665.

50. *Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636, basis of court's authority under some statutes.

[a] **Written consent necessary.** *Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636.

[b] **Ratification of adoption sufficient.** *Lindsley v. Patterson* (Mo.), 177 S. W. 826, L. R. A. 1915F, 680.

51. **Cal.**—*In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163. **Ill.**—*Watts v. Dull*, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Jones v. Bean*, 136 Ill. App. 545. **La.**—*Vollmer's Succession*, 40 La. Ann. 593, 4 So. 254. **Neb.**—*Milligan v. McLaughlin*, 94 Neb. 171, 142 N. W. 675, 46 L. R. A. (N. S.) 1134.

[a] **Presence in court sufficient, where consent need not be in writing.** *Milligan v. McLaughlin*, 94 Neb. 171, 142 N. W. 675, 46 L. R. A. (N. S.) 1134. See also *Mullany's Adoption*, 25 Pa. Co. Ct. 561.

[b] **Consent of both parents may not be necessary.** *Haworth v. Haworth*, 123 Mo. App. 303, 100 S. W. 531.

52. **Ariz.**—*Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636. **Ark.**—*Willis v. Bell*, 86 Ark. 473, 111 S. W. 808. **Cal.**—*In re Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214; *In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; *In re Johnson's Est.*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380. **Idaho.**—*Jain v. Priest*, 30 Idaho 273, 164 Pac. 364. **Ill.**—*Watts v. Dull*, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141. **Ia.**—*Sires v. Melvin*, 135 Iowa

460, 113 N. W. 106; *Hopkins v. Antrobus*, 120 Iowa 21, 94 N. W. 251; *Bresser v. Saarman*, 112 Iowa 720, 84 N. W. 920. **Ky.**—*Villier v. Watson's Admx.*, 168 Ky. 631, 182 S. W. 869, L. R. A. 1918A, 820. **La.**—*Vollmer's Succession*, 40 La. Ann. 593, 4 So. 254. **Me.**—*Taber v. Douglass*, 101 Me. 363, 64 Atl. 653. **Mass.**—*In re Humphrey*, 137 Mass. 84. **Mo.**—*Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635. **N. J.**—*Winans v. Luppie*, 47 N. J. Eq. 302, 20 Atl. 969. **N. Y.**—*In re Johnston*, 76 Misc. 374, 137 N. Y. Supp. 92. **Ohio.**—*In re Olson*, 3 Ohio Dec. 663, 3 Ohio N. P. 304. **Okla.**—*Allison v. Bryan*, 26 Okla. 520, 109 Pac. 934, 138 Am. St. Rep. 988, 30 L. R. A. (N. S.) 146, and note. **Ore.**—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. **Pa.**—*In re Bastin*, 10 Pa. Super. 570. **Tenn.**—*In re Knott*, 138 Tenn. 349, 197 S. W. 1097. **Wash.**—*In re Potter*, 85 Wash. 617, 149 Pac. 23; *In re Beer's Adoption*, 78 Wash. 576, 139 Pac. 629. **Wis.**—*In re McCormick's Est.*, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890. **Wyo.**—*Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

[a] **Not Necessary on Second Adoption.**—*In re MacRae*, 189 N. Y. 142, 81 N. E. 956, 12 Ann. Cas. 505. *Contra*, *In re Upton*, 16 La. Ann. 175; *Baskette v. Streight*, 106 Tenn. 549, 62 S. W. 142.

53. See *infra*, this section.

[a] **When Child Is of Age.**—*Mullany's Adoption*, 25 Pa. Co. Ct. 561.

[b] **When Parent Adjudged an Habitual Drunkard.**—*Ariz.*—*Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636. **Cal.**—*In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80. **Wash.**—*In re Beer's Adoption*, 78 Wash. 576, 139 Pac. 629.

54. **U. S.**—*Omaha Water Co. v. Schamel*, 147 Fed. 502, 78 C. C. A. 68. **Cal.**—*In re Kelly*, 25 Cal. App. 651, 145

consent only is required;⁵⁵ or when either parent has been deprived of civil rights;⁵⁶ or divorced, on certain grounds,⁵⁷ and the custody of the child given to the other parent.⁵⁸

(B.) CONSENT OF GUARDIAN OR CUSTODIAN. — When the consent of a child's natural parents is unnecessary, the statutes generally require the consent of the person entitled to its custody.⁵⁹

Pac. 156. **Me.**—*Taber v. Douglass*, 101 Me. 363, 64 Atl. 653. **N. J.**—*Winans v. Luppig*, 47 N. J. Eq. 302, 20 Atl. 969. **N. Y.**—*Von Beck v. Thomsen*, 44 App. Div. 373, 60 N. Y. Supp. 1094, 7 N. Y. Ann. Cas. 33. **Ohio.**—*In re Olson*, 3 Ohio Dec. 668, 3 Ohio N. P. 304. **Ore.**—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. **Pa.**—*Breakiron's Adoption*, 25 Pa. Dist. 851. **Wash.**—*In re Potter*, 85 Wash. 617, 149 Pac. 23. **Wis.**—*In re McCormick's Est.*, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890; *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894. **Wyo.**—*Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

55. **Mass.**—*In re Gibson*, 154 Mass. 378, 28 N. E. 296. **Okla.**—*Allison v. Bryan*, 26 Okla. 520, 109 Pac. 934, 138 Am. St. Rep. 988, 30 L. R. A. (N. S.) 146. **Pa.**—*Booth v. Van Allen*, 7 Phila. 401.

[a] Legitimation of a bastard does not obviate the necessity of its mother's consent in a proceeding for its adoption. *Allison v. Bryan*, 26 Okla. 520, 109 Pac. 934, 138 Am. St. Rep. 988, 30 L. R. A. (N. S.) 146.

56. **Ariz.**—*Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636. **Cal.**—*In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80. **Ore.**—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

57. *Bailey v. Kenagy*, 16 Ariz. 272, 144 Pac. 636; *In re Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214; *In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80; *In re Williams' Est.*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

[a] Consent of parent who has been divorced for failure to provide is necessary. *Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874.

[b] Upon a separation after finally determining never to live together again, the consent of the parent retaining the custody of the children to

an adoption is sufficient. *Seibert v. Seibert*, 170 Iowa 561, 153 N. W. 160.

58. **Cal.**—*In re Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214. **Ill.**—*Baker v. Strahorn*, 33 Ill. App. 59. **Ia.**—*Seibert v. Seibert*, 170 Iowa 561, 153 N. W. 160. **Kan.**—*Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 578. **N. J.**—*Winans v. Luppig*, 47 N. J. Eq. 302, 20 Atl. 969. **Wash.**—*In re Beer's Adoption*, 78 Wash. 576, 139 Pac. 629. **Wyo.**—*Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

[a] When Guilty Parent Retains Custody.—*In re Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214.

59. See *infra*, this note.

[a] Such as (1) its guardian (**Mass.** *In re Edds*, 137 Mass. 346. **Pa.**—*Lucareni's Adoption*, 13 Pa. Dist. 782. **Wash.**—*In re Beer's Adoption*, 78 Wash. 576, 139 Pac. 629. **Wis.**—*In re McCormick's Est.*, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890), (2) next friend (**Conn.**—*Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453. **Mass.** *In re Edds*, 137 Mass. 346. **Pa.**—*Lucareni's Adoption*, 13 Pa. Dist. 782; *In re Reuben H. Davis*, 13 Pa. Dist. 688), (3) next of kin (*Holmes v. Derrig*, 127 Iowa 625, 103 N. W. 973; *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894), (4) principal officer of a charitable institution (**U. S.**—*Omaha Water Co. v. Schamel*, 147 Fed. 502, 78 C. C. A. 68. **Cal.**—*Ex parte Chambers*, 80 Cal. 216, 22 Pac. 138. **Mich.**—*Fisher v. Gardner*, 183 Mich. 660, 150 N. W. 358. **N. Y.**—*In re Korte*, 78 Misc. 276, 139 N. Y. Supp. 444; *Manuel v. Beck*, 70 Misc. 357, 127 N. Y. Supp. 266), (5) public official (*Anderson v. Blakesly*, 155 Iowa 430, 136 N. W. 210; *Holmes v. Derrig*, 127 Iowa 625, 103 N. W. 973; *In re Carter*, 77 Kan. 765, 93 Pac. 584), or (6) board of public officials. *Egoff v. Madison County Bd. of Children's Guardians*, 170 Ind. 238, 84 N. E. 151.

[b] Required Even in Absence of

(C.) CONSENT OF CHILD AND HIS SPOUSE. — The consent of the minor is not necessary under some statutes;⁶⁰ under others, it is necessary where the child is above a certain age.⁶¹

If the child, when adopted, is married, the consent of such child's spouse is sometimes required.⁶²

d. *Application or Petition for Adoption.* — (I.) By Whom Made. The proper persons to file the application or petition for adoption are the adopting parents,⁶³ who must join in jurisdictions where one cannot adopt without the consent of the other.⁶⁴

(II.) Form and Sufficiency.⁶⁵ — In accordance with the general rules of pleading, all jurisdictional facts should be averred in a petition for adoption;⁶⁶ but the technical rules of pleading are not generally adhered to closely in a proceeding of this kind.⁶⁷

The petition or application should show that the requisite consent

Statute.—Burger v. Frakes, 67 Iowa 460, 23 N. W. 746, 25 N. W. 735.

[c] **Form of Consent to Adoption by Principal Officer of an Institution.** Fisher v. Gardner, 183 Mich. 660, 150 N. W. 358.

60. See the following: **Ky.**—Villier v. Watson's Admx., 168 Ky. 631, 182 S. W. 869, L. R. A. 1918A, 820. **Mass.** Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441. **Mo.** In re Clements, 78 Mo. 352; Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531.

61. **Cal.**—In re Johnson's Est., 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380. **Mich.**—Morrison v. Sessions, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500. **N. J.**—Luppig v. Winans, 37 N. J. Eq. 245, reversed on other grounds, 47 N. J. Eq. 302, 20 Atl. 969. **Ore.** Furgeson v. Jones, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

62. **McComeskey's Adoption**, 14 Pa. Dist. 420 (husband); **Mullany's Adoption**, 25 Pa. Co. Ct. 561, wife.

63. **Shirley v. Grove**, 51 Ind. App. 17, 98 N. E. 874.

[a] **Right of Nonresidents.**—Knight v. Galloway, 42 Wash. 413, 85 Pac. 21.

[b] **Right of Temporary Residents.** Foster v. Waterman, 124 Mass. 592; **Sankey's Case**, 4 Pa. Co. Ct. 624. See also **Milligan v. McLaughlin**, 94 Neb. 171, 142 N. W. 675, 46 L. R. A. (N. S.) 1134.

[c] **A guardian is not a necessary party to a petition for the adoption of his infant ward.** Shirley v. Grove, 51 Ind. App. 17, 98 N. E. 874.

64. **Ill.**—McCann v. Daly, 168 Ill.

App. 287. **Mass.**—Davis v. McGraw, 206 Mass. 294, 92 N. E. 332, 138 Am. St. Rep. 398; Buckley v. Frazier, 153 Mass. 525, 27 N. E. 768. **Tenn.**—Bland v. Gollaher, 48 S. W. 320.

[a] **Not necessary to join where such consent is unnecessary.** Barnhizer v. Ferrell, 47 Ind. 335.

65. **Petition for Adoption of Orphan Child.**—Sankey's Case, 4 Pa. Co. Ct. 624.

[a] **Petition for Adoption of Abandoned Child.**—Woodward's Appeal, 81 Conn. 152, 70 Atl. 453.

[b] **For other forms of petitions to adopt**, see **Ark.**—Morris v. Dooley, 59 Ark. 483, 28 S. W. 30. **Haw.**—Paris v. Kealoha, 11 Hawaii 450. **Ill.** Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; Tynan v. Weinhard, 153 Ill. 598, 38 N. E. 1014. **Ore.**—Furgeson v. Jones, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. **Pa.**—Brown's Adoption, 25 Pa. Super. 259. **Tenn.**—Bland v. Gollaher, 48 S. W. 320. **Wis.**—In re McCormick's Est., 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890.

66. **Coleman v. Coleman**, 81 Ark. 7, 98 S. W. 733; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Sullivan v. People ex rel. Heeney, 224 Ill. 468, 79 N. E. 695 (affirming 126 Ill. App. 389); Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

67. **In re Edds**, 137 Mass. 346; Wilson v. Otis, 71 N. H. 483, 53 Atl. 439, 93 Am. St. Rep. 564. But see Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

[a] **Failure to name court not fatal.** Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678.

to adoption has been given;⁶⁸ the name and residence of the natural parents,⁶⁹ or, if an orphan, its guardian or next of kin,⁷⁰ and the residence of the child.⁷¹ But that the petitioner resides in the county of the court's jurisdiction is unnecessary.⁷²

e. *Hearing*.—Aside from the procedure generally provided by statute to be followed in the hearing of a petition for adoption,⁷³ the court, for the purpose of determining the best interests of the child,⁷⁴ may examine fully into all the circumstances of the case.⁷⁵ It is within the court's discretion to grant,⁷⁶ or deny,⁷⁷ the petition.

f. *Order or Decree*.—Unlike a declaration or agreement of adoption, or an order of approval of such agreement,⁷⁸ an order or decree of adoption in a judicial proceeding to adopt is a judgment.⁷⁹ If drawn in substantial compliance with the statute, it is generally sufficient;⁸⁰ but it need not be in any particular form.⁸¹ Generally the juris-

68. Ill.—Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320; Foley v. Foley, 61 Ill. App. 577. Me.—Taber v. Douglass, 101 Me. 363, 64 Atl. 653. Pa.—In re Reuben H. Davis, 13 Pa. Dist. 688.

As to consent to adoption, see *supra*, IX, B, 3, c, (III).

69. Morris v. Dooley, 59 Ark. 483, 28 S. W. 30, 430; Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; Foley v. Foley, 61 Ill. App. 577.

[a] That such allegation is not necessary, see Wilson v. Otis, 71 N. H. 483, 53 Atl. 439, 93 Am. St. Rep. 564; In re McCormick's Est., 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890.

[b] If unknown, that fact should be stated. Coleman v. Coleman, 81 Ark. 7, 98 S. W. 733; Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

70. In re Reuben H. Davis, 13 Pa. Dist. 688.

71. Morris v. Dooley, 59 Ark. 483, 28 S. W. 30, 430.

72. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320.

[a] Unless such residence is essential to the court's jurisdiction. McComeskey's Adoption, 14 Pa. Dist. 420.

[b] Effect of Alleging Inconsistent Facts.—McComeskey's Adoption, 14 Pa. Dist. 420.

73. See the statutes.

74. Knight v. Gallaway, 42 Wash. 413, 85 Pac. 21.

75. Ind.—Brown v. Brown, 101 Ind. 340. Mass.—Dumain v. Gwynne, 10 Al-

len 270. Utah.—Harrison v. Harker, 44 Utah 541, 142 Pac. 716.

76. In re Ward's Est., 59 Misc. 328, 112 N. Y. Supp. 282.

77. In re Peterson, 212 Pa. 453, 61 Atl. 1005; In re Wells, 60 Wash. 518, 111 Pac. 778.

78. See *supra*, IX, B, 2, a.

79. Hill's Appeal, 97 Me. 82, 53 Atl. 885; Ferguson v. Herr, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542.

As to judgments generally, see the title "Judgments."

80. Ark.—Willis v. Bell, 86 Ark. 473, 111 S. W. 808 (must be in conformity with the statute); Coleman v. Coleman, 81 Ark. 7, 98 S. W. 733. N. H. Wilson v. Otis, 71 N. H. 483, 53 Atl. 439, 93 Am. St. Rep. 564. Pa.—In re Peterson, 212 Pa. 453, 61 Atl. 1005.

Tenn.—Crocker v. Balch, 104 Tenn. 6, 55 S. W. 307. Wis.—Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089. Compare McCormick's Est., 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890.

[a] Made by Court or Judge.—Rosekrans v. Rosekrans, 163 App. Div. 730, 148 N. Y. Supp. 954.

[b] Place of Making Order.—Rosekrans v. Rosekrans, 163 App. Div. 730, 148 N. Y. Supp. 954.

81. Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

[a] For forms of orders or decrees of adoption, see: Ark.—Morris v. Dooley, 59 Ark. 483, 28 S. W. 30, 430. Haw.—Paris v. Kealoha, 11 Hawaii 450. Ill.—Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; Tynan v. Weinhard, 153 Ill. 598, 38 N. E. 1014; Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320. Ind.—Barnes v. Al-

dictional facts are required to appear.⁸² Under some statutes it should state that the allegations of the petition are true,⁸³ and also set out the terms, benefits, or effect of the adoption.⁸⁴

A *nunc pro tunc* entry of an order of adoption will be granted in accordance with the general rules controlling such entries.⁸⁵

g. *Revocation or Abrogation of Decree of Adoption.*⁸⁶ — (I.) In **General**. — An application to revoke or set aside a decree of adoption may be made by motion,⁸⁷ or by an action instituted for that purpose.⁸⁸ The order or decree cannot usually be set aside by act of the parties;⁸⁹ but in some jurisdictions, the statute provides for abrogation by consent of all parties concerned, duly obtained and evidenced in the manner prescribed.⁹⁰ A second adoption has been held to revoke or supersede a first adoption by other parties.⁹¹

(II.) **By What Court**. — A proceeding to revoke an order or decree of adoption is usually addressed to the court or judge making the order or decree, providing such court is one of general jurisdiction, or authority to revoke has been conferred upon it by statute.⁹²

len, 25 Ind. 222. **Kan.**—Cubitt v. Cubitt, 74 Kan. 353, 86 Pac. 475. **Me.** Hill's Appeal, 97 Me. 82, 53 Atl. 885. **Mass.**—Foster v. Waterman, 124 Mass. 592. **Neb.**—Ferguson v. Herr, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542. **N. H.** Wilson v. Otis, 71 N. H. 483, 53 Atl. 439, 93 Am. St. Rep. 564. **Ore.**—Ferguson v. Jones, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. **Pa.**—Brown's Adoption, 25 Pa. Super. 259; Sankey's Case, 4 Pa. Co. Ct. 624. **S. D.**—Richards v. Matteson, 8 S. D. 77, 65 N. W. 428; Quinn v. Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875. **Tenn.**—Bland v. Gollaher, 48 S. W. 320.

82. Ward v. Magness, 75 Ark. 12, 86 S. W. 822 (residence of child within court's jurisdiction); *In re McCormick's Est.*, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890, abandonment or consent of its natural parents.

83. Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

84. Beaver v. Crump, 76 Miss. 34, 23 So. 432. But see Crocker v. Balch, 104 Tenn. 6, 55 S. W. 307; Sandon v. Sandon, 123 Wis. 603, 101 N. W. 1089.

85. Ward v. Magness, 75 Ark. 12, 86 S. W. 822; Chester v. Graves, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678.

As to *nunc pro tunc* amendments generally, see 15 STANDARD PROC. 129.

[a] **Innocent Parties**. — Under the rule that the entry of a *nunc pro tunc* judgment will not be allowed to injuriously affect the rights of innocent

third parties, it has been held that the heirs at law of a deceased adoptive parent, in a proceeding wherein the validity of an adoption is drawn in question, are not innocent third parties within the meaning of the rule. *Chester v. Graves*, 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678.

[b] **Effect of Laches of Party**.—*Tynan v. Weinhard*, 153 Ill. 598, 38 N. E. 1014.

86. **Setting aside judgments and decrees generally**, see 6 STANDARD PROC. 789; 15 STANDARD PROC. 199.

87. *Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874.

88. *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051.

[a] **Petition To Revoke Decree of Adoption**.—*Sankey's Case*, 4 Pa. Co. Ct. 624.

[b] **Order Revoking Decree of Adoption**.—*Morrison v. Sessions*, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

89. *In re Clements*, 78 Mo. 352 (*affirming* 12 Mo. App. 592); *In re Ziegler*, 82 Misc. 346, 143 N. Y. Supp. 562.

90. See the statutes, and *In re McDevitt*, 176 App. Div. 418, 162 N. Y. Supp. 1032 (describing proceeding in detail); *In re Ziegler*, 82 Misc. 346, 143 N. Y. Supp. 562.

91. *In re Klapp's Estate* (Mich.), 164 N. W. 381. See also *In re McDevitt*, 176 App. Div. 418, 162 N. Y. Supp. 1032. But see *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993.

92. See the following: **Mass.**—*Tuck-*

Where the proceeding is one for abrogation of the adoption, not revocation of the decree, the petition may be addressed to a court of concurrent jurisdiction.⁹³

(III.) **At Whose Instance.** — A court entering a decree of adoption may revoke it on its own motion,⁹⁴ or on an application by the child's natural parents,⁹⁵ or the adoptive parents,⁹⁶ or the latter's heirs or legal representative, on the ground of fraud.⁹⁷ But a proceeding to revoke by one who is barred by his own conduct will not be entertained.⁹⁸

(IV.) **Grounds.** — The grounds for setting aside or vacating an order or decree of adoption are usually specified in the statute.⁹⁹

(V.) **Time for Filing Application.** — An application to revoke a decree of adoption must be made with reasonable promptness.¹ If the ap-

er *v. Fisk*, 154 Mass. 574, 28 N. E. 1051. N. Y.—*In re Trimm*, 30 Misc. 493, 63 N. Y. Supp. 952, 7 N. Y. Ann. Cas. 293. Pa.—*Booth v. Van Allen*, 7 Phila. 401.

See also *In re Knott*, 138 Tenn. 349, 197 S. W. 1097.

[a] When the decree is by a probate court of limited jurisdiction, the power to vacate it generally rests exclusively in an appellate court, unless otherwise provided by statute. See *In re Bush*, 47 Kan. 264, 27 Pac. 1003.

As to what court the motion or petition should be addressed generally, see 15 STANDARD PROC. 151.

93. *In re Ziegler*, 82 Misc. 346, 143 N. Y. Supp. 562.

94. *In re Sleep*, 6 Pa. Dist. 256.

95. *In re Gatjkowski*, 12 Pa. Co. Ct. 191.

96. *In re Sovanofsky*, 18 Lanc. L. Rev. (Pa.) 30; *In re Blair*, 11 Wkly. N. C. (Pa.) 239.

97. *Raymond v. Cooke*, 226 Mass. 326, 115 N. E. 423; *Phillips v. Chase*, 203 Mass. 556, 89 N. E. 1049, 17 Ann. Cas. 544, 30 L. R. A. (N. S.) 159; *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051; *In re Pepin's Estate*, 53 Mont. 240, 163 Pac. 104.

Grounds generally, see *infra*, IX, B, 3, h, (1).

98. Ark.—*Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733. Cal.—*In re McKeag's Est.*, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80. Ill.—*Sullivan v. People*, 224 Ill. 468, 79 N. E. 695; *Barclay v. People ex rel. Bleakley*, 132 Ill. App. 338. Wis.—*Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894.

[a] Except where the order is void

for want of jurisdiction. *Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

99. See the statutes.

[a] Usual grounds are, (1) fraud or misrepresentation (Cal.—*Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. Ind.—*Lee v. Back*, 30 Ind. 148. Mass.—*Fiske v. Pratt*, 157 Mass. 83, 31 N. E. 715. Ohio.—*In re Olson*, 3 Ohio Dec. 668, 3 Ohio N. P. 304. Pa. *Swartwood's Adoption*, 19 Pa. Dist. 819; *Keeler's Adoption*, 40 Pa. Co. Ct. 46; *Booth v. Van Allen*, 7 Phila. 401. Wash.—See *James v. James*, 35 Wash. 655, 77 Pac. 1082), (2) undue influence (*Phillips v. Chase*, 203 Mass. 556, 89 N. E. 1049, 17 Ann. Cas. 544, 30 L. R. A. [N. S.] 159), (3) want of consent (N. Y.—*In re Johnston*, 76 Misc. 374, 137 N. Y. Supp. 92. Ohio. *In re Olson*, 3 Ohio Dec. 668, 3 Ohio N. P. 304. Pa.—*Keeler's Adoption*, 52 Pa. Super. 516; *Luccareni's Adoption*, 13 Pa. Dist. 782. Tenn.—*In re Knott*, 138 Tenn. 349, 197 S. W. 1097), (4) notice (*In re Moore*, 72 Misc. 644, 132 N. Y. Supp. 249), or (5) jurisdiction (*In re Johnston*, 76 Misc. 374, 137 N. Y. Supp. 92; *Luccareni's Adoption*, 13 Pa. Dist. 782), and (6) in some cases, when the child's welfare demands it. *In re Gatjkowski*, 12 Pa. Co. Ct. 191; *In re Blair*, 11 Wkly. N. C. (Pa.) 239.

1. *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147, 70 Am. St. Rep. 894.

[a] **Estoppel by Laches.**—*Brown v. Brown*, 101 Ind. 340 (ten years); *Brown's Adoption*, 25 Pa. Super. 259, twenty-one years. See also *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051. But see generally 15 STANDARD PROC. 186, and 210, et seq.

plication is a motion to vacate the order of adoption it must be made within the time provided by statute for filing such a motion.²

h. *Review*.³—The statutes generally provide for an appeal in adoption proceedings;⁴ but where not so provided an appeal is not permissible.⁵

Certiorari is the proper remedy where no provision is made for appeal.⁶

i. *Collateral Attack*.—This subject has been treated elsewhere in this work.⁷

2. *Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874.

3. See generally the titles "*Appeals*;" "*Certiorari*;" "*Review*;" "*Writ of Error*."

4. *Kan.*—*Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 578. *Mass.*—*Purinton v. Jamrock*, 195 Mass. 187, 80 N. E. 802, 18 L. R. A. (N. S.) 926; *McKay v. Kean*, 167 Mass. 524, 46 N. E. 120; *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051. *Neb.*—*Ferguson v. Herr*,

64 Neb. 649, 90 N. W. 625, 94 N. W. 542. *R. I.*—*Buckley v. Hammond*, 29 R. I. 442, 72 Atl. 389.

[a] *As to a divorced parent's right to appeal*, see *Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 578.

5. *In re Warner's Petition*, 193 Ill. App. 382; *Meyers v. Meyers*, 32 Ill. App. 189; *Lewis Appeal (Pa.)*, 10 Atl. 126.

6. *In re Bastin*, 10 Pa. Super. 570.

7. See 15 STANDARD PROC. 405.

PARTICULARS.—See **Bills of Particulars.**

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PARTIES

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CROSS-REFERENCES:

Admiralty;	Interpleader;
Amendments and Jeofails;	Intervention;
Equity Jurisdiction and	Revivor;
Procedure;	Suits and Actions;
Guardian ad Litem;	Survival.

For rules as to parties in particular cases, see the specific titles.

Disqualification of judge because a party, see 16 STANDARD PROC. 649.

Effect of motive in bringing a suit, see the title "Suits and Actions."

For forms in addition to those found in this article, see 9 STANDARD PROC. 913.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITIONS AND DISTINCTIONS. — A. GENERALLY. — The term "parties" includes all persons who are directly interested in the subject matter in issue, who have a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.¹ Generally the word "party" includes only those persons mentioned in the record as plaintiffs or defendants;² but the term is not always so limited.³ The plaintiff is he who, in a personal action, seeks a remedy in a court of justice for an injury to or a withholding of his rights.⁴ The defendant is that party against whom relief is sought in an action.⁵

Formal, necessary and indispensable parties are defined at appropriate places in this article.⁶

Strangers to the suit are persons who are neither parties nor possess the rights possessed by them.⁷

1. **U. S.**—*Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Burrell v. United States*, 147 Fed. 44, 77 C. C. A. 308; *Rumford Chemical Wks. v. Hygienic Chem. Co.*, 148 Fed. 862. **N. H.**—*Hunt v. Haven*, 52 N. H. 162. **Ore.**—*Raper v. Dunn*, 53 Ore. 203, 99 Pac. 889.

[a] For other definitions, see *Idaho Irr. Co. v. Dill*, 25 Idaho 711, 139 Pac. 714; *In re Kenny*, 92 Misc. 330, 156 N. Y. Supp. 827.

Who are parties in respect to liability for costs, see 5 STANDARD PROC. 798.

2. **Cal.**—*Ford v. Doyle*, 37 Cal. 346. **Ind.**—*Sturgis v. Rogers*, 26 Ind. 1. **Ky.** *Allin's Heirs v. Hall's Heirs*, 1 A. K. Marsh. 525. **Me.**—*Douglass v. Gardner*, 63 Me. 462; *Walker v. Hill*, 21 Me. 481. **Mass.**—*Merchants' Bank v. Cook*, 4 Pick. 405.

[a] The word "party" always means party to a suit or party in interest in the suit. *Treleaven v. Dixon*, 119 Ill. 548, 553, 9 N. E. 189. See also *Chicago, R. I. & P. Ry. Co. v. Mitchell*, 19 Okla. 579, 101 Pac. 850.

How persons are made parties, see *infra*, VII.

Parties under statute relating to service of process, see the title "Service of Process and Papers."

3. *McDowell v. Warden*, etc. of Ionia, 169 Mich. 332, 135 N. W. 265; *Taber v. Gardner*, 6 Abb. Pr. N. S. (N. Y.) 147, as to verification of pleading by party. But see *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 238, 41 Am. Dec. 549; *Woods v. De Figanieri*, 16 Abb. Pr. (N. Y.) 1.

[a] Where jurisdiction depends on parties, the court will look through

the nominal party and determine who are the real parties in interest to a suit. *McDowell v. Warden*, etc. of Ionia, 169 Mich. 332, 135 N. W. 265. *Contra*, *Dunn v. State University*, 9 Ore. 357, 362.

[b] On joining in an agreement to arbitrate, a person is to be regarded as a party to the suit although not formally made a party. *Shultz Bros. v. Lempert*, 55 Tex. 273.

Use plaintiff as party, see *infra*, V, C, 5, a, (I) and (III), (D).

4. *Burrell v. United States*, 147 Fed. 44, 77 C. C. A. 308.

[a] The person who sets in motion the machinery of the court. *In re Nagao*, 4 Alaska 678.

[b] The legal plaintiff is he in whom the legal title or right of action is vested. *Burrell v. United States*, 147 Fed. 44, 77 C. C. A. 308.

[c] The equitable plaintiff is he who, not having the legal title, is in equity entitled to the thing sued for. *Burrell v. United States*, 147 Fed. 44, 77 C. C. A. 308. As to use plaintiffs, see *infra*, V, C, 5.

In admiralty, the libellant. See 1 STANDARD PROC. 428.

5. *In re Nagao*, 4 Alaska 678.

In admiralty, see 1 STANDARD PROC. 428.

6. See *infra*, IV, D, 2 and 3.

7. **U. S.**—*Robbins v. Chicago*, 4 Wall. 657, 672, 18 L. ed. 427; *Burrell v. United States*, 147 Fed. 44, 77 C. C. A. 308. **Ala.**—*Kirk v. Morris*, 40 Ala. 225. **Fla.**—*Carter v. Bennett*, 4 Fla. 283, 352. **La.**—*Bracey v. Calderwood*, 36 La. Ann. 796. **N. J.**—*Sexton v. Pennsylvania & N. J. S. Co.*, 7 N. J.

B. JOINDER OF PARTIES.—The term “joinder of parties” is to be distinguished from the term “joinder of causes of actions.”⁸

C. MISJOINDER AND DEFECT OF PARTIES.—A misjoinder of parties is the joinder of one or more persons, who are not concerned in an action,⁹ and who should not be joined.¹⁰ It is not the same as a misjoinder of causes of action;¹¹ and is not a defect of parties,¹² which means an absence of necessary parties.¹³

II. NECESSITY FOR PARTIES.—To the maintenance of an action, it is essential that there be parties plaintiff and defendant;¹⁴ a judgment without parties, however perfect in form, is void.¹⁵

III. RULES RELATING TO PARTIES GENERALLY.—A. EFFECT OF CODE ON RULES AS TO PARTIES.—The code has modified the extremely arbitrary and technical rules of the common law in respect to parties,¹⁶ substantially adopting the rules formerly prevailing in equity, and making them applicable to actions respecting legal as well as equitable rights.¹⁷

B. POSITION OF PARTIES AS PLAINTIFFS OR DEFENDANTS.—At law, persons jointly interested must stand on the same side of the case upon the record;¹⁸ and adverse parties should be on opposite sides of the case.¹⁹ But in equity, although it is proper and preferable to so

L. 169. *W. Va.*—*Gall v. Gall*, 50 W. Va. 523, 40 S. E. 380.

[a] **Notice To Defend.**—When a person, to whom another is responsible by operation of law or by express contract, is duly notified of the pendency of an action and requested to make defense, he is no longer regarded as a stranger. *Prichard v. Farrar*, 116 Mass. 213; *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759.

8. See 14 STANDARD PROC. 629.

9. *Gagle v. Besser*, 162 Iowa 227, 144 N. W. 3. See also *Henshaw v. Salt River Valley Canal Co.*, 6 Ariz. 151, 54 Pac. 577.

As to position of parties as plaintiffs and defendants, see *infra*, III, B.

10. *Dolan v. Hubinger*, 109 Iowa 408, 80 N. W. 514.

11. See 14 STANDARD PROC. 629, and *Henshaw v. Salt River Valley Canal Co.*, 6 Ariz. 151, 54 Pac. 577.

12. See 6 STANDARD PROC. 901.

13. See 6 STANDARD PROC. 899.

14. *Cal.*—*Ryan v. Tomlinson*, 31 Cal. 11. *Ga.*—*Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *Knox v. Greenfield Est.*, 7 Ga. App. 305, 66 S. E. 805; *Charles v. Valdosta F. & M. Co.*, 4 Ga. App. 733, 62 S. E. 493. *Nev.*—*Mexican Mill v. Yellow Jacket S. M. Co.*, 4 Nev. 40, 97 Am. Dec. 510. *N. J.*—*Emerson v. Pierce* (N. J. Eq.), 11 Atl. 745.

Vt.—*Boston Type & S. Foundry v. Spooner*, 5 Vt. 93.

Necessity of parties defendant to cross-complaint, see 6 STANDARD PROC. 302.

15. See 14 STANDARD PROC. 782.

16. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

17. See the following: *Ind.*—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Goodnight v. Goar*, 30 Ind. 418; *Tate v. Ohio & M. R. Co.*, 10 Ind. 174, 71 Am. Dec. 309. *Ia.*—*Miller v. Hawkeye Gold Dredg. Co.*, 156 Iowa 557, 137 N. W. 507. *Ohio.*—*Galpin v. Lamb*, 29 Ohio St. 529. *Ore.*—See *Stewart v. Templeton*, 55 Ore. 364, 104 Pac. 978, 106 Pac. 640.

Rule as to real party in interest, see *infra*, V, C, 4.

As to defendants, see *infra*, VI.

[a] **As to Joinder of Parties.**—The various sections of the code relating to joinder of plaintiffs and defendants are not in derogation of the general rule in equity requiring all persons interested in the subject of the suit to be made parties, which it applies to all actions where the controversy can be ended by one hearing an adjudication. *Derham v. Lee*, 87 N. Y. 599; *Turner v. Conant*, 18 Abb. N. C. (N. Y.) 160. See *infra*, VIII, A, 3.

18. *Sadler v. Taylor*, 49 W. Va. 104, 115, 38 S. E. 583.

19. *Piatt v. Oliver*, 3 McLean 27, 19

arrange the parties,²⁰ all parties to the suit are or may be actors without regard to their formal positions on the record, and their position on the record as plaintiffs or defendants is neither material nor important.²¹

C. **SAME PERSON AS BOTH PLAINTIFF AND DEFENDANT.**—The same person cannot be both plaintiff and defendant on the record at law, whether he sues alone or is joined with others,²² even though he may assume to act in different capacities.²³ If it is necessary in order to

Fed. Cas. No. 11,116; *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397.

20. *Kempton v. Bartine*, 59 N. J. Eq. 149, 162, 44 Atl. 461.

21. **U. S.**—*McArthur v. Scott*, 113 U. S. 340, 386, 5 Sup. Ct. 652, 28 L. ed. 1015; *Campbell v. James*, 18 Blatchf. 92, 2 Fed. 338, 349. **Ala.** *Parkman's Admr. v. Aicardi*, 34 Ala. 293, 73 Am. Dec. 457. **D. C.**—*Taylor v. Leesnitzer*, 31 App. Cas. 99. **Md.** *Farmers' & M. Bank v. Wayman*, 5 Gill 336. **N. H.**—*Peterborough Savings Banks v. Hartshorn*, 67 N. H. 156, 33 Atl. 729. **N. J.**—*Kempton v. Bartine*, 59 N. J. Eq. 149, 163, 44 Atl. 461. **Va.**—*Meek v. Spracher*, 87 Va. 162, 12 S. E. 397. See *Campbell v. Shipman*, 87 Va. 655, 659, 13 S. E. 114. **W. Va.**—*McConaughy v. Bennett's Exrs.*, 50 W. Va. 172, 40 S. E. 540; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583. **Wis.**—*Armstrong v. Pratt*, 2 Wis. 299.

Parties may be transposed from one side to the other. See *infra*, XI, A, 5.

22. **U. S.**—*The Majestic*, 73 Fed. 499. **Cal.**—*Byrne v. Byrne*, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196. **Conn.** *Moore v. Denslow*, 14 Conn. 235. **Ill.** *Oliver v. Oliver*, 178 Ill. 527, 53 N. E. 303. **Ky.**—*Gatewood v. Lyle*, 5 Mon. 6; *Allen v. Gray*, 1 Mon. 98. **Me.** *Portland Bank v. Hyde*, 11 Me. 196. **Md.**—*Grahame v. Harris, Parran & Co.*, 5 Gill & J. 489. **Mass.**—*Warren v. Stearns*, 19 Pick. 73. **Miss.**—*Stone v. Brooks*, 6 How. 373. **Mo.**—*Wilson v. Benedict*, 90 Mo. 208, 2 S. W. 283. **N. H.**—*Blaisdell v. Ladd*, 14 N. H. 129. **N. Y.**—*Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250; *Barton v. Reynolds*, 81 Misc. 15, 142 N. Y. Supp. 895. **N. C.**—*Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24; *Pearson v. Nesbit*, 12 N. C. 315, 17 Am. Dec. 569. **Ohio.**—*Westcott v. Price, Wright* 220. **Pa.**—*Price v. Spencer*, 7 Phila. 179. **R. I.**—*Barber v. Barber*, 32 R. I.

266, 79 Atl. 482; *Perkins v. Se Ipsam*, 11 R. I. 270. **W. Va.**—*Swearingen v. Steers*, 49 W. Va. 312, 38 S. E. 510; *Sweetland v. Porter*, 43 W. Va. 189, 27 S. E. 352. **Eng.**—*Moffat v. Van Millingen*, 2 Bos. & P. 124n, 126 Eng. Reprint 1193.

In admiralty, see 1 STANDARD PROC. 427.

[a] **In scire facias proceedings**, see *Oliver v. Oliver*, 178 Ill. 527, 53 N. E. 303, and the title "**Scire Facias**."

[b] **Where Party Is Both Obligor and Obligee.**—**Ala.**—*Chandler v. Shehan*, 7 Ala. 251. **Conn.**—*Moore v. Denslow*, 14 Conn. 235. **Ill.**—*Pool v. Potter*, 63 Ill. 533. **Ky.**—*Gatewood v. Lyle*, 5 Mon. 6. But compare *Daniel v. Crooks*, 3 Dana (Ky.) 64; *Faulkner v. Faulkner*, 73 Mo. 327, for rule where contract is not joint, but is several or joint and several.

[c] **Action by Assignee.**—(1) This principle forbids an action by the assignee of some of the obligees of a joint demand in which one of the obligees is also an obligor. *Gatewood v. Lyle*, 5 Mon. (Ky.) 6. (2) But under a statute making joint obligations joint and several and requiring actions to be brought by the real party in interest, the assignee may sue. *Willis v. Neal*, 39 Ala. 464.

Actions between partnerships having a common member, or by or against a partnership by a member, see the title "**Partnership**."

[d] **Any judgment entered is erroneous** and should be reversed where a party is both plaintiff and defendant. *Pearson v. Nesbit*, 12 N. C. 315, 17 Am. Dec. 569.

[e] **Defense raising objection is a plea in bar**, not one in abatement merely. *Stone v. Brooks*, 6 How. (Miss.) 373.

23. **Ala.**—*Swope v. Swope*, 173 Ala. 157, 55 So. 418. **Cal.**—*Buckeye Ref. Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536, Ann. Cas. 1913E, 840. **Ill.**—*Oliver v.*

secure relief that a party must appear on both sides of the record, he must resort to equity.²⁴

There is no presumption from the identity of the plaintiff's and defendant's name that they are the same person.²⁵

D. SAME PERSON AS PARTY IN DIFFERENT CAPACITIES. — A person may be a party in two different capacities under the same circumstances that two different persons might be joined,²⁶ but he cannot be joined in different capacities where the cause of action affecting him in each capacity is different.²⁷

IV. ALL PERSONS INTERESTED TO BE PARTIES IN EQUITY.

A. GENERAL RULE. — It is a fundamental rule in equity that all persons interested in a suit ought to be made parties thereto, either as plaintiffs or defendants, for the purpose of preventing further and unnecessary litigation and of doing complete justice.²⁸ The rule is often stated to be that all persons materially interested, either legally or beneficially, in the subject of the suit, however numerous, ought to be made parties either plaintiffs or defendants.²⁹ But this statement

Oliver, 178 Ill. 527, 53 N. E. 303.
R. I.—Barber v. Barber, 32 R. I. 266, 79 Atl. 482.

[a] As where he appears in one side in his official and on the other side in his personal character. Oliver v. Oliver, 178 Ill. 527, 53 N. E. 303.

[b] A town treasurer cannot in his individual capacity sue himself as town treasurer. Barber v. Barber, 32 R. I. 266, 79 Atl. 482.

As to executors and administrators, see 8 STANDARD PROC. 736.

24. Ill.—Pool v. Potter, 63 Ill. 533.
Pa.—Price v. Spenger, 7 Phila. 179.
W. Va.—Swearingen v. Steers, 49 W. Va. 312, 38 S. E. 510.

But see Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153.

[a] Common Assignee in Bankruptcy.—When after filing a bill some of the complainants and some of the defendants become bankrupt, and they are represented by a common assignee, he may be properly made a party defendant. Toulmin v. Hamilton, 7 Ala. 362.

25. See 6 ENCY. OF EV. 917.

26. See Smith v. Stevenson Brew. Co., 50 Misc. 395, 100 N. Y. Supp. 521, affirmed, 117 App. Div. 690, 102 N. Y. Supp. 672.

[a] A receiver appointed by two courts may sue as receiver under both appointments. Bamberger v. Fillebrown, 12 Misc. 328, 33 N. Y. Supp. 614, 67 N. Y. St. 321. See generally the title "Receivers."

27. Sterrett v. Barker, 119 Cal. 492,

51 Pac. 695; Dias v. Phillips, 59 Cal. 293; Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37. See 10 STANDARD PROC. 870, notes 27 and 28.

28. U. S.—In re Dennett, 221 Fed. 350, 136 C. C. A. 422; Continental & C. T. & S. Bank v. Corey Bros. Const. Co., 208 Fed. 976, 126 C. C. A. 64.
Ala.—Lucas v. Bank of Darien, 2 Stew. 280, 325. Cal.—Reed v. Wing, 168 Cal. 706, 144 Pac. 964. Conn. New London Bank v. Lee, 11 Conn. 112, 27 Am. Dec. 713. Ky.—Johnson v. Rankin, 2 Bibb 184. Md.—Leviness v. Consol. G. E. L. & P. Co., 114 Md. 559, 80 Atl. 304, Ann. Cas. 1913C, 649.
Mass.—Schwoerer v. Boylston Market Assn., 99 Mass. 285, 295. Miss.—McPike v. Wells, 54 Miss. 136. Tex.—Hess v. Webb, 103 Tex. 46, 123 S. W. 111; Slaton v. Anthony (Tex. Civ. App.), 143 S. W. 201. Va.—Campbell v. Shipman, 87 Va. 655, 13 S. E. 114; Meek v. Spracher, 87 Va. 162, 12 S. E. 397. Eng.—Small v. Attwood, Young 407.

29. U. S.—Minnesota v. Northern Sec. Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. ed. 499; Omaha Hotel Co. v. Wade, 97 U. S. 13, 21, 24 L. ed. 917; Nashville & D. R. Co. v. Orr, 18 Wall. 471, 21 L. ed. 810. Ala.—Seay v. Graves, 178 Ala. 131, 59 So. 469; Davis v. Vandiver & Co., 143 Ala. 202, 38 So. 850. Ark.—Porter v. Clements, 3 Ark. 364. Cal.—Wilson v. Castro, 31 Cal. 420. Conn.—Judson v. Metropolitan Wash. Mach. Co., 33 Conn. 467; Crocker v. Higgins, 7 Conn. 342. Fla.

has been criticised as being too broad in some cases, which hold it to be more accurate to say persons interested in the object of the suit must be made parties.³⁰ While it is not always necessary to join all persons who have an interest in the subject matter of the suit, those who have an interest in the object sought to be obtained must be joined.³¹

Whatever statement of the rule be adopted, it must be remembered that the rule does not admit of any universal test, and is useful only as a practical guide.³² It is not founded on any general principle and is a rule chiefly of convenience and policy,³³ and subject to the discretion of the court.³⁴ The rule will not be rigidly enforced where

Florida *L. R. Phosphate Co. v. Anderson*, 50 Fla. 501, 39 So. 392. **Ga.** *Carey v. Hoxey*, 11 Ga. 645. **Idaho.** *Beane v. Givens*, 5 Idaho 774, 51 Pac. 987. **Ill.**—*East St. Louis, C. & W. Ry. Co. v. Illinois State Trust Co.*, 248 Ill. 559, 94 N. E. 149; *St. Louis & P. R. Co. v. Kerr*, 153 Ill. 182, 196, 38 N. E. 638. **Me.**—*Hussey v. Dole*, 24 Me. 20. **Mass.**—*Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 84 N. E. 449; *Shaw v. Norfolk County R. Co.*, 5 Gray 162. **Mo.**—*Sampson v. Mitchell*, 125 Mo. 217, 228, 28 S. W. 768; *Leyden v. Owen*, 150 Mo. App. 102, 129 S. W. 984. **N. Y.**—*Delcambre v. Delcambre*, 210 N. Y. 460, 104 N. E. 950. **R. I.**—*Vernon v. Reynolds*, 20 R. I. 552, 40 Atl. 419. **S. C.**—*Moseley v. Hankinson*, 22 S. C. 323. **Tex.**—*Slaton v. Anthony* (Tex. Civ. App.), 143 S. W. 201; *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 753. **Vt.**—*Stimson v. Lewis*, 36 Vt. 91; *McConnell v. McConnell*, 11 Vt. 290. **Va.**—*Armstrong v. Gibbons*, 25 Gratt. (66 Va.) 371. **W. Va.**—*Coffman v. Hope Natural Gas Co.*, 74 W. Va. 57, 81 S. E. 575; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. 380. **Wis.**—*Armstrong v. Pratt*, 2 Wis. 299. **Eng.**—*Cockburn v. Thompson*, 16 Ves. Jr. 221, 33 Eng. Reprint 1005.

[a] **Other Statements of Rule.**—All persons interested in the subject matter of the suit should be made plaintiffs or defendants. **U. S.**—*Caldwell v. Taggart*, 4 Pet. 190, 202, 7 L. ed. 828. **Ala.**—*Parkman's Admr. v. Aicardi*, 34 Ala. 393, 73 Am. Dec. 457. **N. Y.**—*Derham v. Lee*, 87 N. Y. 599; *Ducas v. Ducas*, 150 App. Div. 397, 135 N. Y. Supp. 35.

[b] **All persons having a common interest and common object in the subject matter of the bill ought to be made parties.** *Heath v. Ellis*, 12 Cush.

(Mass.) 601; *Fletcher v. Newark Tel. Co.*, 55 N. J. Eq. 47, 35 Atl. 903.

30. *Michigan State Bank v. Gardner*, 3 Gray 305; *Fletcher v. Newark Tel. Co.*, 55 N. J. Eq. 47, 52, 35 Atl. 903.

[a] **Rule has been so stated in following cases:** **U. S.**—*McArthur v. Scott*, 113 U. S. 340, 392, 5 Sup. Ct. 652, 28 L. ed. 1015. **Ga.**—*Bond v. Hunt*, 135 Ga. 733, 70 S. E. 572. **Idaho.**—*Idaho Irr. Co. v. Dill*, 25 Idaho 711, 139 Pac. 714. **Ill.**—*Webster v. French*, 11 Ill. 254, 271. **N. J.**—*Kempton v. Bartine*, 59 N. J. Eq. 149, 154, 44 Atl. 461; *Sweet v. Parker*, 22 N. J. Eq. 453; *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163. **R. I.**—*D'Wolf v. D'Wolf*, 4 R. I. 450. **Va.**—*Fitzgibbon v. Barry*, 78 Va. 755. **Wis.**—*Newcomb v. Horton*, 18 Wis. 566.

[b] **To reconcile the rule that all persons interested in the subject matter of a suit are to be made parties, and the rule that no person is necessarily to be made a party unless his interest may be affected by the decree, the first must be construed as extending only to persons interested in the event of the suit and not to persons interested only in the question involved in the issue.** *Williams v. Russell*, 19 Pick. (Mass.) 162.

31. *Bunce v. Gallagher*, 5 Blackf. 481, 4 Fed. Cas. No. 2,133.

32. *Von Schmidt v. Huntington*, 1 Cal. 55; *Hallett v. Hallett*, 2 Paige (N. Y.) 15.

33. *Leviness v. Consol. G. E. L. & P. Co.*, 114 Md. 559, 80 Atl. 304, Ann. Cas. 1913C, 649; *Fitzgibbon v. Barry*, 78 Va. 755; *Jameson's Admx. v. Deshields*, 3 Gratt. (44 Va.) 4.

34. **U. S.**—*Elmendorf v. Taylor*, 10 Wheat. 152, 166, 6 L. ed. 289. **Ark.**—*Apperson & Co. v. Burgett*, 33 Ark. 328, 333. **Cal.**—*Wilson v. Castro*, 31 Cal. 420. **Conn.**—*New London Bank*

its observance would be attended with great inconvenience and would answer no substantially beneficial purpose, and where the court can dispose of the merits of the case before it without prejudice to the rights or interests of other persons who are not parties.³⁵ Not being an inflexible rule, it is subject to some exceptions and qualifications.³⁶ However, if the persons materially interested can be made parties, the rule will generally be strictly enforced.³⁷

B. CONVERSE OF RULE.—The converse of the rule is equally true. No person need be made a party who has no interest, and against whom, if the cause be brought to a hearing, there cannot be a decree. Such persons are not even proper parties.³⁸ And it is a fatal objection to a bill that some of the complainants do not show any title, or participate in the relief sought.³⁹ There are exceptions to this rule also.⁴⁰

C. NATURE OF INTEREST REQUIRED.—The interest which makes a person a necessary party must be a material interest,⁴¹ that which authorizes the joinder of a party may be either legal or equitable,⁴²

v. Lee, 11 Conn. 112, 27 Am. Dec. 713.

35. **Ala.**—*Lucas v. Bank of Darien*, 2 Stew. 280, 325. **Cal.**—*Wilson v. Castro*, 31 Cal. 420. **Ill.**—*Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; *Webster v. French*, 11 Ill. 254, 271; *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120.

36. **As to exceptions**, see *infra*, IV, E.

As to when a trustee may sue alone, see the title "Trusts and Trustees."

[a] **The courts are at liberty to make exceptions** whenever necessary. *Carey v. Hoxey*, 11 Ga. 645.

37. *Tobin v. Portland F. Mills Co.*, 41 Ore. 269, 277, 68 Pac. 743, 1108.

38. **U. S.**—*United States v. Pratt Coal & Coke Co.*, 18 Fed. 708; *Trecothick v. Austin*, 4 Mason 16, 42, 24 Fed. Cas. No. 14,164. **Ala.**—*Jones v. Caldwell*, 116 Ala. 364, 22 So. 456. **Ark.**—*Peay v. Wright*, 22 Ark. 198. **Conn.**—*Crocker v. Higgins*, 7 Conn. 342. **Fla.**—*Bigelow v. Stringfellow*, 25 Fla. 366, 5 So. 816. **Ga.**—*Bagwell v. Johnson*, 116 Ga. 464, 42 S. E. 732. **Ill.**—*Frye v. Bank of Illinois*, 11 Ill. 367; *Johnson v. Miller*, 55 Ill. App. 163, 179. **Ind.**—*Conklin v. Thurston*, 18 Ind. 290. **Ky.**—*Todd v. Sterrett*, 6 J. J. Marsh. 425. **Me.**—*Linnell v. Lyford*, 72 Me. 280. **Miss.**—*Wherry v. Latimer*, 103 Miss. 524, 60 So. 563, 642; *Hopson v. Harrell*, 56 Miss. 202. **Mo.**—*Missouri Cent. Bldg. & L. Assn. v. Eveler*, 237 Mo. 679, 141 S. W. 877, Ann. Cas.

1913A, 486. **N. J.**—*Van Keuren v. McLaughlin*, 21 N. J. Eq. 163. **N. Y.**—*Callanan v. Keeseville*, A. C. & L. C. R. Co., 48 Misc. 476, 95 N. Y. Supp. 513; *In the Matter of Bull*, 45 Barb. 334, 31 How. Pr. 69. **Tex.**—*Cotton v. Coit*, 88 Tex. 414, 31 S. W. 1061; *Herrington v. Williams*, 31 Tex. 448; *Johnson v. Davis*, 7 Tex. 173; *Broussard v. Wilson* (Tex. Civ. App.), 183 S. W. 814.

[a] **A party against whom the complainant does not ask** and is not entitled to any relief need not be made a party. *Couch v. Terry's Admrs.*, 12 Ala. 225; *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163.

[b] **The rule applies not merely to bills of relief** but also to bills of discovery. *Kenan v. Miller*, 2 Ga. 325.

[c] **An obligee of a bond who has no interest** in the transaction and whose name was inserted for the benefit of another is not a necessary party to a suit to enforce it. *Lang v. Brown*, 29 Ga. 628.

39. *Reynolds v. Caldwell*, 80 Ala. 232; *Dias v. Bouchaud*, 10 Paige (N. Y.) 445, 459; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. (N. Y.) 186.

40. **As to case of persons joined for discovery**, see 7 STANDARD PROC. 524. **As to case of persons who may be joined because liable over to the defendant**, see *infra*, IV, F, 3.

41. See *supra*, IV, A.

42. See *supra*, IV, A.

either direct and immediate,⁴³ or incidental or remote,⁴⁴ or consequential.⁴⁵ Persons whose interests are contingent and not inseparably connected with those of the parties before the court are not necessary or indispensable,⁴⁶ although they are proper⁴⁷ parties.

D. CLASSES OF PARTIES. — 1. **Generally.** — The general rule in equity as to making interested persons parties is subject to qualifications depending upon the classification of parties. Parties are generally divided into two classes, necessary and proper parties.⁴⁸ The federal courts divide parties in equity into three classes, indispensable, necessary, and formal parties;⁴⁹ and some state courts follow the federal classification.⁵⁰

2. **General Chancery Practice.** — a. *Necessary Parties.*⁵¹ — Those persons are necessary parties whose presence is necessary to a determination of the entire controversy,⁵² or who have a substantial interest in the subject matter of the suit, which will be materially affected by any decree that may be rendered,⁵³ or who have such an interest that the defendants already before the court may object to

43. **U. S.** — *Commercial Bank v. Sandford*, 99 Fed. 154. **Mass.** — *Crease v. Babcock*, 10 Mete. 525, 531. **Tenn.** — *Birdsong v. Birdsong*, 2 Head 289.

44. **U. S.** — *Nashville & Decatur R. Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810; *Commercial Bank v. Sandford*, 99 Fed. 154. **Mass.** — *Crease v. Babcock*, 10 Mete. 525, 531. **N. Y.** — *Champlin v. Champlin*, 4 Edw. Ch. 228. **Ore.** — *Tobin v. Portland F. Mills Co.*, 41 Ore. 269, 275, 68 Pac. 743. **Va.** — *Collins v. Lofftus & Co.*, 10 Leigh (37 Va.) 5, 34 Am. Dec. 719.

[a] All parties however remotely concerned in interest must be before the court or no decree can be made to bind them. *Collins v. Lofftus & Co.*, 10 Leigh (37 Va.) 5, 34 Am. Dec. 719.

45. *Blaisdell v. Bohr*, 68 Ga. 56; *Busby v. Littlefield*, 31 N. H. 193. See *infra*, IV, F, 3.

46. **D. C.** — *Landram v. Jordan*, 25 App. Cas. 291, 301. **Ill.** — *Green v. Grant*, 143 Ill. 61, 69, 32 N. E. 369, 18 L. R. A. 381; *Pinkney v. Weaver*, 115 Ill. App. 582. **Mo.** — *Collins v. Crawford*, 214 Mo. 167, 183, 112 S. W. 538, 127 Am. St. Rep. 661; *Green v. Grant*, 143 Ill. 61, 32 N. E. 369, 18 L. R. A. 381. **Va.** — *Fitzgibbon v. Barry*, 78 Va. 755.

[a] A contingent interest depending upon the event of the suit is not such an interest as makes the person having it a necessary party. *Barbour v. Whitlock*, 4 Mon. (Ky.) 180.

[b] Persons to whom a public officer intends to make a lease are not nec-

essary parties to a bill to determine his authority to make such lease. *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. ed. 183.

47. *McCrea v. New York E. R. Co.*, 13 Daly (N. Y.) 302.

48. See *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30, and *infra*, IV, D, 2. 49. *California v. Southern Pac. Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. ed. 683.

50. See *infra*, IV, D, 3.

51. Under federal practice, see *infra*, IV, D, 3.

52. **U. S.** — *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30. **Idaho.** — *Taylor v. Lytle*, 26 Idaho 97, 141 Pac. 92. **N. Y.** — *Bailey v. Inglee*, 2 Paige 278. **Tex.** — *Collin County S. Trustees v. Stiff* (Tex. Civ. App.), 190 S. W. 216; *Biggs v. Miller* (Tex. Civ. App.), 147 S. W. 632. **Wis.** — *Newcomb v. Horton*, 18 Wis. 566.

53. **Ala.** — *Wilkinson v. Mayo*, 69 Ala. 33. **Cal.** — *Wilson v. Castro*, 31 Cal. 420. **Colo.** — *McLean v. Farmers' Highline C. & R. Co.*, 44 Colo. 184, 98 Pac. 16; *Lynch v. Foley*, 32 Colo. 110, 76 Pac. 370. **Fla.** — *Indian River Mfg. Co. v. Wooten*, 48 Fla. 271, 278, 37 So. 731. **Ill.** — *Hopkins v. Roseclaire Lead Co.*, 72 Ill. 373; *Prentice v. Kimball*, 19 Ill. 319; *Thickson v. Barry*, 138 Ill. App. 100. **Minn.** — *Disbrow v. Creamery Pkg. Mfg. Co.*, 104 Minn. 17, 115 N. W. 751. **Nev.** — *Robinson v. Kind*, 23 Nev. 330, 335, 47 Pac. 1, 997. **N. H.** — *Jones v. Herbert*, 77 N. H. 282, 90 Atl. 854. **N. Y.** — *Wiser v. Blachly*, 1 Johns.

proceeding without them.⁵⁴ Who are necessary parties must be determined from the complaint alone unaided by affidavits.⁵⁵

Necessary parties must be made parties to the suit,⁵⁶ with certain exceptions;⁵⁷ until they are made parties the court will not proceed with the case.⁵⁸

b. *Proper parties* are those who have an interest in the subject matter of the litigation, which may be conveniently settled therein.⁵⁹ Such persons may or may not be parties at the plaintiff's election.⁶⁰

3. **Under the federal practice** parties in equity are classified as indispensable, necessary and formal.⁶¹ An indispensable party is one who not only has an interest in the subject matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting his interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.⁶² Such a person must be

Ch. 437. **Tex.**—Matagorda Canal Co. v. Markham Irr. Co. (Tex. Civ. App.), 154 S. W. 1176.

[a] Persons whose interests in the subject-matter in litigation and whose liabilities are determinable wholly from their independent relation thereto, unaffected by the rights of the defendant named in the action, are not necessary parties. *Kettle River v. Bruno*, 106 Minn. 58, 118 N. W. 63.

54. **U. S.**—Commercial Bank v. Sandford, 99 Fed. 154. **Mass.**—Williams v. Russell, 19 Pick. 162. **N. Y.**—Bailey v. Inglee, 2 Paige 278.

[a] Where a defendant is interested in having another made a party, the plaintiff must make him a party, so that the defendant may have his assistance in his defense. To entitle him to the assistance of a third party within this rule, he must show that he has a right to claim through or rely upon the equitable title of such person. Mere witnesses are not contemplated by the rule. *Williams v. Russell*, 19 Pick. (Mass.) 162.

55. *Quint v. Dimond*, 135 Cal. 572, 67 Pac. 1034; *Hannon v. Nuevo Land Co.*, 14 Cal. App. 700, 112 Pac. 1103.

56. **Colo.**—Lynch v. Foley, 32 Colo. 110, 76 Pac. 370. **Ill.**—Thickson v. Barry, 138 Ill. App. 100. **Mass.**—Cassidy v. Shimmmin, 122 Mass. 406. **N. J.**—Hess v. Cole, 23 N. J. L. 116; *In re Martin*, 86 N. J. Eq. 265, 98 Atl. 510. **N. Y.**—Wiser v. Blachly, 1 Johns. Ch. 437.

See also *infra*, IV, D, 3.

57. As to exceptions, see *infra*, IV, E.

58. **D. C.**—Willey v. Stormont, 38

App. Cas. 399, 412. **Fla.**—Hull v. Burr, 62 Fla. 499, 504, 56 So. 673; *Worley v. Dade Co. Sec. Co.*, 52 Fla. 666, 42 So. 527; *Florida Land Rock Phos. Co. v. Anderson*, 50 Fla. 501, 514, 39 So. 392. **Kan.**—Union Terminal R. Co. v. Board of R. R. Comrs., 52 Kan. 680, 35 Pac. 224. **Minn.**—P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417. **N. M.**—Miller v. Klasner, 19 N. M. 21, 140 Pac. 1107. **N. Y.**—Mawhinney v. Bliss, 124 App. Div. 609, 109 N. Y. Supp. 332; *Elias v. Schweyer*, 13 App. Div. 336, 43 N. Y. Supp. 55. **Tex.**—Black v. Black, 95 Tex. 627, 69 S. W. 65; *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77.

59. *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30; *Kelley v. Boettcher*, 85 Fed. 55, 64, 29 C. C. A. 14; *Starn v. Huffman*, 62 W. Va. 422, 59 S. E. 179.

[a] "A 'proper' party is one without whom the cause might have proceeded, but whose presence will allow a decree or judgment to more clearly settle the controversy between all of the parties." *Taylor v. Lytle*, 26 Idaho 97, 141 Pac. 92.

60. **U. S.**—Hunter v. Robbins, 117 Fed. 920. **Ill.**—Briscoe v. Power, 85 Ill. 420. **Tex.**—League v. Scott (Tex. Civ. App.), 156 S. W. 1129. **W. Va.**—Stern v. Huffman, 62 W. Va. 422, 59 S. E. 179.

61. See *supra*, IV, D, 1.

62. **U. S.**—California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. ed. 683; *Williams v. Bankhead*, 19 Wall. 563, 571, 23 L. ed. 184; *Shields v. Barrow*, 17 How. 130, 139, 15 L. ed. 158; *Silver King Coalition Mines Co. v. Silver King Consol. Min.*

made a party.⁶³ unless the parties are too numerous, when the case is subject to a special rule.⁶⁴

A **necessary party** is one who has an interest in the controversy but whose interest is separable from those of the parties before the court, and will not be directly affected by a decree which does full and complete justice between them.⁶⁵ If possible and practicable such a person must be made a party.⁶⁶

A **formal party** is one who has no interest in the controversy between the immediate litigants but has an interest in the subject matter which may be conveniently settled in the suit and thereby prevent further litigation; he may or may not be a party at the option of the complainant.⁶⁷

E. EXCEPTIONS TO RULE REQUIRING INTERESTED PERSONS TO BE PARTIES. — 1. Generally. — Exceptions to the rule requiring interested persons to be made parties exist where they are not indispensable to a full and fair investigation and it is difficult or impossible to reach them,⁶⁸ or where it is wholly impracticable to make them parties.⁶⁹

2. Where Parties Are Beyond the Jurisdiction of Court or Are Unknown. — When interested persons, who are not joined, are unknown,⁷⁰ or are beyond the jurisdiction of the court, so as not to be

Co., 204 Fed. 166, 122 C. C. A. 402; *De Galard v. Safe Deposit & Trust Co.*, 196 Fed. 981; *United States v. Allen*, 179 Fed. 13, 21, 103 C. C. A. 1. **Ala.** *Culley v. Elford*, 187 Ala. 165, 65 So. 381. **D. C.** — *Landram v. Jordan*, 25 App. Cas. 291, 300. **Wis.** — *Board of Supervisors of Douglas County v. Walbridge*, 38 Wis. 179, 188.

[a] "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party." *Waterman v. Canal-Louisiana Bank & Tr. Co.*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. ed. 80.

63. *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. ed. 792; *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, 208 Fed. 976, 126 C. C. A. 64; *Chadbourn v. Coe*, 51 Fed. 479, 2 C. C. A. 327.

[a] The case cannot proceed without him. *Hoe v. Wilson*, 9 Wall. (U. S.) 501, 19 L. ed. 762.

[b] If he is not and cannot be made a party the court will dismiss the bill on the ground of inability to proceed. *Abbot v. American Hard Rubber Co.*, 4 Blatchf. 489, 1 Fed. Cas. No. 9.

64. See *infra*, IX.

65. *Minnesota v. Northern Sec. Co.*,

184 U. S. 199, 236, 22 Sup. Ct. 308, 46 L. ed. 499; *Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061; *Williams v. Bankhead*, 19 Wall. 563, 571, 22 L. ed. 184; *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, 208 Fed. 976, 126 C. C. A. 64; *Chadbourn v. Coe*, 51 Fed. 479, 2 C. C. A. 327.

Under general chancery practice, see *supra*, IV, D, 2, a.

66. *Chadbourn v. Coe*, 51 Fed. 479, 2 C. C. A. 327. See *supra*, IV, D, 2, a.

67. *Williams v. Bankhead*, 19 Wall. (U. S.) 563, 571, 22 L. ed. 184; *Barney v. Baltimore City*, 6 Wall. (U. S.) 280, 18 L. ed. 825; *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, 208 Fed. 976, 126 C. C. A. 64; *Chadbourn v. Coe*, 51 Fed. 479, 2 C. C. A. 327.

68. *Lucas v. Bank of Darien*, 2 Stew. 280, 291; *Searles v. Northwestern Mut. L. Ins. Co.*, 148 Iowa 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405.

69. *Whitney v. Mayo*, 15 Ill. 251.

70. **U. S.** — *Alger v. Anderson*, 78 Fed. 729. **Ala.** — *Noble v. Gadsden Land & Imp. Co.*, 133 Ala. 250, 258, 31 So. 856, 91 Am. St. Rep. 27; *Morton v. New Orleans & S. R. Co.*, 79 Ala. 590, 610. **Ill.** — *Ryan v. Lynch*, 68 Ill. 140; *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120. **Miss.** — *Davis v. Hoopes*, 33 Miss. 173. **R. I.** — *D'Wolf v. D'Wolf*, 4 R. I. 450.

subject to its process,⁷¹ and all belong to a class whose rights are analogous to those actually before the court because dependent on the same principles of law, the court may proceed to adjudge the rights of the class as such notwithstanding the nonjoinder, unless the absent parties would be injuriously affected by the decree in which case the court will not proceed to final decree without them.⁷² The existence of a statute authorizing service by publication does not affect the application of the rule.⁷³

3. Where Joinder Would Oust Jurisdiction. — Persons who would

[a] **Bondholders.**—In a bill to restrain collection of tax for payment of interest on bonds, the holders of bonds being unascertainable need not be made parties. *Ryan v. Lynch*, 68 Ill. 760.

[b] **But heirs known in a general way** and whose names and residences are easily obtainable are not to be made parties under the designation unknown heirs. *Seymour v. Edwards*, 31 Ill. App. 50.

71. U. S.—*McArthur v. Scott*, 113 U. S. 340, 392, 5 Sup. Ct. 652, 28 L. ed. 1015; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 21, 24 L. ed. 917; *Union Bank v. Stafford*, 12 Wall. 327, 341, 13 L. ed. 1008; *Elmendorf v. Taylor*, 10 Wheat. 152, 167, 6 L. ed. 289; *Edwards v. Mercantile Trust Co.*, 124 Fed. 381; *Mackay v. Gabel*, 117 Fed. 873; *Federal Equity Rule 39. Ala.*—*Culley v. Elford*, 187 Ala. 165, 65 So. 381; *Noble v. Gadsden Land & Imp. Co.*, 133 Ala. 250, 31 So. 856, 91 Am. St. Rep. 27; *Parkman's Admr. v. Aicardi*, 34 Ala. 293, 73 Am. Dec. 457. **Ark.**—*Porter v. Clements*, 3 Ark. 364. **Cal.**—*Von Schmidt v. Huntington*, 1 Cal. 55. **Ga.** *Carey v. Hoxey*, 11 Ga. 645. **Ia.** *Searles v. Northwestern Mut. L. Ins. Co.*, 148 Iowa 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405. **Mass.**—*Cassidy v. Shimmis*, 122 Mass. 406. **Miss.**—*McPike v. Wells*, 54 Miss. 136. **Mo.** *Legden v. Owen*, 150 Mo. App. 102, 129 S. W. 984. **N. Y.**—*Bouton v. Brooklyn*, 15 Barb. 375; *Sippile v. Albites*, 5 Abb. Pr. (N. S.) 76. **N. C.** *Spivey v. Jenkins*, 36 N. C. 126. **R. I.** *D'Wolf v. D'Wolf*, 4 R. I. 450. **Eng.** *Cockburn v. Thompson*, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

But see *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

[a] **It is a matter in the sound discretion** of the court whether, under all the circumstances of the case, it ought to proceed with a suit to collect a debt from the estate of a deceased partner with the partners without the juris-

diction. *Vose v. Philbrook*, 3 Story 335, 28 Fed. Cas. No. 17,010.

72. U. S.—*Jessup v. Illinois Cent. R. Co.*, 36 Fed. 735; *Gray v. Larrimore*, 4 Sawy. 638, 2 Abb. 542, 10 Fed. Cas. No. 5,721; *Cole Silver Min. Co. v. Virginia, etc. Water Co.*, 1 Sawy. 685, 6 Fed. Cas. No. 2,990. **Mass.**—*Eustis Mfg. Co. v. Sazo Brick Co.*, 198 Mass. 212, 84 N. E. 449. **Miss.**—*McPike v. Wells*, 54 Miss. 136, 147. **Mo.**—*Leyden v. Owen*, 150 Mo. App. 102, 129 S. W. 984. **W. Va.**—*White v. Kennedy's Admr.*, 23 W. Va. 221.

[a] **Justice Story** says: "It is an important qualification ingrafted on this particular exception that persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court. The doctrine ordinarily laid down on this point is, that when the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree, or if they have rights wholly distinct from those of the other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being made parties." *Story's Eq. Pl.*, §§81-83, quoted in *Gray v. Larrimore*, 4 Sawy. 638, 2 Abb. 542, 10 Fed. Cas. No. 5,721; *Leyden v. Owen*, 150 Mo. App. 102, 129 S. W. 984.

73. Spivey v. Jenkins, 36 N. C. 126. See *Whitney v. Mayo*, 15 Ill. 251, query.

be proper parties need not be joined if their joinder would oust the jurisdiction of the court.⁷⁴

4. Where Plaintiff Waives Claim Against Persons Not Joined. A complainant may sometimes avoid the necessity of making particular persons parties by waiving all claim against them in his bill, where this can be done without prejudice to the rights of those made defendants.⁷⁵

5. Doctrine of Representation.—*a. In General.*—An exception to the rule requiring all interested persons to be made parties is known as the doctrine of representation.⁷⁶ A general statement of this doctrine is that where it appears that a particular party though not in the court in person, is so far represented by others that his interests receive actual and efficient protection, the decree will be held binding on him although not a party.⁷⁷ A familiar illustration of the doctrine of representation exists where the parties are very numerous and it is impracticable to join them.⁷⁸

b. Representation of Persons Having Future Interests in Real Property.—Another illustration of the doctrine is the case of representation of all persons having interests in real property subsequent to the first estate of inheritance. In such case it is generally sufficient, all parties having antecedent estates being made parties, to bring before the court the first person having an estate of inheritance,⁷⁹ unless his estate is defeasible by a shifting use, conditional limitation, or executory

74. Federal Eq. Rule 39; *Silver King Coal M. Co. v. Silver King Consol. M. Co.*, 204 Fed. 166, 122 C. C. A. 402; *Cleveland Tel. Co. v. Stone*, 105 Fed. 794; *Dillon's Admr. v. Bates*, 39 Mo. 292.

As to Code rule of joinder, see *infra*, VIII, A, 3 and B, 3.

75. *Dart v. Palmer*, 1 Barb. Ch. (N. Y.) 92, 98; *Bull v. Bell*, 4 Wis. 54.

[a] **Not where it would prejudice defendant**, in case of an accounting involving other persons. *Dart v. Palmer*, 1 Barb. Ch. (N. Y.) 92, 98.

76. *Culley v. Elford*, 187 Ala. 165, 65 So. 381; *Mead v. Mitchell*, 5 Abb. Pr. (N. Y.) 92, 106, *affirmed* in 17 N. Y. 210, 72 Am. Dec. 455.

77. *Hale v. Hale*, 146 Ill. 227, 256, 33 N. E. 858, 20 L. R. A. 247.

78. See *infra*, IX.

79. **U. S.**—*McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. ed. 1015. **Ala.**—*Culley v. Elford*, 187 Ala. 165, 65 So. 381. **Ill.**—*Hale v. Hale*, 146 Ill. 227, 256, 33 N. E. 858, 20 L. R. A. 247. **Ky.**—*Hermann v. Parsons*, 117 Ky. 239, 78 S. W. 125. **Md.**—*Long v. Long*, 62 Md. 67. **Miss.**—*Cannon v. Barry*, 59 Miss. 289. **N. Y.**—*Brevoort v. Brevoort*, 70 N. Y. 136 (partition

suit); *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455 (partition suit); *Nordine v. Greenfield*, 7 Paige 544, 34 Am. Dec. 363 (foreclosure suit); *Doscher v. Wyckoff*, 113 N. Y. Supp. 655. **Va.**—*Harrison v. Wallton's Exr.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; *Faulkner v. Davis*, 18 Gratt. (59 Va.) 651, 687, 98 Am. Dec. 698; *Baylor's Lessee v. Dejarrette*, 13 Gratt. (54 Va.) 152. **Eng.**—*Cockburn v. Thompson*, 16 Ves. Jr. 321, 33 Eng. Reprint 1005; *Lloyd v. Johnes*, 9 Ves. Jr. 37, 56, 32 Eng. Reprint 514; *Wills v. Slade*, 6 Ves. Jr. 498, 31 Eng. Reprint 1163.

[a] **Rule Stated.**—Where real estate is in controversy which is subject to an entail, it is sufficient to make the first tenant in tail in esse in whom an estate of inheritance is vested a party with those claiming prior interests, without making those parties who may claim in reversion or remainder after such estate of inheritance. *Hale v. Hale*, 146 Ill. 227, 256, 33 N. E. 858, 20 L. R. A. 247; *Baylor's Lessee v. Dejarrette*, 13 Gratt. (54 Va.) 152.

In partition, see the title "Partition."

devise.⁸⁰ If under certain circumstances, there is no tenant in tail in being, the first tenant for life has been regarded as representing the entire fee;⁸¹ but a contingent remainderman with no vested interest does not represent the estate.⁸² This doctrine often applies to living persons;⁸³ but it is especially applicable where the rights to be represented are those of persons who may afterwards come into being.⁸⁴

c. *Representation of Persons Having Equitable Interests.*—If a person has an interest which is involved in that of another possessing the legal right so that his interest may be asserted in the latter's name, he need not be made a party to a suit in which the latter is a party.⁸⁵

80. *Long v. Long*, 62 Md. 33, 67; *Godess v. Williams*, 2 Y. & C. C. C. 595, 7 Jur. 1123, 63 Eng. Reprint 266. *Contra*, *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455, repudiating limitation, and holding that at all events the exception should not be extended.

81. **U. S.**—*McArthur v. Scott*, 113 U. S. 340, 401, 5 Sup. Ct. 652, 28 L. ed. 1015. **Md.**—*Downin v. Sprecher*, 35 Md. 474, holding the tenant for life is not a sufficient party to represent the estate except in cases of partition and cases where the object of the suit is to collect debts or enforce a charge or lien on the land. **Mo.**—*Sparks v. Clay*, 185 Mo. 393, 84 S. W. 40 (partition suit); *Sikemeier v. Galvin*, 124 Mo. 367, 27 S. W. 551 (partition suit); *Reinders v. Koppelman*, 68 Mo. 482, 501, 30 Am. Rep. 802, partition suit. **Va.**—*Carneal v. Lynch*, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819 (partition by life tenant); *Baylor's Lessee v. Dejarnette*, 13 Gratt. (54 Va.) 152, 167. **Eng.**—*Giffard v. Hort*, 1 Sch. & Lef. 386.

[a] In an action to sell the fee, the life tenant does not represent the remainderman. *Williamson v. Jones*, 43 W. Va. 562, 576, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

82. *Cannon v. Barry*, 59 Miss. 289.

83. **Ill.**—*Hale v. Hale*, 146 Ill. 227, 259, 33 N. E. 588, 20 L. R. A. 247. **S. C.**—*Bofil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627. **Va.**—*Faulkner v. Davis*, 18 Gratt. (59 Va.) 651, 98 Am. Dec. 698.

84. **Ill.**—*Hale v. Hale*, 146 Ill. 227, 259. **Md.**—*Long v. Long*, 62 Md. 33, 67. **S. C.**—*Bofil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627; *Van Lew v. Parr*, 2 Rich. Eq. 321. See *Leroy v. Charleston*, 20 S. C. 71. **Va.**—*Faulkner v. Davis*, 18 Gratt. (59 Va.) 651, 98 Am. Dec. 698. **Eng.**—*Gaskell v. Gaskell*, 6 Sim. 643, 58 Eng. Reprint 735.

[a] Where an estate is vested in

living persons subject to open and let in afterborn persons, the living owners have been held, for purposes of litigation, to represent the whole estate, the interests of the unborn persons as well as their own. *Kent v. St. Michael*, 136 N. Y. 10, 32 N. E. 704, 32 Am. St. Rep. 693, 18 L. R. A. 331. But see *Downin v. Sprecher*, 35 Md. 474.

85. *Hopkirk v. Page*, 2 Brock. 20, 12 Fed. Cas. No. 6,697; *Sweet v. Parker*, 22 N. J. Eq. 453.

[a] Thus (1) a trustee (see the following: **U. S.**—*Manson v. Duncanson*, 166 U. S. 533, 543, 17 Sup. Ct. 647, 41 L. ed. 1105; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Hopkirk v. Page*, 2 Brock. 20, 12 Fed. Cas. No. 6,697. **Ill.**—*St. Louis & P. R. Co. v. 552*. **W. Va.**—*Billmyer Lumb. Co. v. 99 Tex. 172*, 88 S. W. 542, 89 S. W. Merchants Coal Co., 66 W. Va. 696, Am. Dec. 455. **Tex.**—*Austin v. Cahill*, Kerr, 153 Ill. 182, 38 N. E. 638. **N. J.** **N. Y.**—*Van Vechten v. Terry*, 2 Johns. Ch. 197; *Mead v. Mitchell*, 5 Abb. Pr. 92, 106, affirmed in 17 N. Y. 210, 72 *Sweet v. Parker*, 22 N. J. Eq. 453. 66 S. E. 1073, 26 L. R. A. (N. S.) 1101; *Zane v. Fink*, 18 W. Va. 693, 736; and generally the title “Trusts and Trustees”), or (2) an executor or administrator (*Hopkirk v. Page*, 2 Brock. 20, 12 Fed. Cas. No. 6,697; *Mead v. Mitchell*, 5 Abb. Pr. 92, 106, affirmed in 17 N. Y. 210, 72 Am. Dec. 455) may sue without joining the cestui que trust, the legatee or distributee. (3) Residuary legatees are represented by the executors, and are not necessary parties to a suit affecting the personal estate. **U. S.**—*Dandridge v. Washington's Exrs.*, 2 Pet. 370, 7 L. ed. 454. **Ill.**—*McConnel v. Smith*, 39 Ill. 279. **N. J.**—*Melick v. Melick*, 17 N. J. Eq. 156. (4) The same is true of suits by and against assignees for the benefit of

6. **Where Interested Person Is Insolvent.** — Insolvency of a party will sometimes excuse his joinder.⁸⁶

7. **Where State Is Interested.** — Where the state should be a party, but by law cannot be sued, it need not be joined.⁸⁷

F. RULES APPLIED TO SPECIAL CASES. — 1. **Person Holding Legal Title.** — In an action by a beneficial claimant, the holder of the legal title must be made a party.⁸⁸

2. **Joint Owners and Contractors.** — In the case of joint obligations, all the joint owners or contractors are necessary parties,⁸⁹ but under statutes making such obligations joint and several they are not necessary,⁹⁰ although proper,⁹¹ parties.

3. **Persons Liable Over to Defendant.** — The success of a plaintiff against a defendant immediately interested may give him a right to proceed against others for the purpose of compensation or restitution. In such cases to avoid a multiplicity of suits parties so consequentially interested are sometimes required to be brought in.⁹²

4. **Simple Contract Creditors.** — The interest of a simple contract creditor in the property of his debtor is so remote and indefinite that he is not even a proper party to an action against the debtor.⁹³

5. **Persons who have parted with their interests in the subject of**

creditors (see 3 STANDARD PROC. 75), (5) and receivers. See the title "**Receivers.**" (6) Similarly the obligee in a bond not assignable by law may sue without joining the equitable assignee. *Hopkirk v. Page*, 2 Brock. 20, 12 Fed. Cas. No. 6,697.

Action on behalf of Indians by United States, see 12 STANDARD PROC. 44, 46.

As to nominal and use plaintiffs, see *infra*, V, C, 5.

Obligee as trustee of express trust, see *infra*, V, c, 4, d, (II), (D).

86. **Ala.**—*Couch v. Terry's Admr.*, 12 Ala. 225. **Ark.**—*Roane v. Pickett*, 7 Ark. 510. **N. Y.**—*Van Cleef v. Sickles*, 5 Paige 505. **W. Va.**—*Holsberry v. Poling*, 38 W. Va. 186, 18 S. E. 485.

[a] **In an action against the surety on a joint and several note**, the principal need not be made a party if he is so destitute of all property that no valuable portion of the debt can be made out of his estate. *Roane v. Pickett*, 7 Ark. 510.

In an action for contribution, insolvent co-obligors need not be joined, see 5 STANDARD PROC. 502.

Joining insolvent joint judgment debtor in creditors' suit, see 6 STANDARD PROC. 201, note 28.

87. *Whitney v. Mayo*, 15 Ill. 251; *Webster v. French*, 11 Ill. 254, 272; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 239, 41 Am. Dec.

549. See generally the title "**States and Territories.**"

88. **Ky.**—*Johnson v. Rankin*, 2 Bibb 184. **Ohio.**—*Myers v. Miller*, 2 Ohio Dec. (Reprint) 319. **W. Va.**—*Tavener v. Barrett*, 21 W. Va. 656, 673.

Assignor as a party, see 3 STANDARD PROC. 116, 117.

Trustee as a party, see the title, "**Trusts and Trustees.**"

89. *Bailey v. Inglee*, 2 Paige (N. Y.) 278; *Slaton v. Anthony* (Tex. Civ. App.), 143 S. W. 201; *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751.

90. *Craig v. McKnight*, 108 Tenn. 690, 69 S. W. 322.

91. *Craig v. McKnight*, 108 Tenn. 690, 69 S. W. 322.

92. **Ark.**—*Peay v. Wright*, 22 Ark. 198. **Ga.**—*Blaisdell v. Bohr*, 68 Ga. 56. **N. H.**—*Busby v. Littlefield*, 31 N. H. 193, 199.

[a] **Where a grantor by mistake includes too much land in his deed and this mistake is repeated in subsequent warranty deeds**, the intermediate grantors, because of their prima facie contingent liability for breach of covenant, should be joined in an action by the original grantor to enjoin a writ of entry by the ultimate grantee. *Busby v. Littlefield*, 31 N. H. 193.

93. *Postal Tel. Cable Co. v. Snowden*, 68 Md. 118, 123, 12 Atl. 549.

the controversy, or whose power over it has terminated, are not proper parties to a suit in equity,⁹⁴ unless fraud is charged and relief is asked against them.⁹⁵ And therefore a trustee whose power over an estate has terminated,⁹⁶ an assignor who has made an absolute assignment,⁹⁷ or a bankrupt whose interest has passed to an assignee in bankruptcy,⁹⁸ is neither a necessary nor proper party to a suit.

6. Witnesses.— Mere witnesses against whom there can be no relief ought not to be made parties.⁹⁹

7. Agents, Auctioneers, Public Officers, etc.— The mere fact of a person being or having been an agent,¹ attorney,² auctioneer,³ or stakeholder,⁴ in reference to the subject of controversy does not constitute him a necessary party. Similarly in a suit brought merely to determine the validity of an act or thing done by a public or judicial officer, without questioning his personal integrity or want of good faith, the officer is not a necessary party;⁵ although he is sometimes held to be a proper party.⁶

8. Persons Asserting Outstanding Paramount Title.— Persons claiming under a title which is paramount to the title asserted cannot properly be made parties.⁷

9. Persons Disclaiming Interest.— A person who, in his testimony or deposition, disclaims all interest in the controversy need not be made a party.⁸

94. U. S.—*Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30. **Ala.**—*Wilkinson v. Mayo*, 69 Ala. 33. **Colo.**—*Thatcher v. Rockwell*, 4 Colo. 375. **Conn.**—*Crocker v. Higgins*, 7 Conn. 342. **Ill.**—*Marsh v. Green*, 79 Ill. 385. **Ky.**—*Hanly v. Blackford*, 1 Dana 1, 25 Am. Dec. 114, remote grantor. **Ohio.**—*McGaffey v. Finley*, 20 Ohio 474. **Tenn.**—*Williams v. Vantrese* (Tenn. Ch. App.), 39 S. W. 741. **Tex.**—*Herrington v. Williams*, 31 Tex. 448, 456.

95. Florida Land Rock Phos. Co. v. Anderson, 50 Fla. 501, 514, 39 So. 392. See also *Brown v. Solary*, 37 Fla. 102, 115, 19 So. 161.

96. Williams v. Vantrese (Tenn. Ch. App.), 39 S. W. 741.

97. Joining assignor in action by assignee, see 3 STANDARD PROC. 117.

98. Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381; *Fry v. Street*, 37 Ark. 39.

99. U. S.—*Trecothick v. Austin*, 4 Mason 16, 42, 24 Fed. Cas. No. 14,164. **Mass.**—*Williams v. Russell*, 19 Pick. 162. **Eng.**—*Smith v. Snow*, 3 Madd. 10, 56 Eng. Reprint 413; *Whitworth v. Davis*, 1 Ves. & B. 545, 550, 35 Eng. Reprint 212.

1. Ala.—*Baker v. Rowan*, 2 Stew. & P. 361. **Cal.**—*Behlow v. Fischer*, 102 Cal. 208, 36 Pac. 509. **Ill.**—See *Miller*

v. Whittaker, 23 Ill. 453. **W. Va.**—*Tavener v. Barrett*, 21 W. Va. 656.

See the title "Principal and Agent."

2. Kenan v. Miller, 2 Ga. 325.

3. Veazie v. Williams, 8 How. (U. S.) 134, 159, 12 L. ed. 1018; *Tavener v. Barrett*, 21 W. Va. 656, 673.

4. Rodes' Exrs. v. Bush, 5 Mon. (Ky.) 467. See *Long v. Eisenbeis*, 23 Wash. 556, 63 Pac. 249.

[a] But where after notice not to pay over money, a stakeholder pays over money in his hands in a gambling transaction, he is responsible and is a proper party. *Lillard v. Mitchell* (Tenn. Ch.), 37 S. W. 702.

5. Oliver v. Jersey City, 63 N. J. L. 634, 44 Atl. 709, 76 Am. St. Rep. 228, 48 L. R. A. 412; *Montgomery v. Whitworth*, 1 Tenn. Ch. 174. See *Rodes' Exrs. v. Bush*, 5 Mon. (Ky.) 467.

6. See 16 STANDARD PROC. 817, note 34, holding a sheriff a proper party to an action to set aside a sheriff's sale.

7. Ga.—*Bond v. Connelly*, 8 Ga. 302. **Ill.**—*Allen v. Woodruff*, 96 Ill. 11, 27; *Frye v. Bank of Illinois*, 11 Ill. 367. **N. Y.**—*Eagle Fire Co. v. Lent*, 6 Paige 635. **Va.**—*Lange v. Jones*, 5 Leigh (32 Va.) 192.

See the title "Mortgages."

8. Johnson v. Rankin, 3 Bibb (Ky.)

10. Party for Discovery.—Persons other than principal defendants may sometimes be made parties to a bill for relief for the purpose of obtaining a discovery.⁹

11. Personal Representatives of Interested Persons.—If the interested person is dead, his personal representative must be brought in as a general rule;¹⁰ but he may be dispensed with in certain cases.¹¹

12. Persons Acquiring Interest Pending Suit.—Voluntary purchasers,¹² assignees,¹³ and incumbrancers,¹⁴ pendente lite of the subject matter of the action or the defendant's interest are not necessary parties, but may or may not be joined at the plaintiff's election;¹⁵ but in the case of an assignment of the defendant's interest under the bankruptcy or insolvency acts, the assignee must be made a party before the case can be proceeded in.¹⁶

V. WHO MAY BE PARTIES PLAINTIFF.—A. GENERALLY. Who may maintain an action is a matter of law, not subject to the private conventions of parties.¹⁷

86; *McConnell v. McConnell*, 11 Vt. 290.

9. See 7 STANDARD PROC. 524.

10. *Kempton v. Bartine*, 59 N. J. Eq. 149, 44 Atl. 461; *Read v. Bennett*, 55 N. J. Eq. 587, 37 Atl. 75; *Martin v. McBryde*, 38 N. C. 531.

[a] In suits affecting the estates of a deceased, their personal representatives ought to be made parties. *Trecothick v. Austin*, 4 Mason 16, 24 Fed. Cas. No. 14,164.

11. See *infra*, this note.

[a] Thus (1), if it is shown that the interested person left no personal estate (*Overly v. Tipton*, 68 Ind. 410), or (2) that there is no administration of his estate (*Trecothick v. Austin*, 4 Mason 16, 41, 24 Fed. Cas. No. 14,164; *Chapman v. Peebles*, 84 Ala. 283, 4 So. 273, where a proper but not necessary party was insolvent and there was no administration of his estate. But see *Martin v. McBryde*, 38 N. C. 531, holding if there be no personal representative the person seeking a division of the fund must procure the appointment of one), or (3) that the right of representation is in litigation in another court (*West v. Randall*, 2 Mason 181, 193, 29 Fed. Cas. No. 17,424, dictum) he need not be made a party.

12. Ala.—*Smith v. Inge*, 80 Ala. 283. Ill.—*Moran v. Pellifant*, 28 Ill. App. 278. Minn.—*Steele v. Taylor*, 1 Minn. 274. N. Y.—*Murray v. Ballou*, 1 Johns. Ch. 566. R. I.—*Sprague v. Stevens*, 37 R. I. 1, 91 Atl. 43. Tex.—*Jemison v. Halbert*, 47 Tex. 180, 188; *Portis v. Hill*, 30 Tex. 529, 98 Am. Dec. 481. Va.

Vashon v. Barrett, 99 Va. 344, 38 S. E. 200.

See the title "Lis Pendens."

[a] **Purchasers at Execution Sale.** *Steele v. Taylor*, 1 Minn. 274.

13. Conn.—*Pond v. Clark*, 24 Conn. 370. N. Y.—*Sedgwick v. Cleveland*, 7 Paige Ch. 287. Tex.—*Drouilhet v. Pinckard* (Tex. Civ. App.), 42 S. W. 135. W. Va.—*Zane v. Fink*, 18 W. Va. 693, 736.

As to assignees under insolvency acts, see *infra*, this section.

The defendant may refuse to proceed until the assignee is made a party, however. See 3 STANDARD PROC. 121.

14. N. Y.—*Cook v. Mancius*, 5 Johns. Ch. 89. S. C.—*Miller v. Kershaw*, 1 Bailey Eq. 479, 23 Am. Dec. 183. Eng. Bishop of Winchester *v. Paine*, 11 Ves. Jr. 194, 32 Eng. Reprint 1062.

15. As to amendment adding them as parties, see *infra*, XI, A, 1, e, (III).

16. Ala.—*Davis v. Vandiver & Co.*, 143 Ala. 202, 38 So. 850; *Smith v. Inge*, 80 Ala. 283. Minn.—*Steele v. Taylor*, 1 Minn. 274. N. Y.—*Sedgwick v. Cleveland*, 7 Paige Ch. 287. W. Va. *Zane v. Fink*, 18 W. Va. 693, 736.

[a] Compare *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. ed. 949, holding that if the assignee expressly consents that the bankrupt might continue the suit in his own name, the defendants cannot avail themselves of bankruptcy as a defense. The statute authorizing the prosecution or defense of suits by the assignee does not make it necessary for him to make himself a party of record.

17. *Mackay v. Randolph Macon*

B. NECESSITY OF LEGAL ENTITY. — 1. Generally. — No action can be lawfully prosecuted save in the name of a plaintiff having a legal entity.¹⁸ Accordingly parties plaintiff must be either natural, legal or artificial persons, individuals or corporations,¹⁹ or under some statutes quasi artificial persons, such as unincorporated associations and partnerships,²⁰ but, in the absence of such statutory authority, the latter class of persons have no legal entity authorizing them to sue in the firm or association name.²¹ Neither a dead person,²² nor his

Coal Co., 178 Fed. 881, 102 C. C. A. 115.

[a] **Parties to a contract** cannot confer upon a third party the naked right to sue thereon, without statutory authority. *Mackay v. Randolph Maceon Coal Co.*, 178 Fed. 881, 102 C. C. A. 115. See *Knorr v. Bates*, 14 Misc. 501, 35 N. Y. Supp. 1060, 70 N. Y. St. 686.

18. **U. S.**—*Fruit-Cleaning Co. v. Fresno Home-Packing Co.*, 94 Fed. 845. **Cal.**—*Miller v. Superior Court*, 26 Cal. App. 41, 146 Pac. 72. **Ga.**—*Western & Atlantic R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *Anderson v. Brumby*, 115 Ga. 644, 42 S. E. 77; *Hill v. Armour Fert. Wks.*, 14 Ga. App. 106, 80 S. E. 294. **Ill.**—*Kanawha Dispatch v. Fish*, 219 Ill. 236, 76 N. E. 352; *American Exch. Bank v. Mitchell*, 179 Ill. App. 612. **Minn.**—*St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725. **Neb.**—*Brookmire v. Rosa*, 34 Neb. 227, 51 N. W. 840.

19. **Ala.**—*Moore v. Burns & Co.*, 60 Ala. 269. **Ga.**—*Roberts v. Tift*, 136 Ga. 901, 72 S. E. 234; *Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *Anderson v. Brumby*, 115 Ga. 644, 42 S. E. 77. **Ill.**—*American Exchange Bank v. Mitchell*, 179 Ill. App. 612. **Minn.**—*St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725. **N. Y.**—*Doe v. Penfield*, 19 Johns. 308. **Okl.**—*Chicago, R. I. & P. Ry. Co. v. Mitchell*, 19 Okla. 579, 101 Pac. 850. **Tex.**—*Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409.

Capacity of corporations to sue, see 5 STANDARD PROC. 546, 598, 638.

Right of Indians to sue, see 12 STANDARD PROC. 44.

Persons civilly dead as parties, see the title, "Prisons and Prisoners."

20. **Ga.**—*Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *Hill v. Armour Fer-*

tilizer Wks., 14 Ga. App. 106, 80 S. E. 294. **Ia.**—*Van Dyk v. Mosterd*, 171 Iowa 3, 153 N. W. 206. **Ohio.**—*Haskins v. Alcott*, 13 Ohio St. 210.

21. **Ala.**—*Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 635, 54 So. 62. **Cal.**—*Gilman & Co. v. Cosgrove*, 22 Cal. 356. **Fla.**—*Richardson v. Smith & Co.*, 21 Fla. 336. **Ind.**—*Karges Furn. Co. v. Amalgamated W. L. Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; *Hughes v. Walker, Carter & Co.*, 4 Blackf. 50. **Mich.**—*Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270. **Neb.**—*Brookmire v. Rosa*, 34 Neb. 227, 51 N. W. 840. **Tex.**—*Bank of Alabama v. Simonton*, 2 Tex. 531; *Burton v. Grand Rapids School Furn. Co.*, 10 Tex. Civ. App. 270, 31 S. W. 91. **Utah.**—*Pearson v. Anderburg*, 28 Utah 495, 80 Pac. 307.

Actions by associations in association name, see 3 STANDARD PROC. 161, and the titles "Joint Stock Companies;" "Loan Associations;" "Religious Societies."

Partnerships as a legal entity, authorizing suit in the firm name, see the title "Partnerships."

Actions by labor unions, see the title "Labor Unions."

[a] A statute authorizing suit against a quasi artificial person in its trade name does not authorize it to bring an action in such name. *St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725; *Dimond v. Minnesota Sav. Bank*, 70 Minn. 298, 73 N. W. 182.

22. **Ala.**—*Tait v. Frow*, 8 Ala. 543; *Jenks v. Edwards*, 6 Ala. 143. **D. C.**—*Karrick v. Wetmore*, 22 App. Cas. 487. **Mass.**—*Brooks v. Boston & N. St. R. Co.*, 211 Mass. 277, 97 N. E. 760. **Miss.**—*Humphreys v. Irvine*, 6 Smed. & M. 205.

Effect of death pending suit, see the titles "Judgments" and "Survival."

Continuing action in name of person

estate,²³ nor a race horse,²⁴ or an inanimate thing, such as a steamboat, hotel, toll gate,²⁵ has such legal entity as is necessary to bring an action. And the same is sometimes true of convicts.²⁶

A suit brought in the name of a person, who does not possess such a legal entity, is a nullity,²⁷ and should be dismissed.²⁸ There is no plaintiff and nothing to amend by; therefore it is not permissible to insert the name of a person possessing such entity.²⁹ But if by appropriate allegations in the body of a pleading it is disclosed that the plaintiffs are in fact persons or other legal entities of which the law will take cognizance, an objection that there is no party plaintiff to the action cannot be sustained,³⁰ and an amendment curing the defect in the caption is permissible.³¹ These cases, however, are to be distinguished from that where an action is brought in a name importing a corporation or partnership, and the petition does not disclose its

who dies after transferring his interest, see *infra*, XII, B, 4, b.

Form of plea in abatement, see 9 STANDARD PROC. 3.

23. Estate of Columbus *v.* Mortl, Minn. 568.

24. Steamboat Pembina *v.* Wilson, 11 Iowa 479.

25. Steamboat Pembina *v.* Wilson, 11 Iowa 479.

26. See the title "Prisons and Prisoners."

27. Ga.—Western & Atlantic R. R. Co. *v.* Dalton Marble Wks., 122 Ga. 774, 50 S. E. 978; Hill *v.* Armour Fert. Wks., 14 Ga. App. 106, 80 S. E. 294. Nev.—Mexican Mill *v.* Yellow Jacket S. M. Co., 4 Nev. 40, 97 Am. Dec. 510. Pa.—Porter *v.* Cresson, 10 Serg. & R. 257.

28. Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845.

Manner of raising objections, see *infra*, XIV, A.

29. Cal.—Miller *v.* Superior Court, 26 Cal. App. 41, 146 Pac. 72. Ga.—Western & Atlantic R. R. Co. *v.* Dalton Marble Wks., 122 Ga. 774, 50 S. E. 978; Mutual Life Ins. Co. *v.* Inman Park P. Church, 111 Ga. 677, 36 S. E. 880. Mass.—Brooks *v.* Boston & N. St. R. Co., 211 Mass. 277, 97 N. E. 760. Nev.—Mexican Mill *v.* Yellow Jacket S. M. Co., 4 Nev. 40, 97 Am. Dec. 510.

[a] In an action by a dead person, (1) an amendment substituting the administrator is not permissible. Brooks *v.* Boston & N. St. R. Co., 211 Mass. 277, 97 N. E. 760. (2) But if a person doing business in the name of a dead person, by mistake commences an action in the latter's name, he may substitute his own name. Heckemann

v. Young, 18 Abb. N. C. (N. Y.) 196.

(3) And if the nominal plaintiff is dead, some authorities allow his personal representatives to be substituted. See *infra*, XI, A, 3, a, (III).

[b] But in an action by a township not possessing a legal capacity to sue, when the defendant appears and tests its right to sue, the clerk of the township may be substituted. Township of West Bend *v.* Munch, 52 Iowa 132, 2 N. W. 1047.

30. Fruit-Cleaning Co. *v.* Fresno Home-Packing Co., 94 Fed. 845.

[a] A suit by an individual in an assumed or trade name meets the requirement that there must be a real plaintiff. If a person brings suit by such name he is afterwards estopped from disputing any judgment rendered on the ground there is no real plaintiff. The case where the trade name is merely the name of plaintiff's property is to be distinguished. Clark Bros. *v.* Wyche, 126 Ga. 24, 54 S. E. 909; Charles *v.* Valdosta Foundry & M. Co., 4 Ga. App. 733, 62 S. E. 493.

31. Henderson *v.* Superior Court, 26 Cal. App. 437, 147 Pac. 216; Miller *v.* Superior Court, 26 Cal. App. 41, 146 Pac. 72 (where the plaintiff was styled "San Jacinto Packing House" and the amendment changed it to read A. S. H. doing business under the name of S. J. P. House); Omaha Furn. & Carpet Co. *v.* Meyer, 80 Neb. 769, 115 N. W. 310.

[a] Where an action is brought in a name which is used for convenience by a number of railroads as to certain business, but which has no legal existence, the railroad companies being the real party in interest may be sub-

legal entity. In a case of this character, a judgment rendered without objection would be good, and on objection, the petition may be amended to disclose the entity of the plaintiff.³² And in an action by an association it has been held permissible to amend by making certain members parties suing on behalf of all.³³

2. States and Foreign Governments.—Sovereign states,³⁴ as well as independent foreign governments recognized as such by the United States,³⁵ are legal entities which may bring and maintain actions.

3. Cities and Counties.—The capacity of cities and counties to sue and be sued is elsewhere treated.³⁶

4. Boards.—Boards of commissioners are commonly made bodies corporate and politic by the statutes creating them, and as such they may bring actions.³⁷

C. NECESSITY AND NATURE OF REMEDIAL INTEREST.—1. Necessity

stituted. *Kanawha Dispatch v. Fish*, 219 Ill. 236, 241, 76 N. E. 352.

32. *Gilman & Co. v. Cosgrove*, 22 Cal. 356; *Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *Adas Yeshurun Society v. Fish*, 117 Ga. 345, 43 S. E. 715; *Smith v. Columbia Jewelry Co.*, 114 Ga. 698, 40 S. E. 735; *St. Cecilia's Academy v. Hardin*, 78 Ga. 39, 3 S. E. 305; *Hill v. Armour Fertilizer Wks.*, 14 Ga. App. 106, 86 S. E. 294.

As to corporations, see 5 STANDARD PROC. 652.

As to partnerships, see the title "Partnership."

[a] **Names Importing Corporate Existence.**—(1) See *Hill v. Armour Fertilizer Wks.*, 14 Ga. App. 106, 86 S. E. 294. (2) The words "Valdosta Foundry and Machine Company" (*Charles v. Valdosta F. & M. Co.*, 4 Ga. App. 733, 62 S. E. 493), (3) "The Cable Company" (*Holcomb v. Cable Co.*, 119 Ga. 466, 46 S. E. 671), and (4) "The Georgia Co-operative Fire Association" (*Georgia C. Fire Assn. v. Borchardt & Co.*, 123 Ga. 181, 51 S. E. 429) import a corporation.

33. See *infra*, XI, A, 3.

34. Actions by states, see the title "States and Territories."

Actions by the United States, see the title "United States."

35. *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845; *Republic of Mexico v. De Arangoiz*, 5 Duer (N. Y.) 634.

[a] A foreign sovereign may sue in his political capacity as sovereign, at law or in equity. *Hullet v. King of Spain*, 1 Dow. & C. (Eng.) 169, 6 Eng. Reprint 488; *South African Republic*

v. La Compagnie Franco-Belge du Chemin de Fer du Nord, 77 L. T. N. S. (Eng.) 241.

[b] A republic may sue in its own name without the intervention of a natural person, within the jurisdiction of the court and subject to its process as a nominal plaintiff. *Republic of Mexico v. De Arangoiz*, 5 Duer (N. Y.) 634, *disapproving* *Republic of Colombia v. Rothschild*, 1 Sim. 94, 5 L. J. Ch. (O. S.) 43, 57 Eng. Reprint 514.

[c] Under a statute requiring security for costs to be given when an action is commenced by "a person residing without the state," if required by a defendant, a foreign government must give security, if the defendant requires it. *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642.

[d] **Status as Plaintiff.**—(1) When a foreign government or sovereign sues as plaintiff, the court has complete control over it and may hold it to all proper terms. *Hullet v. King of Spain*, 1 Dow. & C. 169, 6 Eng. Reprint 488. (2) But a counterclaim which is improper in an action by a private citizen will not be allowed to stand merely because the plaintiff is a foreign government and cannot be sued in the courts of the forum. *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, 77 L. T. N. S. (Eng.) 241.

36. See the title "Municipal Corporations."

37. *Board of Comrs. of Tipton Co. v. Kimberlin*, 108 Ind. 449, 9 N. E. 407; *Perry County v. Railroad Co.*, 43 Ohio St. 451, 2 N. E. 854. See the title "Municipal Corporations."

of. — In order that a person may sustain the character of plaintiff, it is requisite that he have an interest either legal or equitable in the subject matter of the suit,³⁸ at the time of its commencement.³⁹ He must have a remedial interest.⁴⁰

2. **Nature of.** — a. *In General.* — The interest necessary to the maintenance of an action may be separate, or joint, or in common.⁴¹ If the interest is separate, then the action must be brought separately by each person interested;⁴² if joint, the interested persons must join.⁴³ If the interest is in common or if the question involved is one of common or general interest, one or more may sue for the benefit of all.⁴⁴

b. *Pecuniary Interest.* — As a general rule, the interest of a party to entitle him to a standing in a court must be a pecuniary interest.⁴⁵

c. *Interest of Private Person in Public Wrongs.* — A private person has not sufficient interest to authorize the institution of an action to redress a public wrong, unless he shows that he has sustained some damage which is special in character, not merely greater in amount.⁴⁶

38. **Ala.**—Turner v. Mobile, 135 Ala. 73, 108, 33 So. 132; Kirk v. Morris, 40 Ala. 225. **Conn.**—Lester v. Kinne, 37 Conn. 9. **Fla.**—Southern L. Ins. & T. Co. v. Lanier, 5 Fla. 110, 146, 58 Am. Dec. 448. **Ill.**—Ryan v. Duncan, 88 Ill. 144; Dix v. Mercantile Ins. Co., 22 Ill. 272; Marlitt Deutscher F. Verein v. Mueller, 140 Ill. App. 621. **Ind.**—Shoemaker v. Board of Comrs., 36 Ind. 175, 184. **Ky.**—Overton v. Overton, 123 Ky. 311, 96 S. W. 469. **La.**—State v. Desforges, 5 Rob. 253. **Me.**—Haskell v. Hilton, 30 Me. 419. **N. J.**—Baxter v. Baxter, 43 N. J. Eq. 82, 10 Atl. 814. **R. I.**—Bailey v. Smith, 10 R. I. 29. **Vt.**—Hadlock v. Williams, 10 Vt. 570. **Va.**—Keyser v. Renner's Admr., 87 Va. 249, 12 S. E. 406; Sillings v. Bumgardner, 9 Gratt. (50 Va.) 273.

[a] Want of interest is fatal. Dix v. Mercantile Ins. Co., 22 Ill. 272, 276; Haskell v. Hilton, 30 Me. 419.

At common law, the holder of the legal title must be plaintiff, see *infra*, V, c, 3.

In equity, the real party in interest must be the plaintiff, see *infra*, V, c, 4.

The Code requires actions to be prosecuted in the name of the real party in interest, see *infra*, V, c, 4.

39. **Cal.**—Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131. **Me.**—Martel v. Desjardin, 93 Me. 413, 45 Atl. 522. **Tex.**—Bradford v. Hamilton, 7 Tex. 55.

[a] On the day a claim is assigned, an assignee may sue thereon. Fraser v. Oakdale L. & W. Co., 73 Cal. 187, 14 Pac. 829.

[b] A subsequent ratification of an unauthorized assignment to plaintiff after the commencement of the action is too late to avail the plaintiff anything. Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Bradford v. Hamilton, 7 Tex. 55.

Necessity for accrual of cause of action before action brought, see the title "Suits and Actions."

40. *In re Nagao*, 4 Alaska 678.

41. Shoemaker v. Board of Comrs., 36 Ind. 175.

42. Shoemaker v. Board of Comrs., 36 Ind. 175, 181.

Right of persons holding separate interests to join, see *infra*, VIII, A.

43. As to joinder, see *infra*, VIII, A.

44. See *infra*, IX.

45. *Waterhouse v. Star Land Co.*, 139 La. 177, 71 So. 358; *Quaker Realty Co. v. Labasse*, 131 La. 996, 60 So. 661, Ann. Cas. 1914A, 1073; *Harding v. Commissioners' Court*, 95 Tex. 174, 66 S. W. 44.

[a] One whose title has been divested by a tax sale has no pecuniary interest in subsequent proceedings involving the land so as to authorize him to sue. *Quaker Realty Co. v. Labasse*, 131 La. 996, 60 So. 661, Ann. Cas. 1914A, 1073.

46. **Ark.**—Ward v. Little Rock, 41 Ark. 526, 48 Am. Rep. 46, restraining nuisance. **Cal.**—McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 433; Bigley v. Nunan, 53 Cal. 404. **Fla.**—Brown v. Florida Chautauqua Assn., 59 Fla. 447, 52 So. 802. **Ill.**—East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395, 59

d. *Interest of Public in Private Wrongs.*—A public corporation cannot maintain an action to protect private rights as it has no special interest in the result,⁴⁷ unless statute authorizes it.⁴⁸

3. *Holder of Legal Title or Interest.*—It is the rule at common law that actions shall be prosecuted in the name of the party who holds the legal title or interest in the cause of action, or whose legal right has been invaded or affected,⁴⁹ even though another person may have the beneficial interest in the cause of action, and be entitled to the avails of it.⁵⁰ If the action is based on contract, it must be brought

Am. St. Rep. 795, vacation of public street. **Ind.**—First Nat. Bank v. Sarlls, 120 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481 (restraining violation of ordinance establishing fire limits); Dwenger v. Chicago & G. T. R. Co., 98 Ind. 153; Sidener v. Haw Creek Tp. Co., 91 Ind. 186, injunction against collection of tolls. **Kan.**—Center Township v. Hunt, 16 Kan. 430. **Neb.**—Hill v. Pierson, 45 Neb. 503, 63 N. W. 835, abatement of nuisance. **N. J.**—Easton & A. R. Co. v. Greenwich, 25 N. J. Eq. 565, obstruction of highway. **N. Y.**—Doolittle v. Broome, 18 N. Y. 155, 16 How. Pr. 512 (quo warranto); Ayres v. Lawrence, 63 Barb. 454, 1 Thomp. & C. 5, restraining issuance of bonds by taxpayer. **Ore.**—State v. Lord, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473, enjoining public officer from using public funds. **Pa.**—Mazet v. Pittsburgh, 27 Wkly. N. Cas. 73.

For illustrations, see specific titles such as "Highways, Streets and Bridges," "Municipal Corporations," "Nuisances."

[a] That the plaintiff sues on behalf of himself and all others in like situation does not alter the case for no matter how many persons join they sue as private persons and individual members of the community. Ayers v. Lawrence, 63 Barb. (N. Y.) 454, 1 Thomp. & C. 5.

47. **Ill.**—Cairo & V. R. Co. v. People, 92 Ill. 170. **Kan.**—Craft v. Lofinck, 34 Kan. 365, 8 Pac. 359; Center Township v. Hunt, 16 Kan. 430. **Mass.**—Attorney General v. Salem, 103 Mass. 138. **Mo.**—Ewing v. Board of Education, 72 Mo. 436. **N. Y.**—People v. Albany & S. R. Co., 57 N. Y. 161.

48. Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 348, 87 N. E. 504, 128 Am. St. Rep. 555, 23 L. R. A. (N. S.) 436.

49. **U. S.**—Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. ed. 501;

McNutt v. Bland, 2 How. 9, 11 L. ed. 159; Arkansas v. Ball, Hempst. 541, 1 Fed. Cas. No. 530. **Ala.**—McNutt v. King, 59 Ala. 597; Kirk v. Morris, 40 Ala. 225; Jones v. Sims, 6 Port. 138, 158. Action by real party in interest in Alabama, see *infra*, V, c. 4. **Ark.** Yell v. Snow, 24 Ark. 554. **Conn.** White v. Portland, 67 Conn. 272, 277, 34 Atl. 1022; Townsend Sav. Bank v. Todd, 47 Conn. 190, 212. **Ga.**—Wortsmann v. Wade, 77 Ga. 651, 4 Am. St. Rep. 102; Dickson v. Matthews, 10 Ga. App. 542, 73 S. E. 705. **Ill.**—Ridgely Nat. Bank v. Patton, 109 Ill. 479; Larned v. Carpenter, 65 Ill. 543. **Ind.** Weaver v. Wabash & Erie Canal, 28 Ind. 112. For present law in Indiana see *infra* V, c. 4. **Ia.**—Fear v. Jones, 6 Iowa 169. For present law in Iowa, see *infra*, V, c. 4. **Me.**—Martel v. Desjardin, 93 Me. 413, 45 Atl. 522. **Mass.** Young v. Miller, 6 Gray 152. **Mich.** Forrest v. O'Donnell, 42 Mich. 556, 4 N. W. 259; Sisson v. Cleveland & T. R. Co., 14 Mich. 489. **Miss.**—Eckford v. Hogan, 44 Miss. 398; Denton v. Stephens, 32 Miss. 194. **Pa.**—Frankem v. Trimble's Heirs, 5 Pa. 520. **Vt.**—Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017; Heald v. Warren, 22 Vt. 409. **Va.**—Calahan's Admrs. v. Depriest, 13 Gratt. (54 Va.) 274.

[a] Actions by receivers constitute no exception to this rule. Such actions are sustained on the ground the statute gives them the legal title. Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017. See generally the title "Receivers."

50. **U. S.**—Arkansas v. Ball, Hempst. 541, 1 Fed. Cas. No. 530. **Ga.**—Wortsmann v. Wade, 77 Ga. 651, 4 Am. St. Rep. 102; Schley v. Lyon, 6 Ga. 530. **Ill.**—Tarrant v. Burch, 102 Ill. App. 393; Cohen v. Schulz, 73 Ill. App. 244. **Me.**—Martel v. Desjardin, 93 Me. 413, 45 Atl. 522. **Mass.**—Goodrich v. Stev-

in the name of the person in whom the legal title is vested;⁵¹ and if the action is founded in tort, the proper person to bring it is he in whom the legal right or property was vested or whose legal right has been affected by the injury complained of.⁵² The purely law courts will not take notice of mere equitable titles and rights of action so as to invest the equitable or beneficial claimant with power to sue in his own name;⁵³ but the equitable owner is allowed to bring an action in the name of the holder of the legal title in a proper case.⁵⁴

4. Real Party in Interest.—a. *Generally.*⁵⁵—With a few exceptions,⁵⁶ it is a mandatory⁵⁷ rule in equity,⁵⁸ in admiralty,⁵⁹ and under the code and some practice acts,⁶⁰ that every action must be prosecuted

ens, 116 Mass. 170. **Miss.**—Field v. Weir, 28 Miss. 56.

Actions by trustees, see the title "Trusts and Trustees."

51. See 11 STANDARD PROC. 958.

Action by person for whose benefit contract is made, see *infra*, V, C, 6.

52. Delgado Mills v. Georgia R. & B. Co., 144 Ga. 175, 86 S. E. 550; Willis v. Burch, 116 Ga. 374, 42 S. E. 718.

Proper plaintiffs in particular tort actions, see the particular titles such as "Case (the Action of Trespass on the)," "Death by Wrongful Act;" "Detinue;" "Replevin;" "Trespass;" "Trover and Conversion."

53. **Ill.**—McLean County Coal Co. v. Long, 91 Ill. 617. **Mass.**—Stone v. Hubbard, 7 Cush. 595; *Somes v. Skinner*, 16 Mass. 348. **Mich.**—Forrest v. O'Donnell, 42 Mich. 556, 4 N. W. 259; *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489. **Miss.**—Kitchens v. Harrall, 54 Miss. 474. **Vt.**—Heald v. Warren, 22 Vt. 409.

Actions by cestuis que trustent, see the title "Trusts and Trustees."

54. **As to nominal and use plaintiffs, see *infra*, V, C, 5.**

55. **Objection that plaintiff is not a real party in interest, see *infra*, XIV, B, 3.**

56. **Under the Code, see *infra*, V, c, 4, d.**

[a] **In equity, see *Zane v. Fink*, 18 W. Va. 693, 736; also *Wright v. Meek*, 3 G. Gr. (Iowa) 472; *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287. As to the doctrine of representation, see *infra*, IX.**

As to when a trustee may sue alone, see the title "Trusts and Trustees;" also *infra*, V, c, 4, d, (II), (B).

57. **Kan.**—*Stewart v. Price*, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581. **Ohio.** *Hall v. Plaine*, 14 Ohio St. 417. **Wis.** *Chase v. Dodge*, 111 Wis. 70, 86 N. W.

548; *Robbins v. Deverill*, 20 Wis. 142.

58. **U. S.**—Federal Eq. Rule No. 37.

Ala.—*Kirk v. Morris*, 40 Ala. 225.

Conn.—*Crocker v. Higgins*, 7 Conn.

342, 347. **Ill.**—*Wolverton v. Taylor &*

Co., 157 Ill. 485, 42 N. E. 49; *Smith v.*

Brittenham, 109 Ill. 540; *Elder v.*

Jones, 85 Ill. 384; *Dixon v. Buell*, 21

Ill. 203; *State Bank of Rock Island v.*

Pope, 179 Ill. App. 282. **Ind.**—*Swift*

v. Ellsworth, 10 Ind. 205, 71 Am. Dec.

316. **Me.**—*Haskell v. Hilton*, 30 Me.

419. **Minn.**—*Chisholm v. Clitherall*, 12

Minn. 375. **N. Y.**—*Rogers v. Trad-*

ers' Ins. Co., 6 Paige 583, 598;

Field v. Maghee, 5 Paige 539; *Oakey*

v. Bend, 3 Edw. Ch. 482. **Tex.**—*Gal-*

veston, H. & S. A. R. Co. v. Freeman,

57 Tex. 156. **Va.**—*Penn v. Hearn*, 94

Va. 773, 27 S. E. 599; *Campbell v.*

Shipman, 87 Va. 655, 13 S. E. 114;

Castleman v. Berry, 86 Va. 604, 10 S.

E. 884. **W. Va.**—*Kellam v. Sayre*, 30

W. Va. 198, 3 S. E. 589; *Grove v. Judy*,

24 W. Va. 294.

[a] **In Texas the practice has con-**
formed to the equity practice, and the
equitable owner may sue in his own
name. *Galveston, H. & S. A. R. Co. v.*
Freeman, 57 Tex. 156.

[b] **Courts of equity are not con-**
fined to legal forms and legal titles,
and allow parties who have equitable
rights to enforce those rights in their
own names, without regard to legal
titles. *Olds v. Cummings*, 31 Ill. 188.

59. See 1 STANDARD PROC. 428.

60. See the statutes, and **U. S.**

Thompson v. Central Ohio R. Co., 6

Wall. 134, 18 L. ed. 765, under Ohio

practice. **Alaska.**—*Dryden v. Sewell*,

2 Alaska 182. **Ariz.**—*Curry v. Gila*, 6

Ariz. 48, 53 Pac. 4, action on bond to

secure taxes. **Cal.**—*Philbrook v. Su-*

perior Court, 111 Cal. 31, 43 Pac. 402;

Wiggins v. McDonald, 18 Cal. 126. **Colo.**

Austin v. Snider, 17 Colo. App. 182,

in the name of the real party in interest.⁶¹

The rule as stated in the code is nothing but a statutory enactment of the rule prevailing in equity.⁶²

b. *To What Actions and Proceedings Rule Applies.*—The rule of the code requiring actions to be prosecuted in the name of the real party in interest applies to both legal and equitable actions,⁶³ and to proceedings for obtaining writs of mandamus,⁶⁴ and certiorari.⁶⁵

In Federal Courts.—The code section applies to actions at law in the federal courts also.⁶⁶

c. *Who Is Real Party in Interest.*—(I.) **Beneficial Claimant.**—The real party in interest has been defined to be the person to be benefited or injured by the result of the litigation,⁶⁷ the party entitled to the

68 Pac. 125. **Fla.**—Woodbury v. Tampa Water Wks. Co., 57 Fla. 249, 49 So. 556, 21 L. R. A. (N. S.) 1037. **Ind.** Swift v. Ellsworth, 10 Ind. 205, 71 Am. Dec. 316. **Kan.**—Deets v. Smith, 6 Kan. App. 601, 51 Pac. 581. **Minn.** Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118; Third Nat. Bank v. Clark, 23 Minn. 263; Rook County Nat. Bank v. Hollister, 21 Minn. 385. **Mont.**—Custer Consol. Mines Co. v. Helena, 45 Mont. 146, 122 Pac. 567. **Mo.**—Citizens' Bank v. Burrus, 178 Mo. 716, 731, 77 S. W. 748. **Neb.**—Alexander v. Overton, 52 Neb. 283, 72 N. W. 212; Linton v. Baker, 1 Neb. (Unof.) 896, 96 N. W. 251. **Nev.**—Miliani v. Tognini, 19 Nev. 133, 7 Pac. 279. **N. Y.** Killmore v. Culver, 24 Barb. 656; Lewando v. Dunham, 1 Hilt. 114. **N. C.** Blount v. Johnson, 165 N. C. 25, 80 S. E. 882; Faust v. Faust, 144 N. C. 383, 57 S. E. 22. **Okla.**—United States v. Choctaw O. & G. R. Co., 3 Okla. 404, 41 Pac. 729.

[a] **Under Alabama code** only in actions for the payment of money. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694; Skinner v. Bedell's Admr., 32 Ala. 44. See Dawson v. Burrus, 73 Ala. 111, as to equity.

61. Effect of statute authorizing trustee of express trust to sue, see *infra*, V, C, 4, d, (II), (B).

[a] **Fictitious Name.**—This code section does not prohibit the bringing of suits in a name by which a person is known in the business world although it may not be his real name. Clark v. Clark, 19 Kan. 522; Sheridan v. Nation, 159 Mo. 27, 59 S. W. 972.

62. **U. S.**—Chew v. Brumagen, 13 Wall. 497, 20 L. ed. 663. **Neb.**—Hoagland v. Van Etten, 23 Neb. 462, 36 N. W. 755. **Nev.**—Gruber v. Baker, 20

Nev. 453, 467, 23 Pac. 858, 9 L. R. A. 302. **N. Y.**—Grinnell v. Schmidt, 2 Sandf. 706, 3 Code Rep. 19.

63. **Cal.**—Wiggins v. McDonald, 18 Cal. 126. **Nev.**—Gruber v. Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302. **N. Y.**—Cummings v. Morris, 25 N. Y. 625; Considerant v. Brisbane, 22 N. Y. 389, 397.

[a] **Rule (1) applies** to actions upon negotiable bills and notes (Parker v. Totten, 10 Hew. Pr. [N. Y.] 233. See generally the title "**Bills and Notes**"), (2) whether or not the instrument sued on is sealed (Sinker v. Floyd, 104 Ind. 291, 4 N. E. 10), but (3) it has been held that the statute does not apply to actions on bonds to the state. Carmichael v. Moore, 88 N. C. 29. Obligee of bond as a trustee of an express trust, see *infra*, V, C, 4, d, (II), (D).

[b] **Not in Alabama.**—(1) See Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694. (2) Ejectment is not within the scope of the statute of Alabama. Caldwell v. Smith, 77 Ala. 157.

64. See the title "**Mandamus.**"

65. People v. County Judge, 40 Cal. 479.

66. Thompson v. Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Weed Sewing Mach. Co. v. Wicks, 3 Dill. 261, 29 Fed. Cas. No. 17,348.

[a] **On removal to a federal court,** a law action begun in a state court by a real party in interest may be continued in his name. Thompson v. Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765.

67. **Ala.**—Monogram Hdw. Co. v. Thrower, 10 Ala. App. 414, 65 So. 89. **Alaska.**—Dryden v. Sewell, 2 Alaska 182, 188. **Ark.**—Bloom v. Home Ins.

fruits of the action, the beneficial claimant,⁶⁸ although he may not have the legal title.⁶⁹

(II.) **Holder of Legal Title.** — Without denying the rule that the real party in interest is the beneficial claimant,⁷⁰ a majority of the courts, under the code, hold that the real party in interest, at least so far as the defendant's right to object is concerned, is the person in whom the legal title to the claim in suit is vested, even though the proceeds when recovered by him are to be paid over to another person ultimately entitled thereto,⁷¹ and therefore it is sufficient to enable a

Agency, 91 Ark. 367, 121 S. W. 293. **Kan.**—See *Stewart v. Price*, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581, *overruled* in part by *Manley v. Park*, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967. **Ky.**—*Lampkin v. Mobile & O. R. Co.*, 146 Ky. 514, 142 S. W. 1037. **Mo.**—*Williams v. Whitlock*, 14 Mo. 552. **Okla.**—*Jackson v. McGilbray*, 46 Okla. 208, 148 Pac. 703. **Wis.**—*Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952. **Action by beneficial owner of a note**, see 4 STANDARD PROC. 231.

[a] **In an action for fees for services of officers who receive salary**, city is real party in interest if the fees go into city treasury. *Des Moines v. Polk*, 107 Iowa 525, 78 N. W. 249.

[b] **In actions involving state school funds** the state is the real party in interest. *Williams v. State*, 37 Ark. 463.

68. **Ala.**—See *Yerby v. Sexton*, 48 Ala. 311, 325. **Ark.**—See *Williams v. State*, 37 Ark. 463. **Neb.**—*Kinsella v. Sharp*, 47 Neb. 664, 66 N. W. 634; *Hoagland v. Van Etten*, 23 Neb. 462, 36 N. W. 755. **Ore.**—*Overholt v. Dietz*, 43 Ore. 194, 72 Pac. 695. **Va.**—*Penn v. Hearon*, 94 Va. 773, 27 S. E. 599.

[a] **The test of whether one is a real party in interest is**, "Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation." *Gross v. Heckert*, 120 Wis. 314, 320, 97 N. W. 952.

69. **Minn.**—*Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363, holder of note payable to A or order without indorsement to him. **Neb.**—*Linton v. Baker*, 1 Neb. (Unof.) 896, 96 N. W. 251. **Ore.**—*Overholt v. Dietz*, 43 Ore. 194, 72 Pac. 695.

But see 3 STANDARD PROC. 112.

70. *Cottle v. Cole*, 20 Iowa 481; *Conyngham v. Smith*, 16 Iowa 471 (allowing suit on appeal bond by assignee of judgment); *Swift & Co. v. Wabash*

R. Co., 149 Mo. App. 526, 131 S. W. 124. See preceding section. But see *Allen v. Newberry*, 8 Iowa 65.

71. **Ala.**—*Carpenter v. Greene*, 130 Ala. 613, 29 So. 194; *Bibb v. Hall*, 101 Ala. 79, 95, 14 So. 98; *Bryan v. Wilson*, 27 Ala. 208. **Alaska.**—*Dryden v. Sewell*, 2 Alaska 182, prima facie the promisee is the real party in interest. **Ariz.**—*Sroufe v. Soto Bros. & Co.*, 5 Ariz. 10, 43 Pac. 221. **Cal.**—*Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49. **Colo.**—*Koeh v. Story*, 47 Colo. 335, 107 Pac. 1093; *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788. **Ia.**—*Cassidy v. Woodward*, 77 Iowa 354, 42 N. W. 319; *Searing v. Berry*, 58 Iowa 20, 11 N. W. 708. **Kan.**—*Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52; *Greene v. McAuley*, 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308; *Manley v. Park*, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967, *overruling Stewart v. Price*, 64 Kan. 191, 64 L. R. A. 581. **Minn.**—*Minnesota Thresher Mfg. Co. v. Heipier*, 49 Minn. 395, 52 N. W. 33; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 23 Minn. 359. **Mo.**—*Guerney v. Moore*, 131 Mo. 650, 669, 32 S. W. 1132 (he is both the real party in interest and a trustee of an express trust); *Swift & Co. v. Wabash R. Co.*, 149 Mo. App. 526, 131 S. W. 124. **N. Y.**—*Hays v. Hathorn*, 74 N. Y. 486; *Sheridan v. New York*, 68 N. Y. 30. **N. D.**—*Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460, 67 N. W. 682. **Ore.**—*Falconio v. Larsen*, 31 Ore. 137, 148, 48 Pac. 703, 37 L. R. A. 254; *Roberts v. Parrish*, 17 Ore. 583, 22 Pac. 136. **S. D.**—*Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891, both real party in interest and trustee of an express trust. **Utah.**—*Wines v. Rio Grande W. R. Co.*, 9 Utah 228, 33 Pac. 1042. **Wis.**—*Brossard v. Williams*, 114

party to bring an action that he have the legal title.⁷² The test has been held to be that so far as the defendant is concerned, an action is brought by the real party in interest where the plaintiff shows such a title that a judgment upon it satisfied by the defendant will protect him from future annoyance or loss, and where, as against the party suing, he may urge any defense he could make against the real owner.⁷³

In some jurisdictions, however, the mere holding of a legal title without any beneficial interest is insufficient to constitute one a real party in interest.⁷⁴

(III.) Illustrations. — (A.) IN CONTRACT ACTIONS. — In actions ex contractu, the person holding the title to the instrument on which the action is brought as well as the person who has merely an equitable title have been held real parties in interest.⁷⁵ The term "real party in interest" embraces a person for whose benefit a contract is made,⁷⁶ a person for whose benefit a bond is executed to a designated obligee,⁷⁷

Wis. 89, 89 N. W. 832; *Chase v. Dodge*, 111 Wis. 70, 86 N. W. 548. Compare *Robbins v. Deverill*, 20 Wis. 142.

See 3 STANDARD PROC. 111, et seq.; 11 STANDARD PROC. 962.

[a] Action may be brought by person to whom payment can legally be made and who can legally discharge debtor. *Ex parte Randall*, 149 Ala. 640, 42 So. 870; *Rice v. Rice*, 106 Ala. 636, 17 So. 628.

[b] Where One Company Is Sole Stockholder of Another.—A corporation which has the legal title to a property right is the real party in interest although another company may have become the sole stockholder in it and have become the owner of the sole beneficial interest in the rights and property of the first corporation. *Wimona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 23 Minn. 359.

72. Cal.—*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Wetmore v. San Francisco*, 44 Cal. 294. Colo.—*First Nat. Bank v. Hummel*, 14 Colo. 259, 275, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788. S. D.—*Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

[a] Though the party holding the legal title to a cause of action be a mere agent or trustee, with no beneficial interest therein, he may sue thereon in his own name. *Cassidy v. Woodward*, 77 Iowa 354, 42 N. W. 319; *Rice v. Savery*, 22 Iowa 470; *Cottle v. Cole*, 20 Iowa 481.

73. Ariz.—*Costello v. Cunningham*, 16 Ariz. 447, 147 Pac. 701. Cal.—*Los Robles Water Co. v. Stoneman*, 146 Cal. 203, 79 Pac. 880; *Iowa & Cal.*

Land Co. v. Hoag, 132 Cal. 627, 64 Pac. 1073; *Philbrook v. Superior Court*, 111 Cal. 31, 43 Pac. 402. Colo.—*Koch v. Story*, 47 Colo. 335, 107 Pac. 1093. Kan.—*Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52; *Greene v. McAuley*, 70 Kan. 601, 79 Pac. 133. N. Y.—*Sheridan v. New York*, 68 N. Y. 30; *St. James Co. v. Security T. & L. Ins. Co.*, 82 App. Div. 242, 81 N. Y. Supp. 739. N. D.—*Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460, 67 N. W. 682. Ore.—*Sturgis v. Baker*, 43 Ore. 236, 72 Pac. 744.

74. Ind.—*Deuel v. Newlin*, 130 Ind. 40, 30 N. E. 795 (citing local cases); *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378; *Board of Comrs. of Bartholomew County v. Jameson*, 86 Ind. 154. Neb.—*Alexander v. Overton*, 36 Neb. 503, 54 N. W. 825; *Hoagland v. Van Etten*, 31 Neb. 292, 47 N. W. 920; *Hoagland v. Van Etten*, 23 Neb. 462, 36 N. W. 755. Compare *Huddleson v. Polk*, 70 Neb. 483, 97 N. W. 464, citing *Allen v. Brown*, 44 N. Y. 228. Nev.—*Gruber v. Baker*, 20 Nev. 453, 465, 23 Pac. 853, 9 L. R. A. 302. See *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678, holding answer insufficient to show plaintiff holding legal title was not a real party in interest. N. C.—*Ravenel v. Ingram*, 131 N. C. 549, 42 S. E. 967. Ohio.—*Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123, where an open account is assigned for collection. See the next section.

75. See 11 STANDARD PROC. 962. Compare 3 STANDARD PROC. 111, et seq.

76. See *infra*, V, C, 6.

77. Neb.—*Stewart v. Carter*, 4 Neb. 564. Nev.—*McBeth v. Van Sickle*, 6

as well as the owner of a note payable to order delivered without indorsement.⁷⁸ In the case of a joint contract, the survivors are the real parties in interest.⁷⁹

(B.) IN TORT ACTIONS. — The person who suffered the injury is the real party in interest in a tort action.⁸⁰

(C.) ASSIGNORS AND ASSIGNEES. — The assignee of the beneficial interest in a chose in action,⁸¹ and an assignee who has only the legal title without any beneficial interest,⁸² are real parties in interest. But a person who has assigned his interest before action brought is not.⁸³

(D.) ACTIONS BY INSURER AND INSURED AGAINST WRONGDOER. — Under the code practice an insurer who has paid the entire loss is the real party in interest and may maintain an action against the wrongdoer in his own name;⁸⁴ and the owner, having no interest legal or equitable, re-

Nev. 134. **N. M.**—Conway *v.* Carter, 11 N. M. 419, 431, 68 Pac. 941. **S. D.** Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190; Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949.

[a] Where the penalty of a bail bond to a state is to be paid into the county treasury for the use of the school fund, the county is a trustee of the school fund, so to speak, and is a proper party plaintiff. Shelby County *v.* Simmonds, 33 Iowa 345.

[b] Even if the reformation of the bond is a part of the relief sought, the obligee county is not a necessary party. Stewart *v.* Carter, 4 Neb. 564.

78. **Fla.**—Little *v.* Bradley, 43 Fla. 402, 31 So. 342, what would be the holding if the payee and plaintiff had been trustee and cestui instead of agent and principal is not decided. **Minn.**—Conger *v.* Nesbitt, 30 Minn. 436, 15 N. W. 875; Cassidy *v.* First Nat. Bank, 30 Minn. 86, 14 N. W. 363. **Ore.**—Overholt *v.* Dietz, 43 Ore. 194, 72 Pac. 695.

See 4 STANDARD PROC. 231.

79. **Indiana** B. & W. R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5.

As to joinder generally, see 11 STANDARD PROC. 963.

80. Woodbury *v.* Tampa Water Wks. Co., 57 Fla. 249, 49 So. 556, 561, 21 L. R. A. (N. S.) 1037; Taylor *v.* Lytle, 26 Idaho 97, 141 Pac. 92.

In particular tort actions, see such titles as "Assault and Battery;" "Case (The Action of Trespass on the);" "Death by Wrongful Act;" "Detinue;" "Libel and Slander;" "Replevin;" "Trespass;" "Trove and Conversion."

81. See 3 STANDARD PROC. 112.

Where there is a partial assignment, see 3 STANDARD PROC. 114.

82. See 3 STANDARD PROC. 111.

In admiralty, see 1 STANDARD PROC. 430.

Assignee of note for collection, see 4 STANDARD PROC. 235. See also 3 STANDARD PROC. 111, note 87.

83. **Ala.**—Willis *v.* Neal, 39 Ala. 464. **Ky.**—Lampkin *v.* Mobile & O. R. Co., 146 Ky. 514, 142 S. W. 1037. **Mo.**—Buffington *v.* South Missouri Land Co., 25 Mo. App. 492.

An insured who is paid the entire loss cannot sue the wrongdoer, see *infra*, this section.

Procedure where the plaintiff assigns pendente lite his interest, see *infra*, XII.

84. **U. S.**—Travelers' Ins. Co. *v.* Great Lakes Eng. Wks. Co., 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60; Southern Ry. Co. *v.* Blunt, 165 Fed. 258. **Mo.**—Swift & Co. *v.* Wabash R. Co., 149 Mo. App. 526, 131 S. W. 124. **N. Y.**—Connecticut F. Ins. Co. *v.* Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171; Chandler *v.* Rutland R. Co., 140 App. Div. 68, 124 N. Y. Supp. 1046, holding improper joinder to be waived. **N. C.**—Cunningham *v.* Seaboard Air Line R. Co., 139 N. C. 427, 51 S. E. 1029, 2 L. R. A. (N. S.) 921. **Ore.** Fireman's Ins. Co. *v.* Oregon R. Co., 45 Ore. 53, 63, 76 Pac. 1075, 67 L. R. A. 161. **Wis.**—Allen *v.* Chicago & N. W. Ry. Co., 94 Wis. 93, 68 N. W. 873; Swarthout *v.* Chicago & N. W. R. Co., 49 Wis. 625, 6 N. W. 314.

See generally the title "Subrogation."

In admiralty, see 1 STANDARD PROC. 431.

Under the common law procedure,

maining, is without any right of action,⁸⁵ except where there are several insurers who, by paying their respective policies, reimburse the owner for the full loss.⁸⁶ But some authorities hold that an insured is a real party in interest in an action by him against the wrongdoer although he has been fully reimbursed by the insurer.⁸⁷

If the value of the property exceeds the insurance paid, the insurer cannot sue in his own name alone;⁸⁸ the action must be brought by the insured or in his name,⁸⁹ except when he arbitrarily refuses to do so and refuses to allow the insurance company to use his name,⁹⁰ or where, it has been held, the wrongdoer settles with the insured for the difference between the value of the property and the amount of the insurance.⁹¹ The insurer and the insured may join in an action

the action of the insurance companies would be brought in the name of the insured. See *infra*, V, C, 5, a, (I), and the title "Subrogation."

85. *Mo.*—Swift & Co. v. Wabash R. Co., 149 Mo. App. 526, 131 S. W. 124, approving *Allen v. Chicago & N. W. Ry. Co.*, 94 Wis. 93, 68 N. W. 873. *Ore.*—Fireman's Ins. Co. v. Oregon R. Co., 45 Ore. 53, 63, 76 Pac. 1075, 67 L. R. A. 161. *Wis.*—Allen v. Chicago & N. W. Ry. Co., 94 Wis. 93, 68 N. W. 873.

86. Swift & Co. v. Wabash R. Co., 149 Mo. App. 526, 131 S. W. 124.

[a] Reason.—Each insurer by paying its policy acquires nothing more than an equitable interest in the insured's cause of action to the extent of its payment. The insured is still the holder of the legal title and therefore the real party in interest. The rule against splitting causes of action would not give the insurers any greater right if the insured made a written assignment to each insurer to the extent of his indemnification without the consent of the wrongdoer. Swift & Co. v. Wabash R. Co., 149 Mo. App. 526, 131 S. W. 124.

87. Illinois Cent. R. Co. v. Hicklin, 131 Ky. 624, 115 S. W. 752, 23 L. R. A. (N. S.) 870; Alaska Pac. S. S. Co. v. Sperry Flour Co., 94 Wash. 227, 162 Pac. 26.

[a] Insured has the legal title and is therefore the real party in interest. Illinois Cent. R. Co. v. Hicklin, 131 Ky. 624, 115 S. W. 752, 23 L. R. A. (N. S.) 870. See also *supra*, V, C, 4, c, (II).

88. Home Mut. Ins. Co. v. Oregon R. & N. Co., 20 Ore. 569, 26 Pac. 857, 23 Am. St. Rep. 151.

89. Southern Ry. Co. v. Blunt, 165

Fed. 258; Norwich Union F. Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433; Grain Dealers' Nat. Mut. F. Ins. Co. v. Missouri, K. & T. R. Co., 98 Kan. 344, 157 Pac. 1187; Shawnee F. Ins. Co. v. Cosgrove, 85 Kan. 296, 116 Pac. 819, 41 L. R. A. (N. S.) 719, 86 Kan. 374, 121 Pac. 488, 41 L. R. A. (N. S.) 725; Railroad Co. v. Home Insurance Co., 59 Kan. 432, 53 Pac. 459.

[a] The rule rests upon the right of the wrongdoer not to have the cause of action against him split up so that he is compelled to defend two actions for the same wrong. Grain Dealers' Nat. Mut. F. Ins. Co. v. Missouri, K. & T. R. Co., 98 Kan. 344, 157 Pac. 1187.

[b] The insurer has three remedies to protect his interests; when notified of negotiations for the settlement of the suit by the insured against the wrongdoer, he may intervene in the action, he may enjoin the insured from settling the case, or after settlement he may treat the settlement as void and bring an action against the wrongdoer for the amount it has paid under the policy. Shawnee F. Ins. Co. v. Cosgrove, 86 Kan. 374, 121 Pac. 488, 41 L. R. A. (N. S.) 725, 85 Kan. 296, 116 Pac. 819, 41 L. R. A. (N. S.) 719.

90. Grain Dealers' Nat. Mut. F. Ins. Co. v. Missouri, K. & T. R. Co., 98 Kan. 344, 157 Pac. 1187.

[a] The proper course, where the assured refuses to bring the action, is for the insurance company to bring the action in its own name joining the assured as a defendant. Grain Dealers' Nat. Mut. F. Ins. Co. v. Missouri, K. & T. R. Co., 98 Kan. 344, 157 Pac. 1187.

91. Aetna Ins. Co. v. Charleston &

if they choose to do so;⁹² and it has been held that they have a united interest which makes their joinder imperative.⁹³

(E.) RECEIVER. — A receiver intrusted with the administration of the assets of a firm or corporation has such a special interest in them that he is undoubtedly a real party in interest.⁹⁴ And as to actions for breach of contracts made with him, he is the real party in interest.⁹⁵

(IV.) Province of Court and Jury. — Whether on a given state of facts a person is a real party in interest is a question for the court, not the jury.⁹⁶

d. *Exceptions to Rule.* — (I.) In General. — The codes specify certain exceptions to the rule that actions shall be brought in the name of the real party in interest.⁹⁷

(II.) Trustee of Express Trust. — (A.) GENERALLY. — A trustee of an express trust may sue in his own name without joining the person for

W. C. R. Co., 76 S. C. 101, 56 S. E. 788.

92. Cal.—Fairbanks *v.* San Francisco & N. P. Ry. Co., 115 Cal. 579, 47 Pac. 450. Kan.—Shawnee F. Ins. Co. *v.* Cosgrove, 85 Kan. 296, 116 Pac. 819, 41 L. R. A. (N. S.) 719, 86 Kan. 374, 121 Pac. 488, 41 L. R. A. (N. S.) 725; Atchison, T. & S. F. R. Co. *v.* Neet, 7 Kan. App. 495, 54 Pac. 134; Atchison, T. & S. F. R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051. Ore. Fireman's Ins. Co. *v.* Oregon R. Co., 45 Ore. 53, 63, 76 Pac. 1075, 67 L. R. A. 161; State Ins. Co. *v.* Oregon R. & N. Co., 20 Ore. 563, 26 Pac. 838; Home Mut. Ins. Co. *v.* Oregon Ry. & Nav. Co., 20 Ore. 569, 26 Pac. 857, 23 Am. St. Rep. 151. S. C.—People's Oil & Fertilizer Co. *v.* Charleston & W. C. Ry., 83 S. C. 530, 65 S. E. 733; Mobile Ins. Co. *v.* Columbia & G. R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725. Tex.—See St. Louis S. W. Ry. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139, where the owner assigned his claim to the insurance company to the extent of the amount paid. Wis.—Swarthout *v.* Chicago & N. W. R. Co., 49 Wis. 625, 6 N. W. 314.

[a] Reason.—The insured and the insurer are both interested in the subject of the action and in the relief demanded. Atchison, T. & S. F. R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051.

[b] An allegation of special damage to the insured in which the insurance company has no interest does not render the misjoinder improper. Fairbanks *v.* San Francisco & U. P. Ry. Co., 115 Cal. 579, 47 Pac. 450.

93. Pratt *v.* Radford, 52 Wis. 114, 8 N. W. 606.

[a] The insured is not a trustee of an express trust as to the recovery which he would hold in trust for the insurance company as the trust arises by implication of law. Pratt *v.* Radford, 52 Wis. 114, 8 N. W. 606.

[b] If the insured refuses to join he may be made a defendant. Pratt *v.* Radford, 52 Wis. 114, 8 N. W. 606. But see Springfield F. & M. Ins. Co. *v.* Richmond & D. R. Co., 48 Fed. 360.

94. Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132. See generally the title "Receivers."

95. Biggs *v.* Bowen, 170 N. C. 34, 86 S. E. 692.

96. Williams *v.* Whitlock, 14 Mo. 552.

97. See the statutes, and Chew *v.* Brumagen, 13 Wall. (U. S.) 497, 20 L. ed. 663.

[a] Thus (1) it is usually provided that an executor or administrator (see the titles "Executors and Administrators;" "Inheritance"), (2) a trustee of an express trust (see *infra*, V, C, 4, d, [II]), or (3) a person expressly authorized by statute (see *infra*, V, C, 4, d, [III]), may sue without joining with him the person for whose benefit the action is prosecuted.

[b] These exceptions are enumerated in the federal equity rules also. Federal Eq. Rule 37; Magruder *v.* Belle Fourche Valley W. U. Assn., 219 Fed. 72, 133 C. C. A. 524.

[c] The use of the term "exception" would seem to exclude the idea that there are other exceptions. Matthews *v.* Cantey, 48 S. C. 588, 26 S. E. 894.

whose benefit the action is prosecuted.⁹⁸ And it has been held that he may sue even after the death of the beneficiary.⁹⁹ Where the legal owner is regarded as a real party in interest,¹ the trustee of an express trust is, of course, a real party in interest,² as he is also where he is entitled to a part of the proceeds.³

(B.) EXCEPTION IS PERMISSIVE. — The code section authorizing suit by the trustee of an express trust is permissive merely,⁴ and does not prevent the beneficiary from suing as the real party in interest,⁵ or forbid the trustee from joining the beneficiary if he chooses to do so.⁶

(C.) TO WHAT ACTIONS EXCEPTION APPLIES. — In addition to the ordinary actions at law and in equity,⁷ this exception applies to mandamus pro-

98. **U. S.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. ed. 663; *Mackay v. Randolph Macon Coal Co.*, 178 Fed. 881, 102 C. C. A. 115. **Cal.**—*Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161; *Kellogg v. King*, 114 Cal. 378, 388, 46 Pac. 166, 55 Am. St. Rep. 74. **Colo.**—*Hecker v. Cook*, 20 Colo. App. 282, 78 Pac. 311. **Ia.**—*Leach v. Hill*, 106 Iowa 171, 177, 76 N. W. 667; *Rice v. Savery*, 22 Iowa 470. **Kan.**—*Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742. **Ky.**—*Fidelity & Cas. Co. v. Ballard*, 105 Ky. 253, 48 S. W. 1074; *Tyler v. Exchange Bank*, 9 Ky. L. Rep. 195. **Minn.**—*Moulton v. Haskell*, 50 Minn. 367, 52 N. W. 960. **Mo.**—*State ex rel. Rife v. Hawes*, 177 Mo. 360, 76 S. W. 653; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198. **Mont.**—*McDonald v. American Nat. Bank*, 25 Mont. 456, 65 Pac. 896. **N. Y.**—*Bartlett v. Tarrytown*, 55 Hun 492, 8 N. Y. Supp. 739, 30 N. Y. St. 341. **Ohio.**—*Hays v. Galion G. L. & C. Co.*, 29 Ohio St. 330. **Wash.**—*United States v. Rundle*, 27 Wash. 7, 67 Pac. 395.

[a] The *cestui que trust* may compel him to bring an action if he fails to do so. *Tyler v. Houghton*, 25 Cal. 26, 39. See generally the title "Trusts and Trustees."

99. *Beck v. Haas*, 111 Mo. 264, 271, 20 S. W. 19, 33 Am. St. Rep. 516.

1. See *supra*, V, C, 4, c, (II).

2. *Koch v. Story*, 47 Colo. 335, 107 Pac. 1093.

3. *Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891, assignee for collection.

4. **Kan.**—*Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742. **N. M.**—*Conway v. Carter*, 11 N. M. 419, 431, 68 Pac. 941. **Ohio.**—*Hall v. Plaine*, 14 Ohio St. 417, 423.

5. **Cal.**—*Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 108 Pac. 308. **Ind.**—*Bryson v. Collmer*, 33 Ind. App. 494, 71 N. E. 229. **Ia.**—*Rice v. Savery*, 22 Iowa 470. **Kan.**—*Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742. **Ky.**—*Smith v. Smith*, 5 Bush 625, 632; *Tyler v. Exchange Bank*, 9 Ky. L. Rep. 195. **Minn.**—*Judd v. Dike*, 30 Minn. 380, 15 N. W. 672. **Mo.**—*Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Chouteau v. Boughton*, 100 Mo. 406, 411, 13 S. W. 877; *Barton Bros. v. Martin*, 60 Mo. App. 351; *Anthony v. German American Ins. Co.*, 48 Mo. App. 65. **N. M.**—*Conway v. Carter*, 11 N. M. 419, 431, 68 Pac. 941. **N. Y.**—*Hubbell v. Medbury*, 53 N. Y. 98; *Cassidy v. Sauer*, 114 App. Div. 673, 99 N. Y. Supp. 1026. **Ohio.**—*Hall v. Plaine*, 14 Ohio St. 417, 423. **Ore.**—*United States v. McCann*, 40 Ore. 13, 66 Pac. 274. **Wash.**—*United States v. Rundle*, 27 Wash. 7, 67 Pac. 395.

See *infra*, V, C, 6; and generally the title "Trusts and Trustees."

[a] A recovery by either would be a bar to another action whether brought by the trustee or beneficiary. *Rogers v. Gosnell*, 51 Mo. 466; *Barton Bros. v. Martin*, 60 Mo. App. 351; *Anthony v. German American Ins. Co.*, 48 Mo. App. 65; *United States v. Rundle*, 27 Wash. 7, 67 Pac. 395. See 15 STANDARD PROC. 485, et seq.

6. **Cal.**—*Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658. **Colo.**—*Hecker v. Cook*, 20 Colo. App. 282, 78 Pac. 311. **Ind.**—*Lilly v. Dunn*, 96 Ind. 220. **Mo.**—*Anthony v. German American Ins. Co.*, 48 Mo. App. 65. **N. Y.**—*Hubbell v. Medbury*, 53 N. Y. 98; *Cassidy v. Sauer*, 114 App. Div. 673, 99 N. Y. Supp. 1026. **N. C.**—*Davidson v. Elms*, 67 N. C. 228; *Mebane v. Mebane*, 66 N. C. 334.

7. See *supra*, V, C, 4.

ceedings;⁸ but it does not apply to an action whose object is to give the trustee powers not conferred upon him by the instrument creating the trust.⁹

(D.) WHO IS A TRUSTEE OF AN EXPRESS TRUST.—(1.) *Definition and Application.*—The code gives an illustration of one class of trustees of express trusts,¹⁰ but it nowhere attempts to define the term itself.¹¹ The courts have inclined toward a liberal interpretation of the term to preserve the common law right of the legal owner to sue,¹² recognizing, however, that the term is sometimes used in a loose or popular sense.¹³

The trust must be express and not implied,¹⁴ but is not confined to trusts in land.¹⁵ If the trust relates to real property there must be some writing, deed or will,¹⁶ but no formal or written agreement is necessary to create a trust in money or personal estate.¹⁷ The trustee of an express trust is, of course, the person in whom is vested the trust estate.¹⁸ He must have the legal title to the property or thing sued on,¹⁹ and where possession is in controversy, the right of possession if any.²⁰

A person may hold a claim partly on his own behalf and partly for

8. *Tyler v. Houghton*, 25 Cal. 26, 29.

9. *Sampson v. Mitchell*, 125 Mo. 217, 229, 28 S. W. 763.

10. See *infra*, this section.

[a] Person for whose benefit a contract is made in name of another. This provision is intended to enlarge rather than limit "trustee of express trust." *Weaver v. Wabash & Erie Canal*, 28 Ind. 112.

11. *Considerant v. Brisbane*, 22 N. Y. 389, 395.

12. *Chew v. Brumagen*, 13 Wall. 497, 503, 20 L. ed. 663. See *supra*, V, C, 4, c, (II).

13. *Campbell v. Fichter*, 168 Ind. 645, 81 N. E. 661.

14. *Ia.*—*Sanderson v. Cerro Gordo*, 80 Iowa 89, 45 N. W. 560. *Ohio.* *Kerlin Bros. Co. v. Toledo*, 8 Ohio N. P. 62, 10 Ohio Dec. 509. See also *Wayne v. Minor*, 6 Ohio Dec. (Reprint) 602. *Wash.*—*Broderick v. Puget Sound T. L. & P. Co.*, 86 Wash. 399, 150 Pac. 616. *Wis.*—*Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606.

[a] There must be some express agreement creating the trust or something which in law is equivalent thereto. *Ind.*—*Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224. *Ohio.*—*Kerlin Bros. Co. v. Toledo*, 8 Ohio N. P. 62, 10 Ohio Dec. 509; *Arcade Hotel Co. v. Wiatt*, 1 Ohio Cir. Dec. 34, 1 Ohio Cir. Ct. 55. *Ore.*—*Simon v. Trummer*, 57 Ore. 153, 110 Pac. 786. *Wis.*—*Rob-*

bins v. Deverill, 20 Wis. 142, 157.

[b] The words "express trust" were perhaps intended to embrace such trusts as were express at common law and by the several statutes. *Brown v. Cherry*, 56 Barb. (N. Y.) 635, 38 How. Pr. 352.

15. *Considerant v. Brisbane*, 22 N. Y. 389; *Slocum v. Barry*, 34 How. Pr. (N. Y.) 320. Compare *Grinnell v. Schmidt*, 2 Sandf. (N. Y.) 706, 3 Code Rep. 19.

16. *Ind.*—*Weaver v. Wabash & E. C. Co.*, 28 Ind. 112, 120. *Nev.*—*Smith v. Logan*, 18 Nev. 149, 1 Pac. 678. *N. Y.*—*Brown v. Cherry*, 56 Barb. 635, 38 How. Pr. 352. *Ohio.*—See *Hays v. Galion G. L. & C. Co.*, 29 Ohio St. 330, query.

17. *Mo.*—*Snider v. Adams Express Co.*, 77 Mo. 523. *N. Y.*—*Slocum v. Barry*, 34 How. Pr. 320. *Wis.*—*Robbins v. Deverill*, 20 Wis. 142.

18. *Kerlin Bros. Co. v. Toledo*, 8 Ohio N. P. 62, 10 Ohio Dec. 509.

19. *U. S.*—*MacKay v. Randolph Maceon Coal Co.*, 178 Fed. 881, 102 C. C. A. 115. *Ia.*—See *Boardman v. Beckwith*, 18 Iowa 292. *Mo.*—*Crescent Furn. & Lumb. Co. v. Raddatz*, 28 Mo. App. 210. *N. C.*—*Mebane v. Mebane*, 66 N. C. 334. *Wash.*—*Sweeney v. Waterhouse & Co.*, 39 Wash. 507, 81 Pac. 1005.

20. *Crescent Furn. & Lumb. Co. v. Raddatz*, 28 Mo. App. 210.

the benefit of others as trustee of an express trust.²¹

Contract for Benefit of Another.—The term includes all contracts in which one person acts in trust for or on behalf of another,²² and it is generally expressly so provided by the codes.²³ This provision embraces all cases in which a person in behalf of a third party enters into a written express contract with another, either in his individual name without description, or in his own name expressly in trust for or on behalf of, or for the benefit of another, by whatever form of expression such trust is declared. It includes not only a person with whom, but one in whose name a contract is made for the benefit of another.²⁴

(2.) *Illustrations.*—(a.) *Formal Trusts.*—Persons to whom land,²⁵ money, choses in action or chattels,²⁶ are conveyed for the use of another, as well as a mortgagee of property to secure debts of the mortgagor to others,²⁷ and a mortgagee who is trustee for the holders of

21. *Phillips v. Laeledge County*, 76 Mo. 68; *Cheltenham Fire Brick Co. v. Cook*, 44 Mo. 29. But compare *Lewando v. Dunham*, 1 Hilt. (N. Y.) 114.

22. *Grinnell v. Schmidt*, 2 Sandf. (N. Y.) 706, 3 Code Rep. 19.

23. See generally the codes and Federal Eq. Rule 37; and also the following: **U. S.**—*Magruder v. Belle Fourche Val. W. U. Assn.*, 219 Fed. 72, 133 C. C. A. 524. **Cal.**—*Chin Kem Yau v. Ah Joan*, 75 Cal. 124, 16 Pac. 705; *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723. **Colo.**—*Houck v. Williams*, 34 Colo. 138, 81 Pac. 800; *Faust v. Goodnow*, 4 Colo. App. 352, 36 Pac. 71. **Ind.**—*Traylor v. Dykins*, 91 Ind. 229 (where county officers sued for funds of library loaned by them); *State ex rel. Ackerman v. Karr*, 37 Ind. App. 120, 76 N. E. 780. **Ky.**—*French v. Bowling*, 27 Ky. L. Rep. 639, 85 S. W. 1182; *Harth v. Farmer*, 21 Ky. L. Rep. 1217, 54 S. W. 739. **Mo.**—*Sawyer v. Wabash Ry. Co.*, 156 Mo. 468, 57 S. W. 108. **N. Y.**—*Considerant v. Brisbane*, 22 N. Y. 389, 395. **Ore.**—*Simon v. Trummer*, 57 Ore. 153, 110 Pac. 786. **S. D.**—*Brannon v. White Lake Tp.*, 17 S. D. 83, 95 N. W. 284.

As to right of person for whose benefit contract is made to sue, see *infra*, V, C, 6.

24. **Mo.**—*Harrigan v. Welch*, 49 Mo. App. 496, 504. **N. Y.**—*Considerant v. Brisbane*, 22 N. Y. 389, 396; *Welsh v. Reinhardt*, 20 Misc. 407, 45 N. Y. Supp. 1026. **Ohio.**—*Hays v. Galion Gas Light, etc. Co.*, 29 Ohio St. 330; *Cheseldine v. Mathers*, 2 Disn. 594, 13 Ohio Dec. (Reprint) 362. **Ore.**—*Simon v. Trummer*, 57 Ore. 153, 110 Pac. 786.

[a] The word "contract," as here used, is not used in a limited or restricted sense, but applies to all and any kind of a contract. *Heavenridge v. Mondy*, 34 Ind. 28; *Owen v. Harriott*, 47 Ind. App. 359, 94 N. E. 591.

25. **Mo.**—*Lancaster v. Connecticut Mut. L. Ins. Co.*, 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739. **N. Y.**—*Considerant v. Brisbane*, 22 N. Y. 389; *Hood v. New York, C. & H. R. R. Co.*, 163 App. Div. 833, 149 N. Y. Supp. 262. **Wis.**—*Goodrich v. Milwaukee*, 24 Wis. 422.

[a] A foreign executor who purchases property for the estate is a trustee of an express trust as to such property. *Doe v. Tenino Coal & Iron Co.*, 43 Wash. 523, 86 Pac. 938.

26. *Hitch v. Stonebraker's Est.*, 125 Mo. 128, 28 S. W. 443; *Bartin Bros. v. Martin*, 60 Mo. App. 351; *Reed v. Harris*, 7 Robt. (N. Y.) 151.

[a] A county made trustee of a school fund and liable for losses on loans made in the county is a trustee of an express trust. *Madison v. Tullis*, 69 Iowa 720, 27 N. W. 487.

[b] Although the contract appointing a person trustee of a fund was not made with him, or in his name or for his benefit, he may sue in his own name. *Hitch v. Stonebraker's Est.*, 125 Mo. 128, 138, 28 S. W. 443.

27. **Minn.**—*Moulton v. Haskell*, 50 Minn. 367, 52 N. W. 960. **Mo.**—*Bergesch v. Keevil*, 19 Mo. 127, notwithstanding a subsequent conveyance from the original owner directly to the creditor. **N. Y.**—*Clark v. Titcomb*, 42 Barb. 122.

notes or bonds secured by the mortgage,²⁸ are trustees of express trusts.

(b.) *Contracts for Benefit of Another.* — The rule that a trustee of an express trust includes a person with whom a contract is made for the benefit of another is illustrated by a great variety of cases.²⁹ It applies to a person who takes out insurance with a provision that the loss shall be paid to a mortgagee,³⁰ or to whom it may concern;³¹ and it applies to a person appointed to receive subscriptions for the benefit of a public institution or other cause.³² But mere authority to collect moneys and fees belonging to another does not make the person so authorized a trustee of an express trust.³³

28. *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 148, 53 N. W. 1134, 38 Am. St. Rep. 530, 20 L. R. A. 535; *Hays v. Galion G. L. & C. Co.*, 29 Ohio St. 330.

29. See notes below.

[a] **Where a note is payable to A for B**, A is a trustee of an express trust. *Heavenridge v. Mondy*, 34 Ind. 28.

[b] **One who takes a note payable to himself but really for the benefit of another.** *Davidson v. Elms*, 67 N. C. 228; *Mebane v. Mebane*, 66 N. C. 534.

[c] **A cashier in whose name contracts are made for the bank.** *Merchants' Bank v. McClelland*, 9 Colo. 608, 13 Pac. 723.

[d] **An attorney who signs a policy issued by underwriters is a trustee of an express trust.** *Lawrence v. Schaefer*, 19 Misc. 239, 42 N. Y. Supp. 992.

[e] **A partner in whose name bonds of a partnership are registered.** *Davidson v. Guardian Trust Co.*, 136 App. Div. 78, 120 N. Y. Supp. 628.

[f] **A treasurer of a corporation as custodian of funds.** *Hunter v. Robbins*, 117 Fed. 920; *DeWitt v. Chandler*, 11 Abb. Pr. (N. Y.) 459, where legacy was bequeathed to the treasurer of a society.

[g] **An insured who has been partly reimbursed for loss occasioned by a wrongdoer is not a trustee of an express trust.** *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606. Compare *People's Oil & Fertilizer Co. v. Charleston & W. C. Ry.*, 83 S. C. 530, 65 S. E. 733. As a real party in interest, see *supra*, V, C, 4, e, (III), (D).

[h] **An employer taking out insurance for the benefit of his employee.** *Fidelity & Cas. Co. v. Ballard*, 105 Ky. 253, 48 S. W. 1074.

[i] **Where a life insurance policy**

is payable to the assured for the benefit of another the assured is a trustee of an express trust. *Greenfield v. Massachusetts Mut. L. I. Co.*, 47 N. Y. 430.

[j] **A purchaser at a foreclosure sale at the request and for the benefit of the mortgagee.** *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723.

[k] **Joint Claimant Collecting Debt.** *Noe v. Christie*, 51 N. Y. 270.

[l] **Administrator Who Has Resigned.**—A promise to an administrator for the benefit of others may be sued upon by him although he has resigned. *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131.

[m] **But a county officer who, under statutory authority, enters into a contract and approves the bond of a contractor does not by such act become a trustee of an express trust for the benefit of the landowners so as to enable him to sue on the bond.** *State ex rel. Ackerman v. Karr*, 37 Ind. App. 120, 76 N. E. 780.

30. *Anthony v. German American Ins. Co.*, 48 Mo. App. 65, 70. See 14 STANDARD PROC. 20.

31. *Walsh v. Washington M. Ins. Co.*, 32 N. Y. 427; *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 648.

32. *Cal.*—*Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161. *Ind.*—*Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888. *Mo.* *Swain v. Hill*, 30 Mo. App. 436. *N. Y.* *Slocum v. Barry*, 34 How. Pr. 320.

[a] **Giving a note to certain persons for the purpose of erecting an institution, constitutes them trustees of an express trust.** *Musselman v. Cravens*, 47 Ind. 1.

33. *Willis v. Standard Oil Co.*, 50 Minn. 290, 52 N. W. 652; *Perry v. Swanner*, 150 N. C. 141, 63 S. E. 611.

(c.) *Assignees*.³⁴ — It has been held that if the assignor of a chose has any interest in the chose assigned the assignee stands in the position of a trustee of an express trust.³⁵ Assignees of choses as collateral security for debts owing by an assignor,³⁶ assignees for purposes of collection,³⁷ and assignees for the benefit of creditors,³⁸ are trustees of express trusts.

(d.) *Factors and Agents*. — A factor or other mercantile agent in whose name a contract is made for the benefit of his principal, whether³⁹ or not⁴⁰ his principal is disclosed, is generally regarded as the trustee of an express trust; but it is otherwise if the agent has no personal interest in the contract and the promise is not made to him.⁴¹

34. In actions on bills and notes, see 4 STANDARD PROC. 229, et seq.

35. *Carpenter v. Johnson*, 1 Nev. 331. See *Guernsey v. Moore*, 131 Mo. 650, 32 S. W. 1132. But see *Whitman v. Keith*, 18 Ohio St. 134.

36. **U. S.**—*Chew v. Brumagen*, 13 Wall. 497, 505, 20 L. ed. 663. **Minn.** *Bates v. Richards Lumb. Co.*, 56 Minn. 14, 57 N. W. 218. **Neb.**—See *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539. **Wis.**—*Gardinier v. Kellogg*, 14 Wis. 605.

37. **U. S.**—*Kent v. Dana*, 100 Fed. 56, 40 C. C. A. 281. **Ariz.**—*Sroufe v. Soto Bros. & Co.*, 5 Ariz. 10, 43 Pac. 221. **Cal.**—*Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490, 497, 33 Pac. 550. **Minn.**—*Struckmeyer v. Lamb*, 64 Minn. 57, 65 N. W. 930. But compare *Rock County Nat. Bank v. Hollister*, 21 Minn. 385, where a note was indorsed, "Pay to A or order for collection." **Mo.**—*Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; *Reyburn v. Mitchell*, 106 Mo. 363, 16 S. W. 592, 27 Am. St. Rep. 350. **Ohio.**—*Wayne v. Minor*, 6 Ohio Dec. (Reprint) 602. **S. D.**—*Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

Contra, *Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123, holding the contract to be one of agency instead.

Action by assignee for collection generally, see 4 STANDARD PROC. 235.

38. See 3 STANDARD PROC. 75.

39. **U. S.**—*Albany & R. Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. ed. 982. **Ind.**—*Owen v. Harriott*, 47 Ind. App. 359, 94 N. E. 591. **Minn.**—*Close v. Hodges*, 44 Minn. 204, 46 N. W. 335. **Mo.**—*Kelly v. Thuey*, 102 Mo. 522, 15 S. W. 62; *Harrigan v. Welch*, 49 Mo. App. 496, 504. **N. Y.**—*Coffin v. Grand Rapids H. Co.*,

136 N. Y. 655, 32 N. E. 1076; *Duncan v. China Mut. Ins. Co.*, 129 N. Y. 237, 29 N. E. 76. **N. C.**—*Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696, where note was payable to "J., cashier." **Ohio.**—*Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123.

40. **Ky.**—*Goff v. Boland*, 29 Ky. L. Rep. 172, 92 S. W. 575. **Minn.**—*Cremer v. Wimmer*, 40 Minn. 511, 42 N. W. 467. **Mo.**—*Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; *Snider v. Adams Express Co.*, 77 Mo. 523. **Neb.** *Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201. **N. Y.**—*Weed v. Hamburg-Bremen F. Ins. Co.*, 133 N. Y. 394, 31 N. E. 231; *Considerant v. Brisbane*, 22 N. Y. 389; *Grinnell v. Schmidt*, 2 Sandf. 706, 3 Code Rep. 19; *Parker v. Paine*, 37 Mise. 768, 76 N. Y. Supp. 942. **Wis.** *Beardsley v. Schmidt*, 120 Wis. 405, 98 N. W. 235, 102 Am. St. Rep. 996.

See the title "Principal and Agent."

[a] A consignor who is agent of the consignee is a trustee of an express trust. *Snider v. Adams Express Co.*, 77 Mo. 523; *Waterman v. Chicago, M. & St. P. R. Co.*, 61 Wis. 464, 21 N. W. 611, 50 Am. Rep. 145; *Hooper v. Chicago & N. W. Ry. Co.*, 27 Wis. 81, 91, 9 Am. Rep. 439. See generally the title "Freight Carriers."

[b] One who deposits money "as agent" is a trustee. *McLaughlin v. First Nat. Bank*, 6 Dak. 406, 43 N. W. 715; *Goodfellow v. First Nat. Bank*, 71 Wash. 554, 129 Pac. 90, 44 L. R. A. (N. S.) 580. As to actions to recover deposits generally, see 4 STANDARD PROC. 8.

41. **Ark.**—*Ferguson v. McMahon*, 52 Ark. 433, 12 S. W. 1070. **Cal.**—*Chin Kem You v. Ah Joon*, 75 Cal. 124, 16 Pac. 705. **Ind.**—*Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224; *Rawlings*

(e.) *Obligee of Bonds.* — As to bonds given to a designated obligee for the benefit of persons who may be injured by a breach of its conditions, the obligee is a trustee of an express trust.⁴² And where a bond is executed for the payment of money to the obligee partly for his own use and partly for the use of another, the obligee may sue in his own name on his own behalf and as trustee for the other.⁴³

(f.) *Public Officers, Auctioneers and Receivers.* — An auctioneer who sells goods in his own name, having made the sale for the benefit of another,⁴⁴ and a receiver with power to collect debts of a firm,⁴⁵ are trustees of express trusts. But while public officers may be designated as trustees, directors, or agents, they are not in any legal sense trustees of an express trust.⁴⁶

(g.) *Partners.* — An ostensible partner is trustee of an express trust as to dormant partners.⁴⁷

(h.) *Guardians.* — A guardian is sometimes regarded as a trustee of an express trust.⁴⁸

(III.) *Persons Expressly Authorized.* — Another exception to the rule that actions must be brought by the real party in interest, exists in the case of persons expressly authorized by statute.⁴⁹ And if a statute which creates a right of action designates certain persons as the persons to sue, no others can bring the action.⁵⁰

v. Fuller, 31 Ind. 255. **Mo.**—*Crescent Furn. & Lumb. Co. v. Raddatz*, 28 Mo. App. 210.

[a] An agent loaning his principal's money in the principal's name is not a trustee of an express trust. *Chin Kem You v. Ah Joan*, 75 Cal. 124, 16 Pac. 705.

[b] The treasurer of a corporation to whom a note is transferred as a mere custodian of the corporation is not a trustee of an express trust. *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224.

42. **Cal.**—*People v. Stacy*, 74 Cal. 373, 16 Pac. 192. **Idaho.**—*State v. Title Guar. & Sur. Co.*, 27 Idaho 752, 152 Pac. 189. **Ia.**—*Shelby County v. Simmonds*, 33 Iowa 345. **Minn.**—See *Comrs. of Mower County v. Smith*, 22 Minn. 97. **Mo.**—*State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563. **N. M.**—*Wagner v. Romero*, 3 N. M. 167, 3 Pac. 50. **N. Y.**—*Stillwell v. Hurlbert*, 18 N. Y. 374; *People v. Norton*, 9 N. Y. 176, *Seld. Notes* 179. **Ohio.**—See *Hunter v. Comrs. of Mercer County*, 10 Ohio St. 515. **Ore.**—*United States v. McCann*, 40 Ore. 13, 66 Pac. 274. **Wash.**—*United States v. Rundle*, 27 Wash. 7, 67 Pac. 395. **Wis.**—*Milwaukee v. United States Fid. & Guar. Co.*, 144 Wis. 603, 129 N. W. 786.

43. *Cheltenham F. B. Co. v. Cook*, 44 Mo. 29.

44. *Brown v. Cherry*, 56 Barb. (N. Y.) 635, 38 How. Pr. 352; *Bogart v. O'Regan*, 1 E. D. Smith (N. Y.) 590. Compare *Minturn v. Main*, 7 N. Y. 220.

45. *Neland v. Haugan*, 70 Minn. 349, 73 N. W. 169; *Williamson v. Selden*, 53 Minn. 73, 54 N. W. 1055; *Henning v. Raymond*, 35 Minn. 303, 29 N. W. 132. See generally the title "*Receivers.*"

46. *Kerlin Bros. Co. v. Toledo*, 8 Ohio N. P. 62, 10 Ohio Dec. 509. See generally the title "*Officers.*"

47. See the title "*Partnership.*"

48. See 10 STANDARD PROC. 860.

49. See generally the statutes and the following: **Ind.**—*Swift v. Ellsworth*, 10 Ind. 205, 71 Am. Dec. 316. **Ohio.**—*Whitman v. Keith*, 18 Ohio St. 134. **Ore.**—*Hannah v. Wells*, 4 Ore. 249, district attorney suing on bail bond.

See the specific titles, including "*Bills and Notes*," "*Death by Wrongful Act*," "*Husband and Wife*," "*Joint Tenants*," "*Seduction*," "*Tenants in Common*."

50. **Cal.**—*Monterey v. Abbott*, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73. **Minn.**—*State Bank v. Heney*, 40 Minn. 145, 41 N. W. 411. **Mo.**—*Oates v.*

5. Nominal and Use Plaintiffs.—*a. At Common Law.*—(I.) **In General.**—The rule of the common law requiring actions to be brought by the person holding the legal title suffered a relaxation, and the practice arose of bringing actions in the name of a legal or nominal plaintiff to the use of the equitable owner.⁵¹ But tort actions cannot be brought in the name of one person for the use of another; if so brought, the name of the usee will be treated as surplusage.⁵²

(II.) **Right of Party To Sue for Use of Another.**—The holder of a legal title may sue for the use of the person who has only an equitable title.⁵³ One having a right of action for breach of contract may sue for the use of any person he may designate to take the proceeds of the action.⁵⁴ There may be as many usees as there are persons interested.⁵⁵

(III.) **Right To Use Name of Another as Nominal Plaintiff.**—(A.) **IN GENERAL.**—The equitable owner of a right or chose in action is entitled by virtue of his ownership to bring an action in the name of the legal plaintiff for his own use.⁵⁶ The beneficial owner may certainly

Union Pac. Ry. Co., 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348. **N. M.** *Romero v. Atchison*, T. & S. F. R. Co., 11 N. M. 679, 72 Pac. 37. **Ohio.**—*Weidner v. Rankin*, 26 Ohio St. 522.

51. Miss.—*Kitchens v. Harrall*, 54 Miss. 474. **Pa.**—*Coffey v. White*, 14 Wkly. N. Cas. 108. **W. Va.**—*Grove v. Judy*, 24 W. Va. 294.

52. *Willis v. Burch*, 116 Ga. 374, 42 S. E. 718; *Kansas City, M. & B. R. Co. v. Cantrell*, 70 Miss. 329, 12 So. 344; *Myer v. Warner*, 64 Miss. 610, 1 So. 837.

[a] **Replevin.**—*Myer v. Warner*, 64 Miss. 610, 1 So. 837; *Moore v. Watson*, 20 R. I. 495, 40 Atl. 345. See the title "Replevin."

[b] **Detinue.**—*Smith's Exr. v. Mabry*, 9 Yerg. (Tenn.) 313. See generally the title "Detinue."

[c] **Trover.**—*Willis v. Burch*, 116 Ga. 374, 42 S. E. 718; *Mitchell v. Georgia & Ala. Ry. Co.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622. See generally the title "Trover and Conversion."

53. *Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *May v. McCarty*, 11 Ga. App. 454, 75 S. E. 672.

54. Ga.—*Terrell v. Stevenson*, 97 Ga. 570, 25 S. E. 352; *Richmond & D. R. Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676. **Ill.**—*Atkins v. Moore*, 82 Ill. 240; *Brownell Imp. Co. v. Critchfield*, 96 Ill. App. 84, *affirmed*, 197 Ill. 61, 64 N. E. 332. **La.**—*Moore v. Bres*, 18 La. Ann. 483, 19 La. Ann. 532.

[a] **But he must have a legal right of action in himself** (*Norwich, etc. Ins. Soc. v. Wellhouse*, 113 Ga. 970, 39 S. E. 397; *Mitchell v. Georgia & Ala. Ry. Co.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; *Terrell v. Stevenson*, 97 Ga. 570, 25 S. E. 352), (2) though it is not necessary that the usee have any interest or connection otherwise with the subject of the suit. *Atkins v. Moore*, 82 Ill. 240; *Jones v. Maxton*, 100 Ill. App. 201, *affirmed*, 197 Ill. 248, 64 N. E. 328.

[b] **Plaintiff May Dismiss.**—*Moore v. Bres*, 19 La. Ann. 532, 18 La. Ann. 483.

55. Sharman v. Walker, 68 Ga. 148; *Glenn v. Black*, 31 Ga. 393.

[a] **But there is a misjoinder of parties** where, in an action brought by an official obligee on a bond for the benefit of a class, the claims of the several usees are separate and distinct. *Governor v. Hicks*, 12 Ga. 189.

56. Ala.—*Ex parte Randall*, 149 Ala. 640, 42 So. 870; *McNutt v. King*, 59 Ala. 597. **Conn.**—*Townsend Sav. Bank v. Todd*, 49 Conn. 190, 212. **Ga.**—*Calhoun v. Tullass*, 35 Ga. 119; *Dickson v. Matthews*, 10 Ga. App. 542, 73 S. E. 705, but a vendor cannot use the name of the vendee to enforce against another a promise by him to the vendee to pay for the goods bought. **Ill.**—*Congress Const. Co. v. Farson & Libbey Co.*, 199 Ill. 398, 408, 65 N. E. 357; *Jones v. Maxton*, 100 Ill. App. 201. **Ky.**—*Smith v. Doe*, 3 J. J. Marsh. 655. **Me.**—*Matherson v. Wilkinson*, 79 Me.

use the name of the holder of the legal title in the action where he consents thereto.⁵⁷ And generally his name may be used without his consent,⁵⁸ although it has been held that a person may not use the name of another as nominal plaintiff without his consent or authority.⁵⁹

159, 8 Atl. 684; *Pierce v. Robie*, 39 Me. 205, 63 Am. Dec. 614. **Mass.**—*Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285; *Riley v. Taber*, 9 Gray 372. **Mich.** *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160 (assignee); *Park v. Toledo, C. S. & D. R. R. Co.*, 41 Mich. 352, 1 N. W. 1032; *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489, 90 Am. Dec. 252, the statute allowing the assignee of a non-negotiable demand to sue in his own name does not prevent his suing in the assignor's name. **Miss.** *Taylor v. Reese*, 44 Miss. 89; *Field v. Weir*, 28 Miss. 56 (equitable assignee); *Vanhouten v. Reily*, 6 Smed. & M. 440, assignee of judgment. **Mo.**—*Key v. Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. 162. **N. H.**—*Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584; *Webb v. Steele*, 13 N. H. 230. **Pa.**—*Coffey v. White*, 14 Wkly. N. Cas. 111. **Tex.** *Galveston, H. & S. A. R. R. v. Freeman*, 57 Tex. 156, the statute recognizes the practice, but does not require it. The practice has conformed to the general equity practice and allows the equitable owner to sue in his own name. **Vt.**—*Tichout v. Cilley*, 3 Vt. 415.

In ejectment, see 7 STANDARD PROC. 1009.

Action by assignee in name of assignor, see generally 3 STANDARD PROC. 89; action on judgment in name of assignor, see 16 STANDARD PROC. 369.

Necessity of showing action is for use of another, see 6 STANDARD PROC. 652.

Liability of nominal and use plaintiffs for costs, see 5 STANDARD PROC. 813.

Effect of death of nominal plaintiff, see the title "Survival."

57. *Pitts v. Holmes*, 10 Cush. (Mass.) 92.

[a] But if he demands indemnity for costs and damages, the beneficial plaintiff must furnish it. *Webb v. Steele*, 13 N. H. 230; *Tichout v. Cilley*, 3 Vt. 415.

58. **Conn.**—*Townsend Sav. Bank v. Todd*, 49 Conn. 190, 212. **Ga.**—*Calhoun v. Tullass*, 35 Ga. 119. **Mass.** *Fay v. Guynon*, 131 Mass. 31; *Walker v. Brooks*, 125 Mass. 241; *Foss v. Low-*

ell Five Cents Sav. Bank, 111 Mass. 285. **Miss.**—*Anderson v. Miller*, 7 Smed. & M. 586. **Tex.**—*Galveston, H. & S. A. R. R. v. Freeman*, 57 Tex. 156; *McFadin v. MacGreal*, 25 Tex. 73.

[a] Assignment itself confers upon the assignee the right to sue in the name of the assignor. *Rockwood v. Brown*, 1 Gray (Mass.) 261.

Right to use name of co-promisee who refuses to join, see 11 STANDARD PROC. 971.

[b] Even Against His Protest. *Sumner v. Sleeth*, 87 Ill. 500; *Walker v. Brooks*, 125 Mass. 241; *Bates v. Kempton*, 7 Gray (Mass.) 382.

[c] Especially (1) upon proper indemnity as to costs and damages. **Ala.**—*Ex parte Randall*, 149 Ala. 640, 42 So. 870. **Conn.**—*Townsend Sav. Bank v. Todd*, 47 Conn. 190, 212. **Ga.** *Calhoun v. Tullass*, 35 Ga. 119. **Ill.** *Sumner v. Sleeth*, 87 Ill. 500; *Dazey v. Mills*, 10 Ill. 67. **Mass.**—*Walker v. Brooks*, 125 Mass. 241. **Miss.**—*Anderson v. Miller*, 7 Smed. & M. 586. But (2) it has been suggested that without an offer of indemnity his name cannot be retained as a party against his will. *Fain v. Garthright*, 5 Ga. 6. (3) Compare *Bates v. Kempton*, 7 Gray (Mass.) 382, holding the name of the person holding the legal title may be used without his consent; but whether the court on early application would have required indemnity is a question which did not arise.

59. *Foster v. Dow*, 29 Me. 442; *Cage v. Foster*, 5 Yerg. (Tenn.) 261, 26 Am. Dec. 265.

[a] An informal consent is sufficient. *Townsend Sav. Bank v. Todd*, 49 Conn. 190, 211, no consent is required in Connecticut, however.

[b] Assent will be inferred from demanding and receiving indemnity. *Rockwood v. Brown*, 1 Gray (Mass.) 261.

[c] A subsequent ratification relates back to the commencement of the action and authorizes it. *Bowe v. Gress Lumb. Co.*, 86 Ga. 17, 12 S. E. 177; *Craig v. Twomey*, 14 Gray (Mass.) 486.

[d] No presumption that the suit

To be entitled to use the name of another as plaintiff against his consent, however, it must be necessary to the assertion of a party's rights;⁶⁰ and the usee plaintiff must have acquired the whole interest of the nominal plaintiff either by his voluntary act or by operation of law.⁶¹

Designating Beneficiaries in Pleadings. — It is not necessary to give the name of the beneficiary of the action or to state that the action is brought for the use of a third person.⁶² And no distinction is made between cases which do and which do not mention the use.⁶³

(B.) ACTION BY INSURED AND INSURER AGAINST WRONGDOER. — Under the common law practice, an insurer who pays the insured the entire loss is entitled to recover from the wrongdoer in an action brought in the name of the insured for his use.⁶⁴

(C.) QUESTIONING AUTHORITY TO USE NAME OF NOMINAL PLAINTIFF. The defendant may demand in limine the authority of the beneficial owner to use the name of the legal plaintiff;⁶⁵ and if he fails to show a right to use the name, the suit will be stayed.⁶⁶

(IV.) Rights of Nominal and Usee Plaintiffs in Action. — Courts of law can recognize only the nominal plaintiff as the party plaintiff in a strictly legal sense.⁶⁷ The nominal plaintiff is a necessary party in

was brought without the consent of the nominal plaintiff. *Allen v. Pannell*, 51 Tex. 165.

60. *Hargraves v. Lewis*, 6 Ga. 207, 210; *Fain v. Garthright*, 5 Ga. 6, cannot be used capriciously.

[a] Use of name of party merely to defeat the adversary is not permissible. *Fain v. Garthright*, 5 Ga. 6, as where he is a material and competent witness for the adversary.

61. U. S.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87. Ill.—*Chapman v. Shattuck*, 8 Ill. 49. Mass.—*Coffin v. Adams*, 131 Mass. 133, 136.

[a] Only when the assignee acquires title through the promisee can he insist on the right to sue in the latter's name. *Ballard v. Greenbush*, 24 Me. 336. Necessity for proof of connection between usee plaintiff and legal plaintiff, see *infra*, note 67.

62. See 6 STANDARD PROC. 652.

63. *Ex parte Randall*, 149 Ala. 640, 42 So. 870.

64. U. S.—*Southern Ry. Co. v. Blunt*, 165 Fed. 258. See *Webb v. Southern*, 235 Fed. 578, 593. Ala.—*Birmingham Ry., L. & P. Co. v. Aetna A. & L. Co.*, 184 Ala. 601, 64 So. 44; *Southern Ry. Co. v. Stonewall Ins. Co.*, 163 Ala. 161, 50 So. 940, the insurer may sue in its own name or in the name of the insured for its use, Mass.

Hart v. Western R. Corp., 13 Metz. 99, 46 Am. Dec. 719.

See generally the title "Subrogation."

Insurer as real party in interest, see *supra*, V, C, 4, c, (III), (D).

[a] If there are several insurers, the action should be brought by the assured for the benefit of the insurers. *Mobile Ins. Co. v. Columbia, etc. R. R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725.

65. *Mississippi C. R. R. Co. v. Southern R. R. Assn.*, 8 Phila. (Pa.) 107, 4 Brewst. 79.

[a] Defendant may raise objection that the nominal plaintiff did not consent by stating that fact on affidavit, and having a rule on the plaintiff to show cause why the suit should not be dismissed. *Lynn v. Glidwell*, 8 Yerg. (Tenn.) 1; *Cage v. Foster*, 5 Yerg. (Tenn.) 261, 26 Am. Dec. 265.

[b] If the affidavit is delayed, it must state specifically the reason therefor. *Wilson v. Turk*, 10 Yerg. (Tenn.) 247.

66. *Mississippi C. R. R. Co. v. Southern R. R. Assn.*, 8 Phila. (Pa.) 107, 4 Brewst. 79.

67. U. S.—*Irvine v. Lowry*, 14 Pet. 293, 10 L. ed. 462. D. C.—*Karrick v. Wetmore*, 22 App. Cas. 487, 494. Ga.—*Mathis v. Fordham*, 114 Ga. 364, 40 S. E. 324. Ill.—*McCormick v. Fulton*,

every stage of the proceeding;⁶⁸ every step that is taken must be in the name of the nominal plaintiff.⁶⁹ The courts, however, recognize the rights of the beneficial party, protecting him against the acts of the party possessing the naked legal interest whenever it can be done without injuriously affecting the rights of the debtor.⁷⁰ He is recognized as the substantial or real plaintiff for many purposes.⁷¹ He has

19 Ill. 570. **Miss.**—*Lee v. Gardiner*, 26 Miss. 521, 541.

[a] As the legal right of action is in him alone. *Tederick v. Wells*, 152 Ill. 214, 38 N. E. 625.

[b] The jurisdiction of a federal court depends on the residence of the nominal party, not the use plaintiff. *Irvine v. Lowry*, 14 Pet. (U. S.) 293, 10 L. ed. 462. See generally the titles "Jurisdiction," and "United States Courts."

[c] On trial the use plaintiff need not show any right in himself, it being sufficient to prove the legal plaintiff's right to recover. *Montgomery v. Cook*, 6 Watts (Pa.) 238; *Armstrong v. Lancaster*, 5 Watts (Pa.) 68, 30 Am. Dec. 293; *Mississippi C. R. R. Co. v. Southern R. R. Assn.*, 8 Phila. (Pa.) 107, 4 Brewst. 79. But compare *Doe ex dem. Shanks v. Roe*, 36 Ga. 432; *Adams v. McDonald*, 29 Ga. 571, holding that in ejectment a plaintiff in order to use the name of another must show some connection between his title and that of the legal plaintiff.

68. *McCormick v. Fulton*, 19 Ill. 570.

[a] There can be no recovery on a set-off against him without first making him a party by service of process on him. *McFadin v. MacGreal*, 25 Tex. 73, no set-off or plea in reconvention.

Judgment in the name of the beneficiary alone is erroneous, see 15 STAND-ARD PROC. 62, note 2.

[b] Withdrawal of Nominal Party. *Smith v. Wingate*, 61 Tex. 54.

69. *McCormick v. Fulton*, 19 Ill. 570.

[a] When a defendant perfects his appeal, the nominal plaintiff becomes the appellee and as such must be served with process as in other cases. *McCormick v. Fulton*, 19 Ill. 570. See also *Tederick v. Wells*, 152 Ill. 214, 38 N. E. 625.

70. **U. S.**—*Welch v. Mandeville*, 1 Wheat. 233, 236, 4 L. ed. 79. **Ill.** *Dazey v. Mills*, 10 Ill. 67. **N. H.**—See *Bourdeau v. Eastman*, 59 N. H. 467. **N. J.**—*Belton v. Gibbon*, 12 N. J. L.

76. **Tex.**—*Hudson v. Morris*, 55 Tex. 595. **W. Va.**—*Grafton v. Holt*, 58 W. Va. 182, 52 S. E. 21.

71. **D. C.**—*Karrick v. Wetmore*, 22 App. Cas. 487. **Ga.**—*Atkinson v. Cawley*, 112 Ga. 485, 37 S. E. 717; *Wortsman v. Wade*, 77 Ga. 651, 4 Am. St. Rep. 102; *Governor v. Hicks*, 12 Ga. 189. **Ky.**—*Fenwick v. Phillips*, 3 Mete. 87, he is thereby virtually made a party to the action. **La.**—*United States v. Union Bank*, 8 La. Ann. 388. **Mass.**—*Lewis v. Austin*, 144 Mass. 383, 11 N. E. 538. **Miss.**—*Kitchens v. Harrell*, 54 Miss. 474. **N. J.**—*Sloan v. Sommers*, 14 N. J. L. 509. **N. D.**—*Randall v. Johnstone*, 25 N. D. 284, 141 N. W. 352. **Tex.**—*Smith v. Wingate*, 61 Tex. 54; *Clark v. Hopkins*, 34 Tex. 139. **Va.** *Clarksons v. Doddridge*, 14 Gratt. (55 Va.) 42, 46.

[a] The uses should be regarded as the real beneficiaries of the action when so doing would be essential to the assertion of any right or defense on the part of the defendant. Although the court in *Wortsman v. Wade*, 77 Ga. 651, 4 Am. St. Rep. 102, referred to the uses as "the real plaintiffs in the action" this merely meant that they should be so considered for the purpose of determining whether or not the suit should be removed to a federal court. *Mathis v. Fordham*, 114 Ga. 364, 368, 40 S. E. 324.

[b] Statutes declaratory of common law expressly provide that the use plaintiff must be considered as the sole party on the record. **U. S.**—*Webb v. Southern R. Co.*, 235 Fed. 578, 592 (under Alabama practice); *Southern Ry. Co. v. Blunt*, 165 Fed. 258. **Ala.**—*Birmingham Ry., L. & P. Co. v. Aetna Accident & L. Co.*, 184 Ala. 601, 64 So. 44; *Ex parte Bromberg*, 121 Ala. 361, 25 So. 994. **Tenn.**—*Kyle v. Ewing*, 5 Lea 580; *Burton v. Dees*, 4 Yerg. 4.

[c] Effect of Statute as to Costs. Since the passage of a statute providing that in case judgment is rendered against the plaintiff, costs must be taxed against the beneficiary, the nominal plaintiff is in reality not a party

control of the proceedings.⁷² The nominal plaintiff has no right to interfere with the just rights of the use plaintiff;⁷³ he is not permitted to participate in the action either in person or by attorney;⁷⁴ and he has no control over the suit.⁷⁵

b. *In Equity and Under the Codes.*—The equity⁷⁶ and code⁷⁷ rules requiring actions to be prosecuted in the name of the real party in interest have superseded this common law rule allowing actions in the name of one for the use of another, although some traces of this rule still exist under the code.⁷⁸

6. **Action by Person for Whose Benefit Contract Is Made.**—a. *In Actions at Law.*—(I.) **Generally.**—A well recognized exception to the general rule that strangers to contracts or persons not in privity

to the record, his presence there being purely pro forma. *Birmingham Ry., L. & P. Co. v. Aetna A. & L. Co.*, 184 Ala. 601, 64 So. 44; *Ex parte Bromberg*, 121 Ala. 361, 25 So. 994.

72. *Dazey v. Mills*, 10 Ill. 67; *McFadin v. MacGreal*, 25 Tex. 73.

73. **U. S.**—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87; *Welch v. Mandeville*, 1 Wheat. 233, 4 L. ed. 79. **Ala.** *Ex parte Randall*, 149 Ala. 640, 42 So. 870; *Cunningham v. Carpenter*, 10 Ala. 109, 112. **D. C.**—*Karriek v. Wetmore*, 22 App. Cas. 487. **Ill.**—*Dazey v. Mills*, 10 Ill. 67. **Tex.**—*Hudson v. Morriss*, 55 Tex. 595; *McFadin v. MacGreal*, 25 Tex. 73.

[a] A release by the nominal plaintiff does not prevent recovery by the beneficial plaintiff. **Mass.**—*Riley v. Taber*, 9 Gray 372. **Miss.**—*Anderson v. Miller*, 7 Smed. & M. 586. **N. J.**—*Sloan v. Sommers*, 14 N. J. L. 509.

Requiring indemnity, see *supra*, V, C, 5, a, (III), (A).

74. *McFadin v. MacGreal*, 25 Tex. 73.

75. **Ala.**—*Ex parte Randall*, 149 Ala. 640, 42 So. 870. **Ill.**—*Sumner v. Sleeth*, 87 Ill. 500. **Mass.**—*Rockwood v. Brown*, 1 Gray 261. **Miss.**—*Eckford v. Hogan*, 44 Miss. 398. **N. H.**—*Webb v. Steele*, 13 N. H. 230. **N. D.**—*Randall v. Johnstone*, 25 N. D. 284, 141 N. W. 352. **Tenn.**—*Burton v. Dees*, 4 Yerg. 4. **Tex.** *G. H. & S. A. R. v. Freeman*, 57 Tex. 156 (he is incapable of exercising "any control" over the suit); *McFadin v. MacGreal*, 25 Tex. 73.

Dismissal of the action by nominal party, see 7 STANDARD PROC. 654.

As to satisfaction of judgment by nominal party, see 16 STANDARD PROC. 584.

[a] Payment of a judgment to

nominal plaintiff which is recovered in the name of a nominal plaintiff for the use of another does not satisfy it. See 16 STANDARD PROC. 531.

76. **Ill.**—*Elder v. Jones*, 85 Ill. 384. **Miss.**—*Kitchins v. Harrall*, 54 Miss. 474. **Va.**—*Penn v. Hearon*, 94 Va. 773, 27 S. E. 599, assignor of chose in action secured by vendor's lien cannot sue to enforce the lien for the benefit of the assignee. **W. Va.**—*First Nat. Bank v. Cook*, 55 W. Va. 220, 46 S. E. 1027; *Kellam v. Sayre*, 30 W. Va. 198, 3 S. E. 589; *Grove v. Judy*, 24 W. Va. 294.

[a] In Virginia, statute allows a suit in the name of the holder of the legal title for the use of the beneficial owner. *Preston v. National Exch. Bank*, 97 Va. 222, 33 S. E. 546.

77. **Ala.**—*Willis v. Neal*, 39 Ala. 464. **Ky.**—*Lampkin v. Mobile & O. R. Co.*, 146 Ky. 514, 142 S. W. 1037; *Lytle v. Lytle*, 2 Mete. 127. **Mo.**—*Weise v. Gerner*, 42 Mo. 527; *Brady v. Chandler*, 31 Mo. 28. **N. M.**—*Conway v. Carter*, 11 N. M. 419, 431, 68 Pac. 941. **Ohio.** *Hall v. Plaine*, 14 Ohio St. 417, 423; *Clawson v. Cone*, 2 Hand. 67, 12 Ohio Dec. (Reprint) 333. **Okla.**—*Jackson v. McGilbray*, 46 Okla. 208, 148 Pac. 703. **S. D.**—*Guernsey v. Tuthill*, 12 S. D. 584, 82 N. W. 190; *Hollister v. Hubbard*, 11 S. D. 461, 78 N. W. 949. **Wis.** *Allen v. Chicago & N. W. Ry. Co.*, 94 Wis. 93, 68 N. W. 873.

78. Continuing action in name of original plaintiff after transfer of his interest pendente lite, see *infra*, XII; and the title "Revivor."

Action of ejectment against person holding possession adversely by grantee in name of grantor, the deed being void because made pending adverse possession, see 7 STANDARD PROC. 1009.

thereto cannot sue upon them in their own names,⁷⁹ exists in favor of third persons for whose express benefit the contract is made.⁸⁰ But there is considerable conflict and confusion in the decisions.⁸¹

(II.) **Minority Rule.** — In some states, it is held that third persons for whose benefit a promise is made cannot sue on such promise at law,⁸² whether he is the sole beneficiary thereunder,⁸³ or whether he is a creditor suing upon a promise to another to pay a debt to him.⁸⁴ Although to this rule there are some exceptions, real and apparent.⁸⁵ He may sue in equity, however.⁸⁶

(III.) **Majority Rule.** — (A.) **IN GENERAL.** — The general rule is that a third person for whose direct benefit a contract is made may maintain an action thereon in his own name,⁸⁷ where the contract is not under

Effect of Code on rules as to parties generally, see *supra*, III, A.

Real party in interest rule, see *supra*, V, C, 4.

79. See 11 STANDARD PROC. 961.

80. See *Mellen v. Whipple*, 1 Gray (Mass.) 317.

[a] **Remedy Is Cumulative.** — The exception is permissive and does not prevent the promisee from suing. **Ill.** *Town v. Wood*, 37 Ill. 512. **Ia.** — *Stout v. Folger*, 34 Iowa 71, 11 Am. Rep. 138. **Kan.** — *Trice v. Yoeman*, 8 Kan. App. 537, 54 Pac. 288. **N. Y.** — *Ward v. Cowdrey*, 51 Hun 641, 5 N. Y. Supp. 282, 21 N. Y. St. 372.

81. See *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. ed. 75, and *infra*, this section.

82. **Conn.** — *Atwood v. Burpee*, 77 Conn. 42, 58 Atl. 237; *Morgan v. Randolph & Clowes Co.*, 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653; *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 72 Am. St. Rep. 169, 42 L. R. A. 514. Compare *Treat v. Stanton*, 14 Conn. 445, holding a third person for whose sole benefit a contract is made may sue. **Ga.** — *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245; *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399; *Guthrie v. Atlantic C. L. R. Co.*, 119 Ga. 663, 46 S. E. 824. **Mass.** — *Clark v. Hatch*, 180 Mass. 194, 62 N. E. 250; *Williamson v. McGrath*, 180 Mass. 55, 61 N. E. 636; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469. **Mich.** — *Edwards v. Thoman*, 187 Mich. 361, 153 N. W. 806; *Knights of Modern Maccabees v. Sharp*, 163 Mich. 449, 128 N. W. 786, 33 L. E. A. (N. S.) 780; *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849; *Linneman v. Moross' Est.*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528. **N. H.** — *Lang v. Henry*, 54 N. H. 57; *Warren v. Bat-*

chelder, 16 N. H. 580, 15 N. H. 129, 136. **Vt.** — *Green v. McDonald*, 75 Vt. 93, 53 Atl. 332. Compare *Keyes v. Allen*, 65 Vt. 667, 27 Atl. 319.

[a] **Where the contract is really that of the third person,** he may sue. *Fair v. Martin*, 125 Mich. 612, 85 N. W. 2.

83. See cases cited in preceding note.

84. **U. S.** — *American Exch. Nat. Bank v. Northern Pac. R. Co.*, 76 Fed. 130. **Ga.** — *Sheppard v. Bridges*, 137 Ga. 615, 630, 74 S. E. 245; *Guthrie v. Atlantic C. L. R. Co.*, 119 Ga. 663, 46 S. E. 824; *Hawkins v. Central of Georgia R. Co.*, 119 Ga. 159, 46 S. E. 82. **Mass.** — *Mellen v. Whipple*, 1 Gray 317. **Mich.** — *Edwards v. Clement*, 81 Mich. 513, 45 N. W. 1107; *Hicks v. McGarry*, 38 Mich. 667. **Vt.** — *Green v. McDonald*, 75 Vt. 93, 53 Atl. 332.

[a] **Connecticut statute** provides that a mortgagee may sue a grantee of real estate assuming the incumbrance. *Morgan v. Randolph & Clowes Co.*, 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653, under express statute. Compare *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225.

85. **Suit on contract made with a parent for the benefit of a child and the like,** see *infra*, V, C, 6, a, (III), (G).

Where funds are paid to one person for the benefit of another, see *infra*, V, C, 6, a, (III), (F).

Actions by principals on contracts by agents, see the title "Principal and Agent."

86. See *infra*, V, C, 6, b.

87. **U. S.** — *Pennsylvania Steel Co. v. New York City R. Co.*, 198 Fed. 721, 749, 117 C. C. A. 503; *Goodyear Shoe Mach. Co. v. Dancel*, 119 Fed. 692, 56

C. C. A. 300; *Gibson v. Victor T. M. Co.*, 232 Fed. 225, under New Jersey practice. **Ala.**—*Rice v. Rice*, 106 Ala. 636, 17 So. 628. **Ark.**—*Bloom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293. **Cal.**—*Craig v. Fry*, 68 Cal. 363, 9 Pac. 550. **Ill.**—*Clinton Co. v. Stiles*, 197 Ill. App. 505; *Henning v. Quindel*, 195 Ill. App. 393; *Warder B. & G. Co. v. Cummins*, 74 Ill. App. 650. **Ind.**—*Miller v. Farr*, 178 Ind. 36, 98 N. E. 805; *Reynolds v. Louisville, N. A. & C. Ry. Co.*, 143 Ind. 579, 629, 40 N. E. 410. **Ia.**—*Beeson v. Green*, 103 Iowa 406, 72 N. W. 555; *Marble Sav. Bank v. Mesarvey*, 101 Iowa 285, 70 N. W. 198. **Kan.**—*Hardesty v. Cox*, 53 Kan. 618, 36 Pac. 985; *Clay v. Woodrum*, 45 Kan. 116, 123, 25 Pac. 619; *Hume v. Atkinson*, 8 Kan. App. 18, 54 Pac. 15. **Ky.**—*First Nat. Bank v. Doherty*, 156 Ky. 386, 161 S. W. 211; *Matheny v. Chester*, 141 Ky. 790, 133 S. W. 754; *Duncan v. Owensboro Water Co.*, 12 Ky. L. Rep. 35, 12 S. W. 557. **Me.**—*Motley v. Manufacturers' Ins. Co.*, 29 Me. 337, 50 Am. Dec. 591. **Md.**—*Seigman v. Hoffacker*, 57 Md. 321. **Mo.**—*Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Citizens' Bank v. Douglass*, 178 Mo. App. 664, 166 S. W. 601. **Neb.**—*Meyer v. Shamp*, 51 Neb. 424, 71 N. W. 57; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Shamp v. Meyer*, 20 Neb. 223, 29 N. W. 379. **Nev.**—*Miliani v. Tognini*, 19 Nev. 133, 7 Pac. 279; *Bishop v. Stewart*, 13 Nev. 25. **N. J.**—*Styles v. F. R. Long Co.*, 67 N. J. L. 413, 51 Atl. 710; *Joslin v. New Jersey Car S. Co.*, 36 N. J. L. 141. **N. C.**—*Chandler v. Jones*, 173 N. C. 427, 92 S. E. 145; *Gorell v. Greensboro Water Supply Co.*, 124 N. C. 328, 333, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513. *Compare* *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362; *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550. **Pa.**—See *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779. **R. I.**—*Blake v. Atlantic Nat. Bank*, 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874. **Tenn.**—*Ruohs v. Traders' Fire Ins. Co.*, 111 Tenn. 405, 429, 78 S. E. 85, 102 Am. St. Rep. 790 (citing local cases); *O'Conner v. O'Conner*, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33. **Wis.**—*Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912.

[a] **Basis of Rule.**—Whether the rule

is logically deducible from common-law principles is sometimes doubted, but however this may be, it is a useful rule in practice tending to simplify litigation and accomplishing in one action what two would be required to accomplish otherwise. *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198. See also *Lehow v. Simonton*, 3 Colo. 346; *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438.

[b] **Incidental Benefit Insufficient.** *Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58. And see cases cited *infra*, this section.

[c] **Where a stranger to a contract sues in tort**, he must have the same status under the contract as would entitle him to sue for breach of the contract. *Styles v. F. R. Long Co.*, 67 N. J. L. 413, 51 Atl. 710.

[d] **In Pennsylvania** (1), no one can maintain an action in his own name on a contract to which he is not a party with certain exceptions. These exceptions include contracts "where one person agrees with another to pay money to a third, or to deliver some valuable thing, and such third party is the only one interested in the payment or delivery; or where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that purpose; or where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of the vendor." And also in the case where one receives money or property on the promise to pay or deliver to a third person, the third person is fairly said to be a party to the consideration. *First Methodist Episcopal Church v. Isenberg*, 246 Pa. 221, 92 Atl. 141; *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779; *Howes v. Scott*, 224 Pa. 7, 73 Atl. 186; *Freeman v. Pennsylvania R. Co.*, 173 Pa. 274, 33 Atl. 1034. (2) But if no particular fund or means of payment comes into the hands of the promisor out of which payment is to be made, the promise is regarded as for the benefit of the promisee only. *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779; *Adams v. Kuehn*, 119 Pa. 76, 13 Atl. 184.

Manner of pleading promise in action by person beneficially interested, see 11 STANDARD PROC. 983, and supplement thereto.

seal,⁸⁸ although in many states the distinction as to sealed instruments is not recognized.⁸⁹ Many states have statutes authorizing an action by such third person in such cases.⁹⁰

The person for whose benefit the contract is made is sometimes regarded as the real party in interest,⁹¹ notwithstanding the provision

As to right of consignee of freight to sue, see 10 STANDARD PROC. 235.

As to action by beneficiary of life insurance policy, see 14 STANDARD PROC. 18, et seq.

As to right of inhabitants of a municipality to sue on contracts of the municipality, see the title "Municipal Corporations."

Action by recipient of telegraph message on contract with telephone company, see the title "Telegraphs and Telephones."

88. U. S.—Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. ed. 210, in District of Columbia. Ky.—Jenkins v. Morton, 3 Mon. 28. Md.—Seigman v. Hoffacker, 57 Md. 321. Mass. McCarthy v. Metropolitan L. Ins. Co., 162 Mass. 254, 38 N. E. 435. Tenn. Brice v. King, 1 Head 152.

89. Colo.—Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652. Ill.—Webster v. Fleming, 178 Ill. 140, 52 N. E. 975; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467. Minn.—Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257. Mo.—Rogers v. Gosnell, 51 Mo. 466. N. J. Styles v. F. R. Long Co., 67 N. J. L. 413, 51 Atl. 710. But see Joslin v. New Jersey Car S. Co., 36 N. J. L. 141, before statute. N. Y.—Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958; Vulcan Iron Wks. v. Pittsburg E. Co., 144 App. Div. 827, 129 N. Y. Supp. 676. Utah.—Thompson v. Cheesman, 15 Utah 43, 48 Pac. 477, query.

90. See the statutes, and the following: Cal.—Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. 654; Buckley v. Gray, 110 Cal. 339, 347, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862 (contract must be expressly for plaintiff's benefit); Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543. Mont.—McDonald v. American Nat. Bank, 25 Mont. 456, 495, 65 Pac. 896. N. J.—Standard G. P. Corp. v. New England Casualty Co. (N. J. L.), 101 Atl. 281; Chambers v. Philadelphia Pickling Co., 79 N. J. L. 1, 75 Atl. 159;

Edwards v. National Window Glass J. Assn. (N. J. L.), 68 Atl. 800. N. D. McDonald v. Finseth, 32 N. D. 400, 155 N. W. 863. Okla.—Hiner v. Washita Valley Bank, 152 Pac. 112; Eastman L. & I. Co. v. Long Bell L. Co., 30 Okla. 555, 120 Pac. 276. S. D.—Fry v. Ausman, 29 S. D. 30, 135 N. W. 708, Ann. Cas. 1914C, 842, 39 L. R. A. (N. S.) 150. Va.—See McIlvane v. Big Stony L. Co., 105 Va. 613, 54 S. E. 473. W. Va.—See King v. Scott, 76 W. Va. 58, 84 S. E. 954.

[a] Construction and Application.

(1) A statute providing that third persons for whose benefit a contract is expressly made is not confined in its application to a case of a sole beneficiary. Montgomery v. Dorn, 25 Cal. App. 663, 145 Pac. 148. (2) It has been held that this statute does not embrace gifts not perfected or other executory contracts lacking consideration. To come within the meaning and scope of the statute the executory contract must be one whereby the promisor undertakes to pay or discharge some debt or duty which the promisee owes to the third person,—in other words, the third person must sustain such a relation to the contracting party that a consideration may be deemed to have passed from him to the promisee which raises the implication of a promise from the promisor directly to himself. McDonald v. American Nat. Bank, 25 Mont. 456, 495, 65 Pac. 896, followed in Tatem v. Eglanol Min. Co., 45 Mont. 367, 123 Pac. 28. But compare Fry v. Ausman, 29 S. D. 30, 135 N. W. 708, Ann. Cas. 1914C, 842, 39 L. R. A. (N. S.) 150.

[b] Statute of Virginia and West Virginia.—McIlvane v. Big Stony L. Co., 105 Va. 613, 54 S. E. 473; Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. 899; King v. Scott, 76 W. Va. 58, 84 S. E. 954; Johnson v. McClung, 26 W. Va. 659, 671.

91. U. S.—Weed Sewing Mach. Co. v. Wicks, 3 Dill. 261, 29 Fed. Cas. No. 17,348. Ariz.—Curry v. Gila, 6 Ariz. 48, 53 Pac. 4, action by county on bond to secure payment of taxes. Ark.—Bloom

authorizing the promisee, as a trustee of an express trust, to sue without joining the beneficiary.⁹²

There are two classes of cases which may arise under contracts of this character, those where the contract is for the sole benefit of a third person or where he is the sole beneficiary,⁹³ and those where the promisee attempts to relieve himself of some obligation or duty.⁹⁴ The states which allow a recovery in the former class generally allow a recovery in the second class of cases; but in many states, the application of the rule is limited to the second class of cases.⁹⁵

(B.) ACTION BY SOLE BENEFICIARY. — Although the broad statement of the rule is undoubtedly not warranted by the facts in many cases in which it is announced,⁹⁶ it seems that generally the sole beneficiary of a contract between other parties may maintain an action⁹⁷ upon

v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293. **Cal.**—*Horseshoe Pier Amusement Co. v. Sibley*, 157 Cal. 442, 168 Pac. 308; *Buckley v. Gray*, 110 Cal. 339, 347, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862. **Colo.**—*Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652. **Fla.**—*Woodbury v. Tampa Waterworks Co.*, 57 Fla. 249, 49 So. 556, 21 L. R. A. (N. S.) 1037. **Ind.**—*Bryson v. Collmer*, 33 Ind. App. 494, 71 N. E. 229. **Ia.**—*Dorr Catile Co. v. Jewett*, 116 Iowa 93, 89 N. W. 109; *Leach v. Hill*, 106 Iowa 171, 177, 76 N. W. 667. **Kan.**—*Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809. **Ky.**—*Smith v. Smith*, 5 Bush 625, 632; *Tyler v. Exchange Bank*, 9 Ky. L. Rep. 195. **Mo.**—*Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198. **Nev.**—*Painter v. Kaiser*, 27 Nev. 421, 76 Pac. 747, 103 Am. St. Rep. 772, 65 L. R. A. 672; *Miliani v. Tognini*, 19 Nev. 133, 7 Pac. 279. **N. M.**—*Conway v. Carter*, 11 N. M. 419, 431, 68 Pac. 941. **N. Y.**—*Silliman v. Tuttle*, 45 Barb. 171; *Erickson v. Compton*, 6 How. Pr. 471. But compare New York cases *supra*. **N. C.**—*Faust v. Faust*, 144 N. C. 383, 57 S. E. 22.

92. See *supra*, V, C, 4, d, (II).

93. See *infra*, V, C, 6, a, (III), (B).

94. See *infra*, V, C, 6, a, (III), (C).

95. See *infra*, this section.

96. **Minn.**—See *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257. **N. Y.**—*Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327. **Ore.**—*Washburn v. Interstate Inv. Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620.

97. **U. S.**—*National Bank v. Grand*

Lodge, 98 U. S. 123, 25 L. ed. 75; *Central Elec. Co. v. Sprague Elec. Co.*, 120 Fed. 925, 57 C. C. A. 197. **Ill.**—*Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467. **Miss.**—*Canada v. Yazoo & M. V. R. Co.*, 101 Miss. 274, 57 So. 913, where wife paid transportation of husband from another place, the defendant agreeing to notify the husband a ticket was waiting for him. **Pa.**—*Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347; *Freeman v. Pennsylvania R. Co.*, 173 Pa. 274, 33 Atl. 1034; *Edmundson v. Penny*, 1 Pa. 334, 44 Am. Dec. 137; *Blymire v. Boistle*, 6 Watts 182, 31 Am. Dec. 458. **Tenn.**—*Ruohs v. Traders' Fire Ins. Co.*, 111 Tenn. 405, 78 S. E. 85, 102 Am. St. Rep. 790, action by insured on contract of reinsurance for his benefit.

[a] **Illustration.**—When, for a valuable consideration, a sum of money or other valuable thing is to be paid to a third person not a party to the agreement or in privity to the consideration, he may sue on the promise in his own name. **Ind.**—*Lamb v. Donovan*, 19 Ind. 40. **Kan.**—*Kansas Pac. Ry. Co. v. Hopkins*, 18 Kan. 494. **Me.**—*Bohanan v. Pope*, 42 Me. 93. **Neb.**—*Painter v. Kaiser*, 27 Neb. 421, 76 Pac. 747, 103 Am. St. Rep. 772, 65 L. R. A. 672. **Ohio.**—*Emmitt v. Brophy*, 42 Ohio St. 82. **Pa.**—*First M. E. Church v. Isenberg*, 246 Pa. 221, 92 Atl. 141; *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779. **Wis.**—*Sedgwick v. Blanchard*, 164 Wis. 421, 160 N. W. 267; *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543; *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440, 96 Am. St. Rep. 1003, 61 L. R. A. 509.

it in his own name, regardless of the relations between him and the immediate promisee.⁹⁸

(C.) NECESSITY FOR OBLIGATION OWING TO THIRD PERSON. — In order that the third person can maintain the action, it is sometimes required that there be some privity between the person to be benefited by the contract and the promisee, and some obligation or duty owing from the latter which would give the third person a legal or equitable claim to the benefit of the promise or an equivalent from him personally.⁹⁹

[b] **A sister may sue a brother on a promise to the parent** to pay her money in consideration of his receiving a larger amount by will. *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945; *Faust v. Faust*, 144 N. C. 383, 57 S. E. 22.

[c] **Creditor may sue in his own name a contractor for the construction of state or municipal improvements** who agrees to pay all claims that become due. *Cal.*—See *Clark v. Beyrle*, 160 Cal. 306, 116 Pac. 739. *Ind.*—*National Surety Co. v. Foster L. Co.* (Ind. App.), 85 N. E. 489; *Ochs v. Carnahan Co.* (Ind. App.), 76 N. E. 788. *Neb.* *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837. *N. Y.*—*Little v. Banks*, 85 N. Y. 258 (contract to sell state reports and pay damages to person injured by failure to do so); *Cook v. Dean*, 11 App. Div. 123, 42 N. Y. Supp. 1040. *Wis.*—*R. Connor Co. v. Olson*, 136 Wis. 13, 115 N. W. 811.

Right to sue where promisee is a private person, see the title "Mechanics' Liens."

Right of mortgagee to sue purchaser assuming mortgage where his vendor is not liable, see *infra*, V, C, 6, a, (III), (E).

[d] **But a principal cannot sue to recover money improvidently paid by his surety on a void judgment.** *More v. Churchill*, 155 Cal. 368, 101 Pac. 9.

98. *Fry v. Ausman*, 29 S. D. 30, 135 N. W. 708, Ann. Cas. 1914C, 842, 39 L. R. A. (N. S.) 150; *Smith v. Pfleger*, 126 Wis. 253, 105 N. W. 476, 110 Am. St. Rep. 911, 2 L. R. A. (N. S.) 783; *Tweeddale v. Tweeddale*, 116 Wis. 517, 526, 93 N. W. 440, 96 Am. St. Rep. 1003, 61 L. R. A. 509.

[a] **Agreement Creates Privity.**—*Fry v. Ausman*, 29 S. D. 30, 135 N. W. 708, Ann. Cas. 1914C, 842, 39 L. R. A. (N. S.) 150, *overruling* *Fish & Hunter Co. v. New England H. Co.*, 27 S. D. 221, 130 N. W. 841.

99. *Ark.*—*Georgia State Sav. Assn.*

v. Dearing, 128 Ark. 149, 193 S. W. 512; *Little Rock Ry. & Elec. Co. v. Dowell*, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913D, 1086; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218. *Del.*—*Merchants' Union T. Co. v. New Philadelphia G. Co.*, 10 Del. Ch. 18, 83 Atl. 520. *Minn.*—*Gaffney v. Sederberg*, 114 Minn. 319, 131 N. W. 333; *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492; *Union R. S. Co. v. McDermott*, 53 Minn. 407, 55 N. W. 606; *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257. *Mo.* *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843; *Burton Mach. Co. v. Ruth*, 196 Mo. App. 459, 194 S. W. 526; *Uhrie v. Globe Surety Co.* (Mo. App.), 166 S. W. 845. But see *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907. *Mont.*—*Tatem v. Eglanol* Min. Co., 45 Mont. 367, 123 Pac. 28; *McDonald v. American Nat. Bank*, 25 Mont. 456, 65 Pac. 896. *N. Y.*—*Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Lawrence v. Fox*, 20 N. Y. 268; *Vulcan Iron Wks. v. Pittsburgh E. Co.*, 144 App. Div. 827, 129 N. Y. Supp. 676; *Haefelin v. McDonald*, 96 App. Div. 213, 89 N. Y. Supp. 395. *Ore.*—*Young Men's Assn. v. Croft*, 34 Ore. 106, 55 Pac. 439, 75 Am. St. Rep. 568; *Washburn v. Interstate Inv. Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620. *S. C.*—*Mack Mfg. Co. v. Massachusetts Bond & Ins. Co.*, 103 S. C. 55, 87 S. E. 439. *Utah.*—*Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623.

[a] **Rule Stated.**—To give a third party an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to

There must be a relation of debtor and creditor between the promisee and the third person,¹ or such a relation that makes the performance of the promise at the instance of the third person a satisfaction of some legal or equitable duty to him from the promisee.² That it would benefit the third person to have the contract enforced,³ or that there is a moral obligation on the part of the promisee to the third person,⁴ is not sufficient to enable him to enforce the promise by action.

(D.) CONTRACTS TO PAY DEBTS OF PROMISEE. — A creditor of a promisee can sue the promisor on his promise to pay the promisee's debt;⁵

the benefit of the promise, or an equivalent from him personally. There need be no privity between the promisor and the party claiming the benefit of the undertaking; neither is it necessary that the latter should be privy to the consideration of the promise. *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

[b] "It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim." *St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 34 Am. St. Rep. 695.

1. *Durnherr v. Rau*, 135 N. Y. 219, 222, 32 N. E. 49; *Carter v. Holahan*, 92 N. Y. 498; *Lawrence v. Fox*, 20 N. Y. 268; *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. 497.

[a] Where one person receives a fund or property from another, and instead of paying him therefor he is allowed to retain the consideration under an agreement to pay the creditors of the other party; or when it is agreed between the parties to a contract, there being a valuable consideration therefor, that the promisor may discharge his debt to the promisee by paying it to some third person to whom the promisee owes some legal duty or obligation, the third person may maintain an action on the contract in his own name. But where there is no fund, debt, or obligation owing from the promisor, but only an executory contract to advance his own money to pay the debts of another not a party to the contract, the doctrine is not applicable as the promise is not for the direct benefit of the creditors. *Washburn v. Interstate Inv. Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620.

2. *Durnherr v. Rau*, 135 N. Y. 219, 222, 32 N. E. 49. See *infra*, V, C, 6, a, (III), (G).

3. *Durnherr v. Rau*, 135 N. Y. 219, 222, 32 N. E. 49; *Haefelin v. McDonald*, 96 App. Div. 213, 89 N. Y. Supp. 395.

4. *Durnherr v. Rau*, 135 N. Y. 219, 222, 32 N. E. 49; *Haefelin v. McDonald*, 96 App. Div. 213, 89 N. Y. Supp. 395.

5. U. S.—*Fish v. First Nat. Bank*, 150 Fed. 524, 80 C. C. A. 266. Ala.—*Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777. Cal.—*Montgomery v. Dorn*, 25 Cal. App. 666, 145 Pac. 148; *Hall-Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617. Colo.—*Burson v. Bogart*, 49 Colo. 410, 113 Pac. 516; *Lehow v. Simonton*, 3 Colo. 346. Fla.—*Wright v. Terry*, 23 Fla. 160, 2 So. 6. Ia.—*Malanaphy v. Fuller & Johnson Mfg. Co.*, 125 Iowa 719, 101 N. W. 640, 103 Am. St. Rep. 332. Kan.—*Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809. Ky.—*Weber-Wolters D. G. Co. v. Scott*, 172 Ky. 280, 189 S. W. 223. Minn.—*Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; *Maxfield v. Schwartz*, 43 Minn. 221, 45 N. W. 429. Mo.—*Rogers v. Gosnell*, 58 Mo. 589; *Boone County Lumb. Co. v. Niedermeyer*, 187 Mo. App. 180, 173 S. W. 57. Mont.—*McDonald v. American Nat. Bank*, 25 Mont. 456, 495, 65 Pac. 896. Neb.—*Meyer v. Shamp*, 51 Neb. 424, 71 N. W. 57. N. J.—*Chambers v. Philadelphia Pickling Co.*, 79 N. J. L. 1, 75 Atl. 159. N. Y.—*Hannigan v. Allen*, 127 N. Y. 639, 27 N. E. 402, 3 Silv. 442; *Lawrence v. Fox*, 20 N. Y. 268. Ohio.—*Trimble v. Strother*, 25 Ohio St. 378. Okla.—*Staver Carriage Co. v. Jones*, 32 Okla. 713, 123 Pac. 148. Ore.—*Washburn v. Interstate Inv. Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620. R. I.—*Kehoe v. Patton*, 23 R. I. 360, 50 Atl. 655. Tex.—*Spann v. Cochran & Ewing*, 63 Tex. 240. Wash.—*Union Mach. & S. Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183; *Johnson v. Shuey*,

and this has been held to be true where the promisor agreed to pay all the promisee's debts generally.⁶ But in some states the creditor cannot maintain the action unless some fund or assets come into the hands of the promisor out of which payment is to be made.⁷

(E.) WHERE GRANTEE AGREES TO PAY DEBTS OR LIENS. — A creditor may usually sue the purchaser of real or personal property who agrees to pay the incumbrance thereon or a debt of the grantor;⁸ but it has been

40 Wash. 22, 82 Pac. 123; Nordby v. Winsor, 24 Wash. 535, 64 Pac. 726. Wis.—Winninghoff v. Wittig, 64 Wis. 180, 24 N. W. 912; Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67.

Compare *supra*, V, C, 6, a, (II).

[a] The creditor is not obliged to invoke this rule of law allowing him to sue another person who promises his debtor to pay the debt. Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671; Winninghoff v. Wittig, 64 Wis. 180, 24 N. W. 912.

[b] Assumption of the debts (1) of a partnership by an incoming partner or by the partners remaining on the retirement of a partner is regarded as a contract for the benefit of the creditor on which he can sue. U. S.—Fish v. First Nat. Bank, 150 Fed. 524, 80 C. C. A. 266; *In re* Downing, 1 Dill. 33, 7 Fed. Cas. No. 4,044. Colo.—Lehow v. Simonton, 3 Colo. 346. Ind.—Way v. Fravel, 61 Ind. 162; Haggerty v. Johnston, 48 Ind. 41; Case v. Ellis, 4 Ind. App. 224, 30 N. E. 907. Ia.—Malanaphy v. Fuller & Johnson Mfg. Co., 125 Iowa 719, 101 N. W. 640, 106 Am. St. Rep. 332; Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223, incoming partner. Mo.—Meyer v. Lowell, 44 Mo. 328. Neb.—McKillip v. Cattle, 12 Neb. 477, 11 N. W. 735. Pa.—Bellas v. Eagely, 19 Pa. 273. See Kountz v. Hothouse, 85 Pa. 235. Wis.—Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122; Kimball v. Noyes, 17 Wis. 695. (2) But where a promisor agrees to pay a portion of the indebtedness of a firm without naming any particular creditors, no creditor can say the contract is for his benefit and sue on the promise. Serviss v. McDonnell, 107 N. Y. 260, 14 N. E. 314; Wheat v. Rice, 97 N. Y. 296. See generally the title "Partnership."

6. Barker v. Pullman's Palace Car Co., 124 Fed. 555; Central Electric Co. v. Sprague Elec. Co., 120 Fed. 925, 57 C. C. A. 197; Collier v. De Brigard, 80 N. J. L. 94, 77 Atl. 513.

7. Sweeney v. Houston, 243 Pa. 542,

90 Atl. 347, L. R. A. 1915A, 779; Delp v. Bartholomay Brew. Co., 123 Pa. 42, 15 Atl. 871; Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184. See Parker v. Jeffery, 26 Ore. 186, 37 Pac. 712.

8. U. S.—Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. ed. 613. Colo.—Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652. Ill.—Hartman v. Pistorius, 248 Ill. 568, 94 N. E. 131; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975. Ind.—McCoy v. McCoy, 32 Ind. App. 38, 69 N. E. 193, 102 Am. St. Rep. 223. Ia.—Beeson v. Green, 103 Iowa 406, 72 N. W. 555; Thompson v. Bertram, 14 Iowa 476. Kan.—Rouse v. Bartholomew, 51 Kan. 425, 32 Pac. 1088. Minn.—Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Barnes v. Hekla F. Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438. Miss.—Barnes v. Jones, 111 Miss. 337, 71 So. 573, vendor's lien. N. J.—Joslin v. New Jersey Car S. Co., 36 N. J. L. 141; Berry v. Doremus, 30 N. J. L. 399. N. Y.—Clark v. Howard, 150 N. Y. 232, 44 N. E. 695; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327. N. D.—McDonald v. Finseth, 32 N. D. 400, 155 N. W. 863; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125. Pa.—Gregg v. Allen, 130 Pa. 611, 18 Atl. 1020, 25 Wkly. N. Cas. 281. Tenn.—O'Conner v. O'Conner, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33. Utah.—Brown v. Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629; Thompson v. Cheesman, 15 Utah 43, 48 Pac. 477.

[a] Reason.—Courts rest their decision upon the ground that the contract is made for his benefit. Cal.—Wormouth v. Hatch, 33 Cal. 121. Ill.—Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467. Minn.—Brown v. Stillman, 43 Minn. 126, 45 N. W. 2. Mo.—Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907. Neb.—Hare v. Murphy, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851. N. Y.—Thorp v. Keokuk Coal Co., 48 N. Y. 253; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327. Ore.—Young Men's C. Assn. v. Croft, 34 Ore. 106, 55 Pac. 439, 75 Am. St. Rep. 568. Utah.

held that he must enforce his promise in equity on the doctrine of subrogation to securities.⁹

(F.) WHERE FUNDS COME INTO HANDS OF PROMISOR FOR THIRD PERSON. If under a contract between two persons some property, fund, thing, or assets come into the promisor's hands or under his control which in equity belong to the third person, he may sue in his own name at law.¹⁰ The suit in this case is based upon the implied contract rather than the express promise, however,¹¹ and may therefore be maintained even in those states denying the right of a third person to sue on a contract for his benefit.¹²

McKay v. Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623.

[b] Even when the vendor is not liable for the incumbrance (Cal. Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. 654; Wormouth v. Hatch, 33 Cal. 121; Montgomery v. Dorn, 25 Cal. App. 666, 145 Pac. 148. Colo.—Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625. Ill.—Daub v. Englebach, 109 Ill. 267; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467. Ia.—Marble Sav. Bank v. Mesarvey, 101 Iowa 285, 70 N. W. 198. Mo.—Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907. See Winn v. Lippincott Inv. Co., 125 Mo. 528, 28 S. W. 998; Saunders v. McClintock, 46 Mo. App. 216. Neb. Hare v. Murphy, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; Dodd v. Skelton, 2 Neb. [Unof.] 475, 89 N. W. 297. Pa.—Merriman v. Moore, 90 Pa. 78. Utah.—McKay v. Ward, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623; Montgomery v. Rief, 15 Utah 495, 50 Pac. 623. Wis.—Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069), (2) although the right of action in the latter case is sometimes denied for then the requisite obligation is lacking. Kan.—Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58. Minn.—Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2. N. Y.—Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Dingeldein v. Third Avenue R. Co., 37 N. Y. 575; Barr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327. Ore.—Portland Trust Co. v. Nunn, 34 Ore. 166, 55 Pac. 441; Young Men's C. Assn. v. Croft, 34 Ore. 106, 55 Pac. 439, 75 Am. St. Rep. 568. (3) But some courts allow a recovery in such case, even though as to contracts generally they require some obligation or duty owing from the promisee to the third person. McKay v. Ward, 20 Utah

149, 57 Pac. 1024, 46 L. R. A. 623; Montgomery v. Rief, 15 Utah 495, 50 Pac. 623.

9. See the following: U. S.—Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. ed. 210 (in District of Columbia); Keller v. Ashford, 133 U. S. 610, 620, 10 Sup. Ct. 494, 33 L. ed. 667; National Bank v. Grand Lodge, 98 U. S. 123, 25 L. ed. 75. Mich.—Corning v. Burton, 102 Mich. 86, 96, 62 N. W. 1040; Unger v. Smith, 44 Mich. 22, 5 N. W. 1069; Hicks v. McGarry, 33 Mich. 667; Crawford v. Edwards, 33 Mich. 354. N. J.—Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650. S. C.—Redfearn v. Craig, 57 S. C. 534, 35 S. E. 1024. Vt.—Congregational Society v. Flagg, 72 Vt. 248, 47 Atl. 782. Va.—Osborne v. Cabell, 77 Va. 462.

And see the title "Subrogation."

As to suit in equity, see *infra*, V, C, 6, b.

10. U. S.—National Bank v. Grand Lodge, 98 U. S. 123, 25 L. ed. 75. Me. Bohanan v. Pope, 42 Me. 93. Mo. Bank of Laddonia v. Bright-Coy Com. Co., 139 Mo. App. 110, 120 S. W. 648. N. H.—Warren v. Batchelder, 16 N. H. 580. Ore.—Feldman v. McGuire, 34 Ore. 309, 55 Pac. 872. Utah.—Montgomery v. Rief, 15 Utah 495, 50 Pac. 623.

As to right to sue in equity to enforce trust arising from this state of facts, see the title "Trusts and Trustees."

11. National Bank v. Grand Lodge, 98 U. S. 123, 25 L. ed. 75; Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225.

12. Conn.—Baxter v. Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514; Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225. Ga. Hawkins v. Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82. Mass.—Ex-

(G.) WHERE THIRD PERSON IS CLOSELY RELATED TO PROMISEE. — Although there are authorities to the contrary,¹² near relationship of the third person and the promisee by blood,¹⁴ and perhaps by affinity,¹⁵ has been held to authorize suits by the third person upon contracts involving the duties arising out of such relationship; but it is otherwise as to contracts generally.¹⁶

b. *In Suits in Equity*. — In equity a third person for whose benefit a contract is made may sue thereon in his own name.¹⁷

D. NECESSITY FOR LEGAL CAPACITY TO SUE. — In addition to the other requisites,¹⁸ a party plaintiff must have a legal capacity to sue;¹⁹ but an absence of this capacity does not go to the jurisdiction of the court,²⁰ nor to the merits of the action.²¹

change Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Mellen *v.* Whipple, 1 Gray 317.

Compare Borden *v.* Boardman, 157 Mass. 410, 32 N. E. 469; Peacock *v.* Williams, 98 N. C. 324, 4 S. E. 550.

Minority rule, see *supra*, V, C, 6, a, (11).

13. Ga.—Cooper *v.* Claxton, 122 Ga. 596, 50 S. E. 399; Gunter *v.* Mooney, 72 Ga. 205. Mass.—Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43. But see Mellen *v.* Whipple, 1 Gray 317. Mich.—Wheeler *v.* Stewart, 94 Mich. 445, 54 N. W. 172, action by wife for value of husband's services. R. I.—Wilbur *v.* Wilbur, 17 R. I. 295, 21 Atl. 497.

14. Conn.—Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 245, 41 L. R. A. 514; Meech *v.* Ensign, 49 Conn. 191, 44 Am. Rep. 225. Ky. Clarke *v.* McFarland's Exrs., 5 Dana 45. N. J.—Buchanan *v.* Tilden, 5 App. Div. 354, 39 N. Y. Supp. 228.

Relation of father and child is sufficient. See the title "Parent and Child."

[a] Relation of aunt and niece is not sufficient. Sullivan *v.* Sullivan, 161 N. Y. 554, 56 N. E. 116.

15. See Buchanan *v.* Tilden, 158 N. Y. 109, 52 N. E. 724, 70 Am. St. Rep. 454, 44 L. R. A. 170 (although not directly deciding the question, it holds the equities of the wife were such when considered with the duty of the husband to support, that she could sue on the promise); Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517, where wife sued on mortgage executed to husband conditioned to support her.

16. Durherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49 (where the facts were such that the husband was not under a

duty to protect the wife's dower); Buchanan *v.* Tilden, 5 App. Div. 354, 39 N. Y. Supp. 228, contract to furnish wife with an independent sum.

17. Ind.—Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671. Ky.—Smith *v.* Smith, 5 Bush 625. Mich.—Palmer *v.* Bray, 136 Mich. 85, 98 N. W. 849. Pa. Zell's Appeal, 111 Pa. 532, 6 Atl. 107. Vt.—Green *v.* McDonald, 75 Vt. 93, 53 Atl. 332. Va.—Castleman *v.* Berry, 86 Va. 604, 10 S. E. 884, even where contract under seal.

[a] Where property placed in the hands of an assignee or trustee to be sold and the proceeds applied to the payment of creditors. Hawkins *v.* Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82.

[b] But a person for whose benefit a contract is in part made, who is not a party to it or its consideration, and who is not otherwise in privity with a party, cannot have it reformed in equity. Cook *v.* Walker, 21 Ga. 370, 68 Am. Dec. 461. See generally the title "Reformation."

18. Legal entity, see *supra*, V, B.

Legal interest, see *supra*, V, C.

19. See *infra*, this section.

In admiralty, see 1 STANDARD PROC. 427.

Want of legal capacity to sue as a ground of demurrer, see 6 STANDARD PROC. 894.

20. Crittenden *v.* Superior Court, 166 Cal. 340, 136 Pac. 287.

Waiver of objection, see *infra*, XIV, C.

21. Crowl *v.* American Linseed Co., 255 Mo. 305, 164 S. W. 618; Wiesmann *v.* Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. (N. S.) 961, absence of legal capacity not fatal to the action.

What Is Legal Capacity To Sue. — A person's capacity to sue must not be confused with right of action.²² The requirement of a legal capacity means that the plaintiff shall be free from general disability such as infancy, insanity, coverture and the like;²³ and that he shall have title to the character in which he sues.²⁴ Some courts have extended

22. *In re Nagao*, 4 Alaska 678.

[a] **It pertains to the person (1)** desiring to sue (U. S.—*Meeks v. Vassault*, 3 Sawy. 206, 16 Fed. Cas. No. 9,393. Cal.—*California Steam Nav. Co. v. Wright*, 8 Cal. 585. Mont.—*Berkin v. Marsh*, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565. Wyo.—*Littleton v. Burgess*, 16 Wyo. 58, 71, 91 Pac. 832, 16 L. R. A. [N. S.] 49), (2) and not to the cause of action or his relation to it. U. S.—*Meeks v. Vassault*, 3 Sawy. 206, 16 Fed. Cas. No. 9,393. Ind.—*Pence v. Aughe*, 101 Ind. 317; *Dale v. Thomas*, 67 Ind. 570. Kan.—*Howell v. Iola Portland Cement Co.*, 86 Kan. 450, 121 Pac. 346. Okla.—*Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383. Wyo.—*Littleton v. Burgess*, 16 Wyo. 58, 71, 91 Pac. 832, 16 L. R. A. (N. S.) 49.

23. *Meeks v. Vassault*, 3 Sawy. 206, 16 Fed. Cas. No. 9,393. See also 6 STANDARD PROC. 895; and such titles as "Incompetents;" "Infants;" "In-sane Persons."

Right of alien enemy to sue, see 1 STANDARD PROC. 788; and the title "War." Form of plea in abatement, see 9 STANDARD PROC. 2.

Suits by married women, see the title "Husband and Wife." Plea in abatement as to coverture, see 9 STANDARD PROC. 2, 3.

Capacity of foreign executor to sue, see 8 STANDARD PROC. 748.

Right of foreign guardian to sue, see 10 STANDARD PROC. 900.

24. Cal.—*Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Swamp & Overflowed Land Dist. No. 110 v. Feck*, 60 Cal. 403. Ind.—*Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567. Mo.—*Gruender v. Frank*, 267 Mo. 713, 186 S. W. 1004. Mont.—*Poe v. Sheridan County*, 52 Mont. 279, 157 Pac. 185. N. Y.—*Ward v. Petrie*, 157 N. Y. 301, 311, 51 N. E. 1002, 68 Am. St. Rep. 790. Ohio.—*Haskins v. Alcott*, 13 Ohio St. 210. Okla.—*Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383. Ore.—*Scholl v. Belcher*, 63 Ore. 310, 127 Pac. 968. Vt.—*Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

[a] **An objection that a foreign executor** cannot maintain an action without being first appointed by a court of the forum as a representative of the estate goes to his capacity to sue. *Anthes v. Anthes*, 21 Idaho 305, 121 Pac. 553. As to executors and administrators, see 8 STANDARD PROC. 744, et seq.

[b] **Where statute authorizes an unincorporated company doing business within the state to sue**, a company not so doing business cannot sue. *Haskins v. Alcott*, 13 Ohio St. 210; *Beers & Co. v. Gurney*, 14 Ohio Cir. Ct. 82.

[c] **Partnerships and associations who fail to file certificates required** have not title to the character in which they sue. Cal.—*Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313; *Spreckels v. Grace Darling H. Assn.*, 28 Cal. App. 646, 153 Pac. 718. Compare *Nicholson v. Auburn G. M. & M. Co.*, 6 Cal. App. 547, 92 Pac. 651, holding statute refers to maintaining not commencing of action. Neb.—*Meyer v. Omaha Furn. & C. Co.*, 76 Neb. 405, 107 N. W. 767. Ohio.—*Kinsey & Co. v. Ohio Southern Ry. Co.*, 3 Ohio Dec. 249, 2 Ohio N. P. 175. Compare *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 539, 59 N. E. 221, in which the court held that a judgment rendered is in effect no judgment as there is in law no party plaintiff. Ore.—*Beamish v. Noon*, 76 Ore. 415, 149 Pac. 522. Wash.—*Pierson v. Northern Pac. Ry. Co.*, 61 Wash. 450, 112 Pac. 509. See also the title "Partnership." Method of objecting to failure to file certificate, see *infra*, XIV, C, 2.

[d] **Foreign corporations who have failed to pay a license fee or do other conditions precedent.** *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031. See generally 5 STANDARD PROC. 725.

[e] **That a person suing as a corporation is not such** has been held an allegation of legal incapacity to sue. *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337. As to raising issue of in-

the objection of want of legal capacity to sue to cases where the plaintiff does not possess a legal entity.²⁵ It is clear, however, that the term has no reference to a want of authority to bring an action,²⁶ or to a failure to show a right of action in the plaintiff.²⁷ And an objection that the plaintiff is not the real party in interest,²⁸ or that the cause of action had not accrued at the commencement of the action,²⁹ does not present a question as to want of legal capacity to sue.

VI. WHO MAY BE PARTIES DEFENDANT. — A. NECESSITY OF LEGAL ENTITY. — Except in actions in rem, in which an action may be brought against a thing,³⁰ it is a general rule that suits and actions must be brought against persons, either natural or artificial, that is individuals or corporations.³¹ In the absence of statute quasi-artificial persons, such as partnerships and associations, are not persons and cannot be sued as such.³² But statutes often authorize actions against

corporation generally, see 5 STANDARD PROC. 645.

25. See *infra*, this note.

[a] As where a partnership or association sues under its trade name in the absence of a statute allowing it to do so. *Mutual Life Co. v. Inman Park Presby. Church*, 111 Ga. 677, 36 S. E. 880; *St. Paul Typothetæ v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725.

[b] “& Co.”—But where an action is brought in the name of a person followed by the words “& Co.,” a demurrer for legal incapacity of plaintiff to sue will not lie. In case the name does not indicate the Christian name of the person, a different case is presented as there is a failure to show that there is a legal entity. *John H. Brookmire v. Rosa*, 34 Neb. 227, 51 N. W. 840.

26. *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305; *Poe v. Sheridan County*, 52 Mont. 279, 157 Pac. 185.

27. *Board of Comrs. of Tipton Co. v. Kimberlin*, 108 Ind. 449, 9 N. E. 407; *Gruender v. Frank*, 267 Mo. 713, 186 S. W. 1004.

28. *Van Zandt v. Grant*, 67 App. Div. 70, 73 N. Y. Supp. 600.

29. *Berkin v. Marsh*, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

30. *The Steamboat M. Burns*, 9 Wall. (U. S.) 237, 19 L. ed. 620.

Proceedings in rem, see the title “Proceedings in Rem.”

Right of res to appeal, see 1 STANDARD PROC. 82.

31. *Ga.*—*Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978; *Barbour v. Albany*

Lodge, 73 Ga. 474. *Ill.*—*American Exchange Bank v. Mitchell*, 179 Ill. App. 612. *Ia.*—*White v. Road District*, 9 Iowa 202, road district not treated as corporation cannot be made a party as such. *Ky.*—*Soper v. Clay City Lumb. Co.*, 21 Ky. L. Rep. 933, 53 S. W. 267, person doing business under trade name cannot be sued in such name. *Mo.*—*Metropolitan St. Ry. Co. v. Adams Express Co. (Mo. App.)*, 130 S. W. 101. *N. C.*—*Nelson v. Atlantic Coast Line R. Co. Relief Dept.*, 147 N. C. 103, 60 S. E. 724, department of corporation which is a mere agency cannot be made defendant. *Tex.*—*Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409.

Validity of judgment, see 14 STANDARD PROC. 782.

Necessity of plaintiff's possessing legal entity, see *supra*, V, B.

[a] A dead man or his estate cannot be a defendant. *Knox v. Greenfield Estate*, 7 Ga. App. 305, 66 S. E. 805.

Corporations as parties defendant, see 5 STANDARD PROC. 546.

32. *U. S.*—*American Steel & W. Co. v. Wire Drawers' & D. M. Unions*, 90 Fed. 598, unions. *Ind.*—*Karges Furniture Co. v. Amalgamated W. L. Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, labor union. *Ky.*—*United Mine Workers v. Cromer*, 159 Ky. 605, 167 S. W. 891. *Mass.*—*Pickett v. Walsh*, 192 Mass. 572, 589, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. (N. S.) 1067 (labor union); *Edwards v. Warren L. & G. Wks.*, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791. *Mo.*—*Metropolitan St. Ry. Co. v. Adams Express Co. (Mo. App.)*, 130 S. W. 101; *Adams Express Co. v. Metropolitan St. R. Co.*,

quasi-artificial persons in the firm or association name with varying limitations.³³ These statutes, being cumulative merely, do not prevent the bringing of an action against the individuals composing the firm or association.³⁴

B. NECESSITY OF INTEREST. — 1. At Common Law. — In actions on contract only those persons should be made defendants who are subject to a legal liability under it.³⁵ In personal or mixed actions, in form *ex delicto*, the persons committing the injury either by himself or agent is in general to be made the defendant.³⁶ Real actions can only be sup-

126 Mo. App. 471, 103 S. W. 583, joint stock company. **Tex.**—*Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409 (partnership); *Standard L. & P. Co. v. Munsey*, 33 Tex. Civ. App. 416, 76 S. W. 931; *Burton v. Grand Rapids School Furn. Co.*, 10 Tex. Civ. App. 270, 31 S. W. 91. **Utah.**—*Pearson v. Anderburg*, 28 Utah 495, 80 Pac. 307.

[a] As there is no legal entity (1) before the court, the whole proceeding is void *ab initio* (*Metropolitan St. Ry. Co. v. Adams Express Co.* [Mo. App.], 130 S. W. 101; *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409; *Standard L. & P. Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931), although (2) it has been held that in the absence of specific objection, the defect is waived. *United Mine Workers v. Cromer*, 159 Ky. 605, 167 S. W. 891. Manner of raising objection, see *infra*, XIV, A.

33. See the statutes, and the following: **Ala.**—*Moore v. Burns & Co.*, 60 Ala. 269. **Cal.**—*King v. Randlett*, 33 Cal. 218; *Gilman & Co. v. Cosgrove*, 22 Cal. 356. **Ga.**—*Western & Atlantic R. R. Co. v. Dalton Marble Wks.*, 122 Ga. 774, 50 S. E. 978. **Minn.**—*St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725. **Neb.**—*Meyer v. Omaha Furn. & C. Co.*, 76 Neb. 405, 107 N. W. 767; *Cleland v. Anderson*, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136 (a voluntary unincorporated association which is not organized to carry on some business or hold property in the state and does not do so cannot be sued as such); *Burlington & M. R. R. Co. v. Dick & Son*, 7 Neb. 242. **N. J.**—*Saunders v. Adams Express Co.*, 71 N. J. L. 270, 57 Atl. 899. **Ohio.**—*Haskins v. Alcott*, 13 Ohio St. 210. **Vt.**—*Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938.

[a] **Statute Strictly Construed.** *King v. Randlett*, 33 Cal. 318; *Meyer*

v. Omaha Furn. & C. Co., 76 Neb. 405, 107 N. W. 767; *Church v. Callahan*, 49 Neb. 542, 63 N. W. 932; *Burlington & Missouri River R. Co. v. Dick & Son*, 7 Neb. 242.

[b] Such proceedings are in the nature of proceedings in rem, and judgment can be entered only against the firm or association, not against the individual members. *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409.

[c] The *lex fori* determines whether a quasi artificial person can be sued as an entity. *Saunders v. Adams Express Co.*, 71 N. J. L. 270, 57 Atl. 899. See generally the title "Remedy."

[d] **In What Name.**—A statute allowing an association to be sued in the company name does not permit suit against it in a name which is not the name under which it transacts business. *King v. Randlett*, 33 Cal. 318.

Actions against associations in association name, see 3 STANDARD PROC. 162; and the title "Religious Societies."

Suits against partnerships in the firm name, see the title "Partnership."

As to whether a labor union is within a statute relating to suits against persons associated in business under a common name, see the title "Labor Unions."

34. **Ala.**—*Cassells' Mills v. Strater Bros. Grain Co.*, 166 Ala. 274, 51 So. 969. **Colo.**—*Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac. 234. **Ia.**—*McCloskey v. Strickland*, 7 Iowa 259. **Ohio.**—*Whitman v. Keith*, 18 Ohio St. 134. **Wash.**—*Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059.

As to partnership, see the title "Partnership."

35. See 11 STANDARD PROC. 972.

36. 1 Chitty Pl. 86. See generally the title "Torts."

ported against the claimant of the freehold.³⁷

2. In equity all necessary and indispensable parties who are not complainants should and must be made defendants; and all formal and proper parties, who are not made complainants may be made defendants.³⁸

3. Under the Code. — The codes provide that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the questions involved therein.³⁹ As in the case of plaintiffs,⁴⁰ actions may be brought against the real party in interest,⁴¹ the trustee of an express trust,⁴² or the executor or administrator,⁴³ or the person expressly authorized to sue,⁴⁴ without joining the person represented by him. It affords no ground for abatement that a person really or nominally interested is made defendant instead of suing as plaintiff.⁴⁵

Conversely one cannot be made a defendant who has no interest in the cause of action sued on and against whom no relief is sought.⁴⁶

4. In Suits Against States and Foreign Governments. — A sovereign state is immune from the jurisdiction of its own courts and cannot be made a defendant in an action without its consent.⁴⁷ Similarly courts decline to exercise their jurisdiction in actions against foreign

37. 1 Chitty Pl. 86. See generally the title "Real and Mixed Actions."

38. See 8 STANDARD PROC. 457.

39. See the codes, and *Bush v. Block*, 193 Mo. App. 704, 187 S. W. 153.

[a] Code section is permissive in its terms. *Penn v. Hayward*, 14 Ohio St. 302.

[b] While it is the embodiment of the equity practice (*Waldorph v. Bortle*, 4 How. Pr. [N. Y.] 358; *Penn v. Hayward*, 14 Ohio St. 302; *Lahman v. Cincinnati Gas Light & C. Co.*, 11 Ohio Dec. 215), (2) It is applicable to every civil action including actions of law as well as suits in equity. *Waldorph v. Bortle*, 4 How. Pr. (N. Y.) 358.

Whether this code section relates to amendments, see *infra*, XI, A, 1, c.

40. See *supra*, V, C, 4.

41. *Benedicto v. Yulo*, 26 Phil. Isl. 160. See also *Ferguson v. Epperly*, 127 Iowa 214, 103 N. W. 94.

General rule as to real parties in interest, see *supra*, V, C, 4.

[a] Attorneys for real parties in interest should not be made defendants. *Benedicto v. Yulo*, 26 Phil. Isl. 160.

42. Kan.—*Harper v. Hendricks*, 49 Kan. 718, 725, 31 Pac. 734. N. Y. *Lawrence v. Schaefer*, 19 Misc. 239, 42 N. Y. Supp. 992; *Mead v. Mitchell*, 5

Abb. Pr. 92, 106, *affirmed*, 17 N. Y. 210, 72 Am. Dec. 455. Wash.—*Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118.

Who is a trustee of an express trust, see *supra*, V, C, 4, d, (II).

43. *Lawrence v. Schaefer*, 19 Misc. 239, 42 N. Y. Supp. 992.

Actions against executors and administrators, see 8 STANDARD PROC. 752.

44. *Lawrence v. Schaefer*, 19 Misc. 239, 42 N. Y. Supp. 992.

Actions by persons expressly authorized, see *supra*, V, C, 4, d, (III).

45. *Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587.

46. *Conklin v. Thurston*, 18 Ind. 290; *Davis v. First Congregational Soc.*, 65 N. Y. 278; *Lexington & B. S. R. R. Co. v. Goodman*, 25 Barb. (N. Y.) 469, 15 How. Pr. 85, 5 Abb. Pr. 493.

[a] Rule not affected by a statute authorizing a plaintiff to designate defendants by fictitious names. *Tyrrel v. Seamen's Bank*, 57 App. Div. 331, 68 N. Y. Supp. 275, statute contemplates an action commenced and a defendant sued or intended to be sued whose name is unknown.

47. See the title "States and Territories."

Right to levy on public property and institutions, see 15 STANDARD PROC. 851.

sovereigns, whether the action is brought against them directly,⁴⁸ or indirectly by proceeding against their properties,⁴⁹ or against the persons or properties of their ambassadors and ministers.⁵⁰ A foreign sovereign or sovereign state may consent to be sued, however,⁵¹ and may be joined as defendant, it has been held, not for the purpose of subjecting it to the coercive power of a court, but to give it an opportunity to appear if it desires to do so.⁵²

5. In Suits Against Counties.—In the absence of statute a county cannot be sued;⁵³ but some statutes have made them liable to suit.⁵⁴

48. *Manning v. Nicaragua*, 14 How. Pr. (N. Y.) 517; *Hassard v. United States of Mexico*, 29 Misc. 511, 61 N. Y. Supp. 939 (*affirmed* in 46 App. Div. 623, 61 N. Y. Supp. 939, and in 173 N. Y. 645, 66 N. E. 1110); *Wadsworth v. Queen of Spain*, 17 Q. B. 171, 215, 117 Eng. Reprint 1246, 1262; *De Haber v. Queen of Portugal*, 17 Q. B. 171, 206, 117 Eng. Reprint 1246, 1259; *Vavasseur v. Krupp*, 9 Ch. Div. 351, 23 Wkly. Rep. 366. See *Schooner Exchange v. McFaddon*, 7 Cranch (U. S.) 116, 3 L. ed. 287; *Mason v. Intercolonial Ry.*, 197 Mass. 349, 83 N. E. 876, 125 Am. St. Rep. 371, 16 L. R. A. (N. S.) 276.

[a] **Doctrine is based on sound consideration of international comity and peace.** *Hassard v. United States of Mexico*, 29 Misc. 511, 61 N. Y. Supp. 939, *affirmed* in 46 App. Div. 623, 61 N. Y. Supp. 939, and 173 N. Y. 645, 66 N. E. 1110.

[b] **Although he has carried on a private trading venture, an independent sovereign cannot be sued personally.** *The Parlement Belge*, L. R. 5 Prob. Div. 197, 220, 42 L. T. N. S. 273, 28 Wkly. Rep. 642.

[c] **Action will be dismissed** (1) on suggestion of a friend of the court (*Mason v. Intercolonial Ry.*, 197 Mass. 349, 83 N. E. 876, 125 Am. St. Rep. 371, 16 L. R. A. [N. S.] 276), or (2) the United States Attorney. *Hassard v. United States of Mexico*, 29 Misc. 511, 61 N. Y. Supp. 939, *affirmed* in 46 App. Div. 623, 61 N. Y. Supp. 939, and 173 N. Y. 645, 66 N. E. 1110.

[d] **Prohibition may be granted at the instance of a stranger.** *Wadsworth v. Queen of Spain*, 17 Q. B. 171, 217, 117 Eng. Reprint 1246, 1262. See generally the title "Prohibition."

49. **U. S.**—*Schooner Exchange v. McFaddon*, 7 Cranch 116, 3 L. ed. 287. Mass.—*Mason v. Intercolonial Ry.*, 197 Mass. 349, 83 N. E. 876, 125 Am. St.

Rep. 371, 16 L. R. A. (N. S.) 276. **N. Y.**—*Hassard v. United States of Mexico*, 29 Misc. 511, 61 N. Y. Supp. 939, *affirmed* in 46 App. Div. 623, 61 N. Y. Supp. 939, and 173 N. Y. 645, 66 N. E. 1110. **Eng.**—*The Jassy*, 95 L. T. N. S. 363; *The Parlement Belge*, 42 L. T. N. S. 273, L. R. 5 Prob. Div. 197, 214, 28 Wkly. Rep. 642; *The Constitution*, L. R. 4 Prob. Div. 39, 45, 48 L. J. P. 13, 40 L. T. N. S. 219, 27 Wkly. Rep. 739; *Vavasseur v. Krupp*, 9 Ch. Div. 351, 28 Wkly. Rep. 366.

[a] **As to Public Property Used Commercially.**—*The Parlement Belge*, 42 L. T. N. S. (Eng.) 273, 285, L. R. 5 Prob. Div. 197, 220, 28 Wkly. Rep. 642. See *Mason v. Intercolonial Ry.*, 197 Mass. 349, 83 N. E. 876, 125 Am. St. Rep. 371, 16 L. R. A. (N. S.) 276.

50. See the title "**Ministers, Ambassadors and Consuls.**"

51. *Manning v. Nicaragua*, 14 How. Pr. (N. Y.) 517.

52. *Manning v. Nicaragua*, 14 How. Pr. (N. Y.) 517.

[a] **Procedure.**—A demurrer on the ground of joinder of foreign state is premature. But if the state should not voluntarily appear, the court may or may not be able to determine the rights of the other parties. If it finds itself incapable of doing this it will, as a matter of necessity dismiss the action. *Manning v. Nicaragua*, 14 How. Pr. (N. Y.) 517.

53. *Whittaker v. County of Tuolumne*, 96 Cal. 100, 30 Pac. 1016. See generally the title "**Municipal Corporations.**"

54. See the statutes and the following: **Colo.**—*Phillips v. Churning*, 4 Colo. App. 321, 35 Pac. 918. **Ill.**—*Rock Island v. Steele*, 31 Ill. 543. **N. Y.** *Magee v. Cutler*, 43 Barb. 239, 261; *Wild v. Board of Supvrs. of Columbia*, 9 How. Pr. 315.

And see the title "**Municipal Corporations.**"

6. In Suits Against Boards. — Individuals which are not constituted a board or corporate body by statute cannot be sued as a board.⁵⁵ But it is otherwise as to boards which are quasi corporations.⁵⁶

VII. HOW PERSONS ARE MADE PARTIES. — A. ORIGINAL PARTIES. — **1. Plaintiff.** — Plaintiffs must come into a suit voluntarily except in cases where one person has the right to use the name of another.⁵⁷ Persons can become original parties plaintiff only by petition or complaint.⁵⁸ An action by one as trustee for another does not make the "cestui" a party.⁵⁹

2. Defendant. — Defendants may be brought into court under compulsion.⁶⁰ No person can be made a party defendant in a cause except by process of law,⁶¹ or by his own consent appearing on the record.⁶²

[a] Whatever mode (1) of suing a county is designated in the statute must be strictly followed. *Phillips v. Churning*, 4 Colo. App. 321, 35 Pac. 918; *Rock Island v. Steele*, 31 Ill. 543. (2) A violation of the statute renders any judgment in the suit null and void. *Phillips v. Churning*, 4 Colo. App. 321, 35 Pac. 918. (3) Statutes sometimes provide that actions against counties shall be brought against the board of supervisors or commissioners. See the title "Municipal Corporations."

55. *People ex rel. Ryan v. Civil Service, etc. Boards*, 17 Abb. N. C. (N. Y.) 64; *Randall v. State*, 64 Ohio St. 57, 59 N. E. 742.

56. See the following: **Ill.**—*Sheaff v. People*, 87 Ill. 189, 29 Am. Rep. 49. **Mich.**—*Oneida v. Allen*, 137 Mich. 224, 100 N. W. 441; *Portman v. State Board of Fish Comrs.*, 50 Mich. 258, 15 N. W. 106. **N. Y.**—*People ex rel. Ajas v. Board of Education*, 104 App. Div. 162, 93 N. Y. Supp. 300; *People ex rel. Steinon v. Board of Education*, 60 Hun 486, 15 N. Y. Supp. 308. **R. I.**—*Kennedy v. State Board of Dentistry*, 26 R. I. 538, 59 Atl. 932. **Wis.**—*Board of Education v. State*, 100 Wis. 455, 76 N. W. 351.

Mandamus to boards of health, see 10 STANDARD PROC. 989. See also the title "Mandamus."

57. *Springfield F. & M. Ins. Co. v. Richmond & D. R. Co.*, 48 Fed. 360; *Frisbie v. McFarlane*, 196 Pa. 110, 116, 46 Atl. 359.

As to nominal and use plaintiffs, see *supra*, V, C, 5.

Right to use name of party who refuses to join, see *infra*, VIII, A, 4.

58. *McFadin v. McGreal*, 25 Tex. 73.

59. **Miss.**—*Pearce v. Twichell*, 41 Miss. 344; *Peck v. Ingraham*, 28 Miss. 246. **Mo.**—*Brady v. Chandler*, 31 Mo. 28. **N. C.**—*Perry v. Swanner*, 150 N. C. 141, 63 S. E. 611.

[a] But he is thereby (1) virtually made a party (*Fenwick v. Phillips*, 3 Mete. [Ky.] 87), and (2) he has a right by amended petition to assume the attitude of the real plaintiff. As to rights of use plaintiff, see *supra*, V, C, 5, a, (III), (D).

Where Suit Is Brought by One for All of a Class.—See *supra*, IX, F, 1.

60. **U. S.**—*Springfield F. & M. Ins. Co. v. Richmond & D. R. Co.*, 48 Fed. 360. **Ore.**—*Tobin v. Portland F. Mills Co.*, 41 Ore. 269, 278, 68 Pac. 743, 1108. **Pa.**—*Frisbie v. McFarlane*, 196 Pa. 110, 116, 46 Atl. 359.

61. *Marshall v. Drayton*, 2 Nott & McC. (S. C.) 25. See generally the title "Process."

[a] By filing an answer, a person not sued does not become a party. *Rousseau v. Hall*, 55 Cal. 164.

[b] In probate proceedings, although notified of the proceedings, the widow and next of kin are not parties unless they intervene, participate in the contestatio litis or are formally made parties. *Clemens v. Patterson*, 38 Ala. 721.

62. *Marshall v. Drayton*, 2 Nott & McC. (S. C.) 25.

As to appearances generally, see the title "Appearances."

[a] An agreement by heirs of a decedent to become parties defendant if the plaintiff will not compel administration ipso facto makes them parties, and if they fail to appear, judgment by default may be rendered. *Barton v. Nix*, 20 Tex. 39.

In Chancery.—No persons are parties defendant to a bill in chancery, except those who are specially named and described in it as such, and against whom process is prayed.⁶³ And to make a person a party to the record so that he will be bound by the decree, there must be service of process on him.⁶⁴

B. NEW PARTIES.—New parties may be made by amendment,⁶⁵ by interpleader,⁶⁶ and by intervention.⁶⁷ But a third person cannot be thrust into the cause without the consent of the plaintiff.⁶⁸ Defendant may object to a nonjoinder and have the proper parties made by the plaintiff,⁶⁹ or he may cause them to be made parties by cross action.⁷⁰

[b] **If the assent does not appear** on the record at any stage of the proceedings at which the persons can possibly be actors until the entering up of the judgment they are not parties, although they are so named in the declaration and replication. *Marshall v. Drayton*, 2 Nott & McC. (S. C.) 25.

63. *Ala.*—*Lucas v. Bank of Darien*, 2 Stew. 280. *Ga.*—*Carey v. Hillhouse*, 5 Ga. 251. *Mich.*—*Michigan State Bank v. Hastings*, 1 Dougl. 225, 237, 41 Am. Dec. 549. *N. Y.*—*Talmage v. Pell*, 9 Paige Ch. 410; *Verplanck v. Mercantile Ins. Co.*, 2 Paige Ch. 438, 449. *Va.*—*Moseley v. Cocke*, 7 Leigh (34 Va.) 224.

Compare Jennes v. Landes, 84 Fed. 73, holding a bill not demurrable which in the caption and body designated the defendant, but which had no prayer for process.

[a] **Converse.**—(1) A person who is not named in the bill and against whom no process is issued is not a party. *Huston v. McClarty's Heirs*, 3 Litt. (Ky.) 274. (2) And although a person is named in the bill, if no process is prayed against him he is not a party defendant. *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 438 (where a corporation was named as defendant but process was prayed against the officers); *Brasher's Exrs. v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 242. See also 4 STANDARD PROC. 145. (3) If a person is not named in the bill and no allegation with respect to him appears therein, naming him in the summons does not make him a party, even though he is served with process, or is named in the prayer of the bill. *Chapman v. Pittsburgh & S. R. Co.*, 18 W. Va. 184, 195.

[b] **The mere filing of an answer** by a person, who is not named in the pleadings or summons, in which he

styles himself the heir of a defendant whose death has not been suggested does not make him a defendant. *Gatewood's Heirs v. Rucker's Heirs*, 1 Mon. (Ky.) 21.

64. *Smith v. Gower*, 3 Metc. (Ky.) 171; *Green v. McKinney's Heirs*, 6 J. J. Marsh. (Ky.) 193.

Necessity for service of process generally, see the title "**Service of Process and Papers.**"

[a] **Publication (1) against a person not named as defendant** does not make him a party (*Letcher v. Schroeder*, 5 J. J. Marsh. [Ky.] 513), (2) and it is improper afterwards to insert his name by amendment. *Taylor v. Bate*, 4 Mon. (Ky.) 267.

65. See *infra*, XI, A.

66. See 14 STANDARD PROC. 225.

67. See the title "**Intervention.**"

68. *Baily v. Trammell*, 27 Tex. 317, 326.

[a] **A person asking (1) to be admitted as a party** does not become such until the bill is amended. *Shinn v. Board of Education*, 39 W. Va. 497, 504, 20 S. E. 604. (2) **Mere filing of a petition asking to be made a party** does not make the petitioner a party of its own force, without an order of court making him a party. *Piedmont & A. L. Ins. Co. v. Maury*, 75 Va. 508. (3) **Nor does a court order, directing that a person not a party to the bill be made a defendant and that process be served on him, make him a party**, in the absence of an amendment of the bill. *Fla.*—*Bigelow v. Stringfellow*, 25 Fla. 366, 5 So. 816. *Va.*—*Moseley v. Cocke*, 7 Leigh (34 Va.) 224. *W. Va.* *McCoy v. Allen*, 16 W. Va. 724.

69. *Baily v. Trammell*, 27 Tex. 317, 326.

As to objections, see XIV, F.

70. *Baily v. Trammell*, 27 Tex. 317, 326.

VIII. JOINDER OF PARTIES.⁷¹ — A. PLAINTIFFS.⁷² — 1. At Common Law. — a. *Generally.* — At common law all persons who are joined as plaintiffs shall have an interest in the whole of the recovery so that a judgment in solido can be rendered in favor of all.⁷³ A person who has no right or title to sue,⁷⁴ or who has transferred his entire interest,⁷⁵ cannot join as plaintiff with persons who have such right or title. If the legal interest in a cause of action residing in several persons is several, each must sue alone.⁷⁶ But if the interest is joint, no number less than all who are living can maintain an action founded upon it,⁷⁷ even though the others refuse to join as plaintiffs,⁷⁸ or may be without the state.⁷⁹ If the joint interest is severed, the remaining obligees may bring separate actions against him.⁸⁰

b. *In Actions Ex Contractu.* — In actions on contracts made with several persons, all, if living, must join if their legal interest is joint; but if their legal interest is several, each must sue separately even though the covenant is in terms joint.⁸¹

c. *In Actions Ex Delicto.* — In actions ex delicto, persons having joint interests must join,⁸² and those having a several interest and suffering a several damage must sue alone,⁸³ while persons having several

Bringing in new parties by cross-bill, see 6 STANDARD PROC. 276.

71. Collusive joinder of parties to confer jurisdiction on federal courts, see the title "United States Courts."

72. In admiralty, see 1 STANDARD PROC. 433.

73. See *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; also 15 STANDARD PROC. 81, et seq.

[a] An agreement that one is to sue at the joint expense of two persons upon a cause of action in favor of one, and is to divide the recovery does not authorize a joint action by them. *Freer v. Cowles*, 44 Ala. 314.

74. Conn.—*White v. Portland*, 67 Conn. 272, 34 Atl. 1022; *Leavet v. Sherman*, 1 Root 159. Ky.—*Scott v. Patton's Exr.*, 1 A. K. Marsh. 441; *Morrison v. Winn*, Hard. 480, action by joint surviving obligee and executrix of deceased. Mass.—*Chandler v. Howland*, 7 Gray 348, 66 Am. Dec. 487; *Grozier v. Atwood*, 4 Pick. 234; *Baxter v. Rodman*, 3 Pick. 435. Mich.—*Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299. N. J.—*Autin v. Townsend*, 3 N. J. L. 313. N. Y.—*Alexander v. Gloversville*, 110 App. Div. 791, 97 N. Y. Supp. 198. Tenn.—*Lillard v. Rucker*, 9 Yerg. 64. Tex.—*Texas & P. Ry. Co. v. Gill*, 2 Wills. Civ. Cas., §175.

75. *Alexander v. Gloversville*, 110 App. Div. 791, 97 N. Y. Supp. 198.

76. *Brady v. Koontz*, 145 Ill. App.

582; *Hoyt v. Sprague*, 12 Pick. (Mass.) 407.

77. Ala.—*Seay v. Graves*, 178 Ala. 131, 59 So. 469; *Davis v. Vandiver & Co.*, 143 Ala. 202, 38 So. 850; *Harris v. Swanson*, 62 Ala. 299. Conn.—*Beach v. Hotchkiss*, 2 Conn. 697. Fla.—*Harris v. Swanson*, 62 Ala. 299. Mass.—*Capen v. Barrows*, 1 Gray 376; *Hoyt v. Sprague*, 12 Pick. 407.

78. See *infra*, VIII, A, 5.

79. *Bolton v. Cuthbert*, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914.

80. *Beach v. Hotchkiss*, 2 Conn. 697, 699; *Boston & M. R. Co. v. Portland, S. & P. R. Co.*, 119 Mass. 498, 20 Am. Rep. 338.

Severance of joint contracts, see 11 STANDARD PROC. 971.

81. See 11 STANDARD PROC. 963.

82. U. S.—*Cochran v. Brannan*, 196 Fed. 219. Conn.—*Russell v. Stocking*, 8 Conn. 236. Ia.—*Rhoads v. Booth*, 14 Iowa 575. Eng.—*Hannay & Co. v. Smurthwaite*, 63 L. J. Q. B. 41, 69 L. T. N. S. 677, 42 Wkly. Rep. 133.

83. Ala.—*Freer v. Cowles*, 44 Ala. 314. N. J.—*Winans v. Denman*, 2 N. J. L. 116. Eng.—*Hannay & Co. v. Smurthwaite*, 63 L. J. Q. B. 41, 69 L. T. N. S. 677, 42 Wkly. Rep. 133.

[a] Two persons cannot join in an action for injury to one only of them. *Winans v. Denman*, 2 N. J. L. 116.

[b] The interests of first and second mortgagees are distinct, and they must sue separately for injuries to their sev-

interests, but suffering an entire joint damage, may join.⁸⁴ In determining whether there may be a joint action, the consequences of an act, not the act itself must be considered.⁸⁵

If the tort causes an injury to real or personal property owned jointly, all the owners, if living, must join in an action for damages.⁸⁶ Tenants in common may join in many personal actions, but in some they must join.⁸⁷ Persons having different estates in a property, such as a life tenant and remainderman, may join in an action for injury to the property.⁸⁸

d. *In Real Actions*. — At common law tenants in common must generally sever in real actions.⁸⁹

2. *In Equity*. — The rules in equity as to joinder of parties are more

equal interests. *Newman v. Tymeson*, 13 Wis. 172, 80 Am. Dec. 735.

84. *Conn.*—*Russell v. Stocking*, 8 Conn. 236. *Ia.*—*Rhoads v. Booth*, 14 Iowa 575. *Minn.*—*Cochrane v. Quackenbush*, 29 Minn. 376, 13 N. W. 154. *Eng.*—*Coryton v. Lithebye*, 2 Wm. Saund. 115, 85 Eng. Reprint 823; *Hannay & Co. v. Smurthwaite*, 63 L. J. Q. B. 41, 69 L. T. N. S. 677, 42 Wkly. Rep. 133; *Weller v. Baker* (Tunbridge Well Case), 2 Wils. C. P. 414, leading case.

[a] *Sheriff and Deputy*.—*Burton v. Winsor Utah Silv. Min. Co.*, 2 Utah 240. See also the title "*Sheriffs, Constables and Marshals*."

85. *Rhoads v. Booth*, 14 Iowa 575.

[a] Thus, (1) if two persons are injured by the same stroke or act, although the act is single, the consequence of the act is several and there cannot be a joint action. *Ind.*—*Swales v. Grubbs*, 6 Ind. App. 477, 33 N. E. 1124. *Ia.*—*Rhoads v. Booth*, 14 Iowa 575. *N. J.*—*Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39. (2) As in cases of libel, assault and battery, and the like. See *Brooks v. Collier*, 3 Ind. Ter. 468, 58 S. W. 559; *Rhoads v. Booth*, 14 Iowa 575; and the specific titles, as "*Assault and Battery*;" "*False Imprisonment*;" "*Libel and Slander*;" "*Malicious Prosecution*;" "*Trespass*."

[b] But there may be cases of an entirety of interest or joint damage (1) resulting from such a tort which would authorize a joinder. So persons who have jointly incurred expenses in their defense of a malicious action may join in an action for damages. *Swales v. Grubbs*, 6 Ind. App. 477, 33 N. E. 1124. (2) Partners who have sustained a joint damage to their busi-

ness by the malicious prosecution of an action, or by illegal imprisonment may join. *Leavet v. Sherman*, 1 Root (Conn.) 159; *Cochrane v. Quackenbush*, 29 Minn. 376, 13 N. W. 154. (3) The same may be where words are spoken of parties in their joint trade or business. *Swales v. Grubbs*, 6 Ind. App. 477, 33 N. E. 1124; *Rhoads v. Booth*, 14 Iowa 575. See also the titles "*Libel and Slander*;" "*Partnership*."

86. *U. S.*—*Cochran v. Brannan*, 196 Fed. 219. *Ala.*—*Bolton v. Cuthbert*, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914; *Price v. Talley's Admr.*, 18 Ala. 21. *Ia.*—*Rhoads v. Booth*, 14 Iowa 575. *Tenn.*—*Turnpike Co. v. Fry*, 88 Tenn. 296, 12 S. W. 720. *Tex.*—*Leonard v. Worsham*, 18 Tex. Civ. App. 410, 45 S. W. 336; *Texas v. P. Ry. Co. v. Gill*, 2 Wills. Civ. Cas., §175; *Houston & T. C. R. Co. v. Hollingsworth*, 2 Wills. Civ. Cas., §173.

Joinder of joint tenants, see 14 STANDARD PROC. 741.

87. *Porter v. Bleiler*, 17 Barb. (N. Y.) 149; *Cummings & Co. v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500, trespass *quare clausum*. See the title "*Tenants in Common*."

Joinder in real actions, see *infra*, VIII, A, 1, d.

88. *Bacon v. Peoria & E. R. Co.*, 162 Ill. App. 162. See the title "*Lands and Land Transfers*."

89. *Mass.*—*Bullock v. Hayward*, 10 Allen 460, real action of waste. *N. Y.*—*Porter v. Bleiler*, 17 Barb. 149. For present New York rule, see the statute. *Tex.*—*May v. Slade*, 24 Tex. 205, in trespass to try title.

See generally the title "*Tenants in Common*."

Joinder in personal actions, see *supra*, VIII, A, 1, c.

elastic than the rules at common law.⁹⁰ In fact, there is almost no inflexible rule as to joinder.⁹¹ It is clear, however, that several complainants having distinct and independent claims to relief against a defendant cannot join in a suit for the separate relief of each;⁹² and that persons having no interest in the controversy and no equity against the defendants cannot join with the plaintiff.⁹³ As a general principle, it may be stated that otherwise unconnected parties may join in one suit where there is a common or connected interest among them all centering in the point in issue in the cause.⁹⁴ Persons may join who are sim-

90. *Cadigan v. Brown*, 120 Mass. 493.

Common law rules, see *supra*, VIII, A, 1.

91. See *infra*, this section.

[a] Court exercises a sound discretion in determining whether or not there is a misjoinder of parties under the particular circumstances of each case. *Mich.*—*Seofield v. Lansing*, 17 Mich. 437. *N. Y.*—*Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773. *S. C.*—*Edwards v. Sartor*, 1 S. C. 266. *W. Va.*—*Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241. *Wis.*—*Barnes v. Racine*, 4 Wis. 454.

92. *Ky.*—*Barry v. Rogers*, 2 Bibb 314. *Md.*—*Fried v. Burk*, 125 Md. 500, 94 Atl. 86; *Miller v. Baltimore County Marble Co.*, 52 Md. 642. *Mich.*—*Winslow v. Jenness*, 64 Mich. 84, 30 N. W. 905; *Brunner v. Bay City*, 46 Mich. 236, 9 N. W. 263. *N. Y.*—*Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773. *Ohio.*—*State v. Ellis*, 10 Ohio 456; *Armstrong v. Athens Co.*, 10 Ohio 235. *Tenn.*—*Lillard v. Mitchell* (Tenn. Ch.), 37 S. W. 702. *W. Va.*—*Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241.

[a] Other Statements of Rule.—See *U. S.*—*Baker v. Portland*, 5 Sawy. 566, 2 Fed. Cas. No. 777. *Idaho.*—*Wilkinson v. Walters*, 1 Idaho 564. *Ind.*—*Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47. *Mich.*—*Winslow v. Jenness*, 64 Mich. 84, 30 N. W. 905. *N. J.*—*Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Plum v. Morris Canal & B. Co.*, 10 N. J. Eq. 256; *Marselis v. Morris Canal & B. Co.*, 1 N. J. Eq. 31. *N. Y.*—*Gray v. Rothschild*, 48 Hun 596, 1 N. Y. Supp. 299, 14 Civ. Proc. 320, 16 N. Y. St. 221. *Ohio.*—*Armstrong v. Treasurer of Athens*, 10 Ohio 235. *S. C.*—*Edwards v. Sartor*, 1 S. C. 266. *Wis.*—*Barnes v. Beloit*, 19 Wis. 93; *Barnes v. Racine*, 4 Wis. 454.

[b] Persons whose interests are

hostile and antagonistic cannot join as plaintiffs in equity. *U. S.*—*Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729; *Parsons v. Lyman*, 4 Blatchf. 432, 18 Fed. Cas. No. 10,779; *Bunce v. Gallagher*, 5 Blatchf. 481, 4 Fed. Cas. No. 2,133. *Ala.*—*Smith v. Smith*, 102 Ala. 516, 14 So. 765; *Michan v. Wyatt*, 21 Ala. 813, 827. *Md.*—*Crook v. Brown*, 11 Md. 158. *Mich.*—*Brunner v. Bay City*, 46 Mich. 236, 9 N. W. 263. *N. Y.*—*Grant v. Van Schoonhoven*, 9 Paige Ch. 255, 37 Am. Dec. 393. *Va.*—*Stauder v. Keck*, 92 Va. 544, 24 S. E. 227; *Meek v. Spratzer*, 87 Va. 162, 12 S. E. 397.

[c] Exceptions to the rule are allowed in favor of devisees, legatees and creditors. *Barry v. Rogers*, 2 Bibb (Ky.) 314.

93. *U. S.*—*Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520. *Ala.*—*Reynolds v. Caldwell*, 80 Ala. 232; *Colburn v. Broughton*, 9 Ala. 351. *Ind.*—*Thompson v. Turner*, 173 Ind. 593, 89 N. E. 314, Ann. Cas. 1912A, 740. *N. Y.*—*Clarkson v. De Peyster*, 3 Paige 336.

94. *Ala.*—*Kennedy's Heirs v. Kennedy's Heirs*, 2 Ala. 571, 610. *Cal.*—*Churchill v. Lauer*, 84 Cal. 233, 24 Pac. 107. *Miss.*—*Comstock v. Rayford*, 1 Smed. & M. 423, 40 Am. Dec. 102. *N. Y.*—*Bradley v. Bradley*, 53 App. Div. 29, 65 N. Y. Supp. 514; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412; *Smith v. Schulting*, 14 Hun 52. *S. C.*—*Edwards v. Sartor*, 1 S. C. 266.

[a] Other Statements of Rule.—See *Ala.*—*Zadek v. Burnett*, 176 Ala. 80, 57 So. 447; *Rogers v. Torburt*, 58 Ala. 523. *Ga.*—*East Atlanta Land Co. v. Mower*, 138 Ga. 380, 75 S. E. 418. *Ia.*—*Brandriff v. Harrison Co.*, 50 Iowa 164; *Powell v. Spaulding*, 3 G. Gr. 443; *De Louis v. Meek*, 2 G. Gr. 55, 50 Am. Dec. 491. *Mass.*—*Cadigan v. Brown*, 120 Mass. 493; *Ballou v. Hopkinton*, 4 Gray 324. *Mont.*—*Beach v. Spokane*

ilarly injured by one act, operating on all precisely alike.⁹⁵

3. Under the Code. — a. *In General.* — The codes relax the strict rules of the common law as to joinder of parties, virtually adopting the equity practice as to joinder of parties,⁹⁶ so that as a general principle, persons who could not properly join under the equity practice cannot properly join as plaintiffs under the code.⁹⁷

b. *Permissive Joinder.* — The usual code provision is that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided.⁹⁸ An interest in two things is thus required, an absence of

R. & W. Co., 25 Mont. 379, 65 Pac. 111. **N. J.**—Henderson v. Champion, 83 N. J. Eq. 554, 91 Atl. 332. **N. Y.** Gray v. Rothschild, 48 Hun 596, 1 N. Y. Supp. 299, 14 Civ. Proc. 320, 16 N. Y. St. 221. **R. I.**—Lonsdale Co. v. Woonsocket, 21 R. I. 498, 44 Atl. 929.

[b] **All complainants (1) must have an interest in the subject matter in controversy, and entitled to relief.** Moore v. Moore, 17 Ala. 631. (2) But if the subject matter is the same, it is no objection to the joinder of plaintiffs that they claim different interests (Wilson v. Hampton, 2 Posey Unrep. Cas. [Tex.] 426), or (3) that their interests are not coextensive (Blackwell's Admr. v. Blackwell's Distributees, 33 Ala. 57, 70 Am. Dec. 556), or (4) that the amount of the injury suffered by each may differ. Bolman v. Overall, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107; Boshier v. Richmond & H. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879. (5) And it is not indispensable that all the parties have an interest in all the matters in the suit. **Cal.**—Wilson v. Castro, 31 Cal. 420. **Mich.**—Michigan Nat. Bank v. Hill, 181 Mich. 7, 147 N. W. 486. **Va.**—Walters v. Farmers' Bank, 76 Va. 12.

[c] **Action To Restrain Nuisance.** Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241, reviewing cases. See also the title "Nuisance."

Action by riparian proprietors to restrain obstruction, pollution or diversion of a stream, see the title "Waters and Watercourses."

[d] **Persons who have been induced (1) by the same fraudulent misrepresentations to subscribe to stock in a corporation, or enter into contracts and the like, may join in a suit to cancel or rescind their subscriptions or contracts** (Hamilton v. American Hulled Bean Co., 143 Mich. 277, 106 N. W.

731; Rader v. Bristol Land Co., 94 Va. 766, 27 S. E. 590; Boshier v. Richmond & H. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879), but (2) if the fraudulent acts are different and unconnected they cannot join. Boshier v. Richmond & H. Land Co., 89 Va. 455, 464, 16 S. E. 360, 37 Am. St. Rep. 879.

To avoid a multiplicity of suits equity will take jurisdiction where there is no community of interest, except in the questions of law and fact involved. This is not a question of parties, however, and is treated in another title. See the title "Multiplicity of Suits."

95. Turner v. Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243.

[a] **If persons are not affected in all things alike, a joinder is not permissible.** Barker v. Vernon, 63 Mich. 516, 30 N. W. 175.

96. See *supra*, III, A. *Compare* Burkett v. Lehman-Higginson Groc. Co., 8 Okla. 84, 56 Pac. 856.

97. Goodnight v. Goar, 30 Ind. 418.

[a] **Rules apply not only to actions formerly denominated equitable, but also to those formerly denominated legal.** **Neb.**—Earle v. Bureh, 21 Neb. 702, 710, 33 N. W. 254. **N. Y.**—Loomis v. Brown, 16 Barb. 325. **Wis.**—Schiffer v. Eau Claire, 51 Wis. 385, 8 N. W. 253.

Equity rules as to joinder, see *supra*, VIII, A, 2.

98. See the codes, and **Cal.**—Cerf v. Ashley, 68 Cal. 419, 9 Pac. 658. **Neb.** Earle v. Bureh, 21 Neb. 702, 710, 33 N. W. 254. **S. C.**—Wagner v. Sanders, 49 S. C. 192, 27 S. E. 68. **Wis.**—Strohn v. Hartford F. Ins. Co., 33 Wis. 648.

[a] **Code is permissive and the action may be maintained without joining all parties having such interest.** Lamar v. Croft, 73 S. C. 407, 53 S. E.

either of which is fatal to the joinder.⁹⁹ The amount or kind of interest which the plaintiffs have in the subject of action and relief sought is not very material.¹ But in the absence of a statute to the contrary, persons having separate causes of action against the same defendant cannot unite and pursue their remedies in one action.² The mere simi-

540; *McCorkle v. Williams*, 43 S. C. 66, 20 S. E. 744.

[b] **Rule in Indiana**, see *Judy v. Jester*, 53 Ind. App. 74, 100 N. E. 15; *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625.

99. **U. S.**—*Keary v. Mutual Reserve Fund L. Assn.*, 30 Fed. 359. **Cal.**—*Barkley v. Hibernia Sav. & L. Soc.*, 21 Cal. App. 456, 132 Pac. 467. **Ind.**—*State v. Holt*, 163 Ind. 198, 71 N. E. 653; *Jones v. Rushville Nat. Bank*, 138 Ind. 87, 37 N. E. 338; *Western Union Tel. Co. v. Huff*, 102 Ind. 535, 26 N. E. 85. **Ia.**—*Miller v. Hawkeye Gold Dredg. Co.*, 156 Iowa 557, 137 N. W. 507. **Kan.**—*Jeffers v. Forbes*, 28 Kan. 174. **Nev.**—*McBeth v. Van Sickle*, 6 Nev. 134. **Ohio.**—*Taylor v. Brown*, 92 Ohio St. 287, 299, 110 N. E. 739. **Wis.**—*Barnes v. Beloit*, 19 Wis. 93.

[a] **Plaintiffs must have a common interest** in respect to the subject of the action and in the relief. Each must be interested that all have relief in respect to the subject matter. **U. S.**—*Keary v. Mutual Reserve Fund L. Assn.*, 30 Fed. 359. **Ind.**—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 10, 13 N. E. 118; *Martin v. Davis*, 82 Ind. 38. **Ia.**—*Miller v. Hawkeye Gold Dredg. Co.*, 156 Iowa 557, 137 N. W. 507. **Ohio.**—*Farmers' Mut. F. & L. Ins. Co. v. Ward*, 14 Ohio Cir. Dec. 156.

[b] **If one general right is claimed**, where there is one common interest among all the plaintiffs centering in the point in issue in a cause, there is no misjoinder, even though they may be entitled to several judgments in respect to the amounts to be recovered. *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Tate v. Ohio & M. R. R. Co.*, 10 Ind. 174, 71 Am. Dec. 309; *Smith v. Schulting*, 14 Hun (N. Y.) 52. As to same rule in equity, see *supra*, VIII, A, 2.

[c] **Persons having no unity of interest** with the plaintiff should not be joined as co-plaintiffs. *Frear v. Bryan*, 12 Ind. 343.

1. *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Miller v. Hawkeye Gold*

Dredg. Co., 156 Iowa 557, 137 N. W. 507. See also *First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788.

[a] **It is not necessary** (1) that the parties have a joint (Ind.—*First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118. **Kan.**—*Atchison St. Ry. Co. v. Nave*, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800. **N. Y.**—*Loomis v. Brown*, 16 Barb. 325. **Wis.**—*School Districts v. Edwards*, 46 Wis. 150, 49 N. W. 968; *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 648), or (2) equal (*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Judy v. Jester*, 53 Ind. App. 74, 100 N. E. 15; *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625; *Loomis v. Brown*, 16 Barb. [N. Y.] 325), or (3) even a common (*Loomis v. Brown*, 16 Barb. [N. Y.] 325; *Schiffer v. Eau Claire*, 51 Wis. 385, 8 N. W. 253; *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 648), interest; (4) but the grievance must be common to all the plaintiffs (*Judy v. Jester*, 53 Ind. App. 74, 100 N. E. 15; *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625), (5) and the injury complained of must have been committed at the same time, by the same act. *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625.

[b] **Persons having interests antagonistic** to each other cannot join under the code. *Martin v. Davis*, 82 Ind. 38; *Shoemaker v. Board of Comrs.*, 36 Ind. 175.

2. **Ind.**—*Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Tate v. Ohio & M. R. Co.*, 10 Ind. 174, 71 Am. Dec. 309. **Ia.**—*Miller v. Hawkeye Gold Dredg. Co.*, 156 Iowa 557, 137 N. W. 507; *Independent School Dist. v. Independent School Dist. No. Two*, 50 Iowa 322; *Bort v. Yaw*, 46 Iowa 323. **Kan.**—*Jeffers v. Forbes*, 28 Kan. 174. **Ky.**—*Pelly v. Bowyer*, 7 Bush 513. **N. Y.**—*Prospect Park & C. I. R. Co. v. Morey*, 155 App. Div. 347, 140 N. Y. Supp. 380.

larity of the questions of law or fact or both which are involved is not of itself a sufficient foundation for a joint suit.³

Illustrations of the character of interest necessary to authorize joinder will be found in the notes.⁴

[a] If different persons have separate interests and suffer a separate damage they must sue separately. *Cal.*—*Foreman v. Boyle*, 88 *Cal.* 290, 26 *Pac.* 94. *N. Y.*—*Gray v. Rothschild*, 48 *Hun* 596, 1 *N. Y. Supp.* 299, 14 *Civ. Proc.* 320, 16 *N. Y. St.* 221. *Okla.*—*St. Louis & S. F. R. Co. v. Dickerson*, 29 *Okla.* 286, 118 *Pac.* 140.

[b] Even though (1) their claims arose out of the same transaction (*Ind.*—*Home Ins. Co. v. Gilman*, 112 *Ind.* 7, 13 *N. E.* 118; *Martin v. Davis*, 82 *Ind.* 38; *Tate v. Ohio & M. R. Co.*, 10 *Ind.* 174, 71 *Am. Dec.* 309. *Ia.*—*Miller v. Hawkeye Gold Dredg. Co.*, 156 *Iowa* 557, 137 *N. W.* 507. *Okla.*—*St. Louis & S. F. R. Co. v. Dickerson*, 29 *Okla.* 386, 118 *Pac.* 140), or (2) were embraced in the same instrument. *McIntosh v. Zaring*, 150 *Ind.* 301, 49 *N. E.* 164; *Goodnight v. Goar*, 30 *Ind.* 418. (3) Exception is made by some codes in cases of persons severally liable on the same obligation or instrument. See the codes.

Where several persons own contents of a trunk carried as baggage, see the title "Passengers."

3. *Miller v. Hawkeye Gold Dredg. Co.*, 156 *Iowa* 557, 137 *N. W.* 507; *Hudson v. Atchison*, 12 *Kan.* 140.

Joinder to prevent a multiplicity of suits, see the title "Multiplicity of Suits."

4. Thus (1) several persons injured by a common nuisance cannot join in an action for damages for a nuisance (*Cal.*—*Foreman v. Boyle*, 88 *Cal.* 290, 26 *Pac.* 94. *Ind.*—*Brownell v. Irwin*, 25 *Ind. App.* 395, 58 *N. E.* 263. *Wis.*—*Younkin v. Milwaukee Light, H. & T. Co.*, 112 *Wis.* 15, 87 *N. W.* 861; *Grand Rapids W.-P. Co. v. Bensley*, 75 *Wis.* 399, 401, 44 *N. W.* 640), although (2) they may join in an action for an injunction against or an abatement of the nuisance. *Cal.*—*Foreman v. Boyle*, 88 *Cal.* 290, 26 *Pac.* 94. *Ind.*—*First Nat. Bank v. Sarlls*, 129 *Ind.* 201, 28 *N. E.* 434, 28 *Am. St. Rep.* 185. *Kan.*—*Atchison St. Ry. Co. v. Nave*, 38 *Kan.* 744, 17 *Pac.* 587, 5 *Am. St. Rep.* 800. *Minn.*—*Grant v. Schmidt*, 22 *Minn.* 1. *N. Y.*—*Strobel v. Kerr Salt Co.*, 164

N. Y. 303, 58 *N. E.* 142, 79 *Am. St. Rep.* 643, 51 *L. R. A.* 687; *Greer v. Smith*, 155 *App. Div.* 420, 140 *N. Y. Supp.* 43. *Wis.*—*Younkin v. Milwaukee Light, H. & T. Co.*, 112 *Wis.* 15, 87 *N. W.* 861; *Grand Rapids W.-P. Co. v. Bensley*, 75 *Wis.* 399, 44 *N. W.* 640. See also *Nortcutt v. Turney*, 101 *Ky.* 214, 41 *S. W.* 21; and generally the title "Nuisance." (3) They are not required to join, however. *Kaukauna W.-P. Co. v. Green Bay & M. Canal Co.*, 75 *Wis.* 385, 391, 44 *N. W.* 638. (4) Similarly several persons who are injured by the diversion of a stream may join in an action to restrain the diversion (*Beach v. Spokane R. & W. Co.*, 25 *Mont.* 379, 65 *Pac.* 111. See the title "Waters and Watercourses"), (5) but not in an action for damages. *Beach v. Spokane R. & W. Co.*, 25 *Mont.* 379, 65 *Pac.* 111. (6) Persons induced by a common fraud to execute a joint release may join in an action to set it aside (*Smith v. Schulting*, 14 *Hun* [N. Y.] 52. See also *Bradley v. Bradley*, 53 *App. Div.* 29, 65 *N. Y. Supp.* 514), but (7) they cannot join in an action for damages. *Ia.*—*Bort v. Yaw*, 46 *Iowa* 323. *N. Y.*—*Gray v. Rothschild*, 48 *Hun* 596, 1 *N. Y. Supp.* 299, 14 *Civ. Proc.* 320, 16 *N. Y. St.* 221. *Ohio.*—*Taylor v. Brown*, 92 *Ohio St.* 287, 110 *N. E.* 739; *Duncan v. Willis*, 51 *Ohio St.* 433, 38 *N. E.* 13. (8) A conversion of the separate property of several persons in the hands of a common bailee does not give them a joint cause of action for damages. *Central State Bank v. Walker*, 7 *Kan. App.* 748, 53 *Pac.* 379. But (9) mortgagees of various priorities in joint possession may join in an action for conversion of the property. *Trompen v. Yates*, 66 *Neb.* 525, 92 *N. W.* 647. (10) Where an act causes injuries to premises, the remainderman and the owner of the particular estate may join in an action for damages. *Schiffer v. Eau Claire*, 51 *Wis.* 385, 8 *N. W.* 253.

In an action by trustee of express trust, see *supra*, V, C, 4, d, (II), (B).

Joinder of insured and insurer against the wrongdoer, see *supra*, V, C, 4, c, (III), (D).

c. *Mandatory Joinder*.—The codes specifically provide that if the parties are united in interest, they must be joined as plaintiffs.⁵ The common law rule that joint owners of property, if living, must join in actions for injury to their property has not been changed.⁶

4. *Procedure Where Parties Refuse To Join*.—At common law,⁷ and in admiralty,⁸ notwithstanding the fact that one or more of several parties to a joint action refuse to consent to a suit, the others may sue in the name of all.⁹ In equity,¹⁰ and under the code practice,¹¹ the common law rule that the names of persons who refuse to join as parties may be used without their consent does not obtain. The rule both in equity,¹² and under the code,¹³ is that if the consent of any one who

5. See the codes, and *Shoemaker v. Board of Comrs.*, 36 Ind. 175; *Burkett v. Lehman-Higginson Groc. Co.*, 8 Okla. 84, 56 Pac. 856.

[a] *Converse*.—If it does not appear by the allegations of the complaint that other persons are united in interest with the plaintiff on record in the relief sought, they need not be joined. *Taylor v. Lytle*, 26 Idaho 97, 141 Pac. 92.

6. *Cal.*—*Whitney v. Stark*, 8 Cal. 514, 68 Am. Dec. 360. *Kan.*—*Hays v. Farwell*, 53 Kan. 78, 35 Pac. 794. *Ky.*—*Newman v. Kendall*, 2 A. K. Marsh. 234. *N. Y.*—*Moppar v. Witcheik*, 56 Misc. 676, 107 N. Y. Supp. 594. *Okla.*—*St. Louis & S. F. R. Co. v. Webb*, 36 Okla. 235, 128 Pac. 252.

Joinder of joint tenants, see the title "Joint Tenants."

Necessity for joinder of partners in action for injury of partnership property, see the title "Partnership."

7. *Ala.*—*Bolton v. Cuthbert*, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914; *Harris v. Swanson*, 62 Ala. 299. *Me.*—*Darling v. Simpson*, 15 Me. 175. *Pa.*—*Swiegart v. Berk*, 8 Serg. & R. 308, 311. *Tenn.*—*Wright v. McLemore*, 10 Yerg. 235; *Gray v. Wilson*, Meigs 394.

In actions on joint contracts, see 11 STANDARD PROC. 971.

In actions by executors, see 8 STANDARD PROC. 734.

8. See 1 STANDARD PROC. 433.

9. See the cases cited in the preceding notes.

[a] *Dismissal not authorized*. *Harris v. Swanson*, 62 Ala. 299.

[b] *Indemnity may be required*. *Bolton v. Cuthbert*, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914; *Harris v. Swanson*, 62 Ala. 299.

10. *Ala.*—*Bentley v. Barnes*, 162 Ala. 524, 50 So. 361. *Fla.*—*Southern*

Life Ins. & T. Co. v. Lanier, 5 Fla. 110, 148, 58 Am. Dec. 448. *N. Y.*—*Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513. *S. C.*—*Dorn v. Beasley*, 6 Rich. Eq. 408, 420.

11. *Tobin v. Portland Mills Co.*, 41 Ore. 269, 68 Pac. 743, 1108.

[a] *Presumption of Consent*.—*Stewart v. Templeton*, 55 Ore. 364, 104 Pac. 978, 106 Pac. 640.

12. *U. S.*—*Omaha Hotel Co. v. Wade*, 97 U. S. 13, 20, 24 L. ed. 917; *Caylor v. Cooper*, 165 Fed. 757, 760. *Ala.*—*Bentley v. Barnes*, 162 Ala. 524, 50 So. 361. *Ark.*—*Porter v. Clements*, 3 Ark. 364. *Ill.*—*Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225. *Mo.*—*Anable v. McDonald L. & M. Co.*, 144 Mo. App. 303, 128 S. W. 38. *N. Y.*—*Morse v. Hovey*, 9 Paige 197; *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513. *Pa.*—*Frisbie v. McFarlane*, 196 Pa. 116, 46 Atl. 358, 79 Am. St. Rep. 696. *S. C.*—*Pogson v. Owen*, 3 Desaus. 31. *Tex.*—*Houston & T. C. R. Co. v. Hollingsworth*, 2 Wills. Civ. Cas., §173.

13. *Ark.*—*W. D. Reeves Lumb. Co. v. Davis*, 124 Ark. 143, 187 S. W. 171; *Ingham Lumb. Co. v. Ingersoll*, 93 Ark. 447, 125 S. W. 139. *Colo.*—*First Nat. Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788. *Ind.*—*Shoemaker v. Board of Comrs.*, 36 Ind. 175, 181. *Ky.*—*Paducah, etc. R. R. Co. v. Dipple*, 16 Ky. L. Rep. 62. *Mo.*—*Dillon's Admr. v. Bates*, 39 Mo. 292; *Anable v. McDonald L. & M. Co.*, 144 Mo. App. 303, 128 S. W. 38. *N. Y.*—*Hasbrouck v. Bunce*, 62 N. Y. 475; *Dahl v. Levenberg*, 172 App. Div. 919, 157 N. Y. Supp. 14; *Wallach v. Dryfoos*, 140 App. Div. 438, 125 N. Y. Supp. 305, not necessary to ask him to join where it appears that such would be idle ceremony merely. *Ohio.*—*Duncan v. Willis*, 51 Ohio St. 433, 38 N. E. 13; *Allen v.*

should be joined cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint.¹⁴ If one or more plaintiffs are joined without their consent, in equity or under the code where this practice is not allowable, the remedy of the party is to move to have his name stricken out.¹⁵ But if the party himself does not complain, the defendant cannot object that he was joined without being consulted.¹⁶

B. DEFENDANT.¹⁷ — **1. At Common Law.** — a. *In Actions Ex contractu.* — In actions on contract, if the obligation is joint, all the joint contractors, if living, must be joined as parties defendant; but if the obligation is several, a joinder of obligors is improper in the absence of statute providing otherwise.¹⁸

Under certain circumstances, the promisee and the person assuming to pay his debts to third persons should be joined.^{18½}

b. *In Actions Ex Delicto.* — (I.) **On Several Tort.** — Persons committing torts which are not joint cannot be joined,¹⁹ unless there is some

Miller, 11 Ohio St. 374. **Ore.**—Williams v. Pacific Sur. Co., 66 Ore. 151, 127 Pac. 145, 131 Pac. 1021, 132 Pac. 959, 133 Pac. 1186. See note below. **Wyo.** Littleton v. Burgess, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A. (N. S.) 49.

[a] **Actions at law** (1) are not within the application of the statute. **U. S.** Springfield F. & M. Ins. Co. v. Richmond & D. R. Co., 48 Fed. 360. **Cal.** Andrews v. Mokelumne H. Co., 7 Cal. 330. **Ore.**—State Ins. Co. v. Oregon Ry. & Nav. Co., 20 Ore. 563, 26 Pac. 838. (2) Many cases apply the rule without distinction to both legal and equitable actions, however. See Ingham Lumb. Co. v. Ingersoll, 93 Ark. 447, 125 S. W. 139; Hill v. Marsh, 46 Ind. 218; and cases cited supra, this note.

[b] **Actions by joint obligees in a bond** are not within the statute. Ryan v. Riddle, 78 Mo. 521.

[c] Where plaintiff may sue for and recover his interest independent of another party who has a like interest, this rule does not obtain. McNear v. Williamson, 166 Mo. 353, 369, 66 S. W. 160.

Actions on joint contracts, see 11 STANDARD PROC. 971.

In partnership cases, see "Partnership."

14. Dahl v. Levenberg, 172 App. Div. 919, 157 N. Y. Supp. 14; Morse v. Hovey, 9 Paige (N. Y.) 197 (failure to state reason ground of special demurrer; but it may be set up by amendment); Allen v. Miller, 11 Ohio St. 374.

[a] It is sufficient to state that the

party made defendant refuse to join without stating the reason of his refusal to join. Wall v. Galvin, 80 Ind. 477.

[b] **Refusal To Join Inferred.**—Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513.

15. Southern Life Ins. & T. Co. v. Lanier, 5 Fla. 110, 148, 58 Am. Dec. 448, not that the bill be dismissed as to him.

16. Richardson v. Wood, 113 Me. 328, 93 Atl. 836; Cinfel v. Malena, 67 Neb. 95, 100, 93 N. W. 165.

17. **In admiralty**, see 1 STANDARD PROC. 434.

18. See 11 STANDARD PROC. 972, et seq.

18½. Hardy v. Blazer, 29 Ind. 226, 92 Am. Dec. 347; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086, where debts were assumed not to exceed a certain amount. See Rouse v. Bartholomew, 51 Kan. 425, 32 Pac. 1088, plaintiff may sue either without forfeiting his rights against the other. To same effect, see Davis v. National Bank, 45 Neb. 539, 63 N. W. 852; Johnson v. Shuey, 40 Wash. 22, 82 Pac. 123.

[a] **Mortgagor and grantee assuming debt** (1) may be joined. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. But (2) nonjoinder may be waived. Keller v. Ashford, 133 U. S. 610, 626, 10 Sup. Ct. 494, 33 L. ed. 667.

19. **Cal.**—Butler v. Ashworth, 110 Cal. 614, 43 Pac. 4, 386. **Conn.**—Patchin v. Rowell, 86 Conn. 372, 85 Atl. 511. **Fla.**—Standard Phosphate Co. v.

privity between them authorizing a joinder.²⁰

(II.) On Joint Tort. — (A.) PERSONAL TORTS UNCONNECTED WITH CONTRACT.

(1.) *Generally.* — Both at common law and under the codes, in actions on joint personal torts independent of contract, the plaintiff may bring his action against all the joint tortfeasors, or against any one or more of them at his election.²¹ To authorize a joinder, the tort must be joint, however.²² But it has been held that where the liability of one party is based wholly upon the doctrine of respondeat superior and not upon his individual fault or participation in the tort, he cannot be

Lunn, 66 Fla. 220, 63 So. 429; Symmes v. Prairie Pebble Phos. Co., 66 Fla. 27, 63 So. 1. **La.**—Courtney v. Louisiana Ry. & N. Co., 131 La. 575, 59 So. 994. **Me.**—Allison v. Hobbs, 96 Me. 26, 51 Atl. 245. **Ore.**—Cooper v. Blair, 14 Ore. 255, 12 Pac. 370. **Va.** McMullin v. Church, 82 Va. 501.

[a] Persons (1) who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly (Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; Allison v. Hobbs, 96 Me. 26, 51 Atl. 245), (2) even though the injuries may have been precisely similar in character, and inflicted at the same moment. Allison v. Hobbs, 96 Me. 26, 51 Atl. 245.

20. See the titles "Master and Servant;" "Principal and Agent."

21. **U. S.**—Atlantic & P. R. R. Co. v. Laird, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485; Chicago G. W. R. Co. v. Hulbert, 205 Fed. 248, 125 C. C. A. 98; Kilkenney v. Bockius, 187 Fed. 382. **Ala.**—Birmingham v. Hawkins, 196 Ala. 127, 72 So. 25. **Cal.**—Cole v. Roebeling Const. Co., 156 Cal. 443, 105 Pac. 255; Butler v. Ashworth, 110 Cal. 614, 43 Pac. 4, 386; Fallon v. United Railroads, 28 Cal. App. 60, 151 Pac. 290. **Conn.**—Sparrow v. Bromage, 83 Conn. 27, 74 Atl. 1070, 27 L. R. A. (N. S.) 209. **Fla.**—Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429; Symmes v. Prairie Pebble Phos. Co., 66 Fla. 27, 63 So. 1. **Ill.**—Yeazel v. Alexander, 58 Ill. 254; Lynch v. Chicago, 152 Ill. App. 160. **La.**—Breaux Bridge Lumb. Co. v. Hebert, 121 La. 188, 46 So. 206; Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153, all participants in a tort may be joined. **Me.**—Allison v. Hobbs, 96 Me. 26, 51 Atl. 245. **Mich.**—Pruner v. Detroit United Ry. Co., 173 Mich. 146, 139 N. W. 48. **Mo.**—Hutchinson v. Richmond Safety Gate Co., 247 Mo. 71,

152 S. W. 52, 64; Mitchell v. Brown (Mo. App.), 190 S. W. 354; Noble v. Kansas City, 95 Mo. App. 167, 68 S. W. 969. **Neb.**—Stull Bros. v. Powell, 70 Neb. 152, 97 N. W. 249. **N. Y.** Low v. Mumford, 14 Johns. 426, 7 Am. Dec. 469. **Ore.**—Strauhel v. Asiatic S. S. Co., 48 Ore. 100, 85 Pac. 230. **R. I.** Young v. Aylesworth, 35 R. I. 259, 86 Atl. 555. **S. C.**—Webber v. Jonesville, 94 S. C. 189, 77 S. E. 857. **Tex.**—Mataorda Canal Co. v. Markham Irr. Co. (Tex. Civ. App.), 154 S. W. 1176; Taylor Water Co. v. Dillard, 9 Tex. Civ. App. 667, 29 S. W. 662. **Va.** Pulaski A. Coal Co. v. Gibboney Sand Bar Co., 110 Va. 444, 66 S. E. 73, 24 L. R. A. (N. S.) 1185; Langhorne v. Richmond City Ry. Co., 91 Va. 369, 22 S. E. 159; McMullin v. Church, 82 Va. 501. **Wis.**—Helberg v. Hosmer, 143 Wis. 620, 128 N. W. 439. **Eng.**—Bristow v. James, 7 T. R. 257, 101 Eng. Reprint 962.

[a] This is true (1) although there may exist a difference in the degree of liability (Riverside Cotton Mills v. Lanier, 102 Va. 148, 159, 45 S. E. 875. See the title "Master and Servant"), or (2) in the quantum of evidence necessary to establish such liability. Riverside Cotton Mills v. Lanier, 102 Va. 148, 159, 45 S. E. 875. (3) And it is immaterial that the wrongful acts of some may have contributed less to the injury than those of others. Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93.

22. Symmes v. Prairie Pebble Phos. Co., 66 Fla. 27, 63 So. 1; Stull Bros. v. Powell, 70 Neb. 152, 97 N. W. 249. And see cases cited supra, this section.

What torts are joint, see *infra*, VIII, B, 1, b, (II), (A), (2).

Striking out party where joint liability is not shown, see *infra*, XI, A, 2.

joined as a defendant in an action against the guilty agent,²³ though the general rule seems to be otherwise.²⁴

In the case of the death of a joint tortfeasor, it is improper to join the survivors with the personal representative of the decedent.²⁵ But a receiver of a going concern is on a different footing and may be joined.²⁶

(2.) *What Torts Are Joint.*—In order that a tort may be joint within the rule, there must be either some concert of action or cooperation, actual or implied by law, which produces the injury,²⁷ or a concurrence of separate and distinct acts in producing the injury.²⁸ Torts that are

23. **U. S.**—Shaffer *v.* Union Brick Co., 128 Fed. 97; Helms *v.* Northern Pac. R. Co., 120 Fed. 389 (where railroad company's liability is statutory, and servant's liability is based on common law); Hukill *v.* Maysville & B. S. R. Co., 72 Fed. 745; Warax *v.* Cincinnati, N. O. & T. P. Ry. Co., 72 Fed. 637, reviewing authorities. **Me.** Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503. **Mass.**—Mulchey *v.* Methodist Religious Society, 125 Mass. 487. **N. H.**—Page *v.* Parker, 40 N. H. 47, 68. **Ohio.**—Clark *v.* Fry, 8 Ohio St. 358, 377, 72 Am. Dec. 590. See the title "**Master and Servant.**"

24. See *supra*, this section and the title "**Master and Servant.**"

25. Tandrup *v.* Sampsell, 234 Ill. 526, 532, 85 N. E. 331, 17 L. R. A. (N. S.) 852; Johnson *v.* Cunningham, 56 Ill. App. 593; Union Bank *v.* Mott, 27 N. Y. 633.

26. Tandrup *v.* Sampsell, 234 Ill. 526, 532, 85 N. E. 331, 17 L. R. A. (N. S.) 852. See generally the title "**Receivers.**"

27. **Cal.**—Hudgens *v.* Chamberlain, 161 Cal. 710, 120 Pac. 422; Doeg *v.* Cook, 126 Cal. 213, 218, 58 Pac. 707, 77 Am. St. Rep. 171; Lang *v.* Lilly & Thurston Co., 20 Cal. App. 223, 128 Pac. 1028. **Conn.**—Sparrow *v.* Bromage, 83 Conn. 27, 74 Atl. 1070, 27 L. R. A. (N. S.) 209. **Idaho.**—McClain *v.* Lewiston Interstate F. & R. Assn., 17 Idaho 63, 104 Pac. 1015, 25 L. R. A. (N. S.) 691. **Ill.**—Yeazel *v.* Alexander, 58 Ill. 254, 262. **Mich.**—Wienskawski *v.* Wisner, 114 Mich. 271, 72 N. W. 177. **Neb.**—Stuart *v.* Bank of Staplehurst, 57 Neb. 569, 78 N. W. 298. **N. Y.**—Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Bishop *v.* Ely, 9 Johns. 294. **Ore.**—Strauhall *v.* Asiatic S. S. Co., 48 Ore. 100, 85 Pac. 230; Cooper *v.* Blair, 14 Ore. 255, 12 Pac. 370. **Pa.**—Little Schuylkill Nav. R. & C. Co. *v.* Richards' Admr., 57

Pa. 142, 98 Am. Dec. 209. **R. I.**—Mason *v.* Geo. H. Copeland & Co., 27 R. I. 232, 61 Atl. 650. **Tenn.**—Swain *v.* Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93. **Tex.**—Blanton *v.* Kincheloe Irr. Co. (Tex. Civ. App.), 102 S. W. 744.

[a] An implied concert of action may grow out of the status or relation of the parties and the conditions under which the tortious acts proximately cause the injury. Symmes *v.* Prairie Pebble Phos. Co., 66 Fla. 27, 63 So. 1.

Master and servant as joint tortfeasors, see the title "**Master and Servant.**"

28. **U. S.**—Kilkenny *v.* Boekius, 187 Fed. 382. **Cal.**—Doeg *v.* Cook, 126 Cal. 213, 218, 58 Pac. 707, 77 Am. St. Rep. 171; Hillman *v.* Newington, 57 Cal. 56; Lang *v.* Lilley & Thurston Co., 20 Cal. App. 223, 128 Pac. 1028. **Conn.**—Cartesen *v.* Stratford, 67 Conn. 428, 35 Atl. 276. **Fla.**—Standard Phosphate Co. *v.* Lunn, 66 Fla. 220, 63 So. 429. **Ill.**—Birch *v.* Charleston Light, H. & P. Co., 113 Ill. App. 229. **Ia.**—Tackaberry Co. *v.* Sioux City Service Co., 154 Iowa 358, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276, 40 L. R. A. (N. S.) 102. **Me.**—Allison *v.* Hobbs, 96 Me. 26, 51 Atl. 245. **N. J.**—Matthews *v.* Delaware, L. & W. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261. **N. Y.**—Chipman *v.* Palmer, 77 N. Y. 51, 33 Am. Rep. 566. **Ore.**—Strauhall *v.* Asiatic S. S. Co., 48 Ore. 100, 85 Pac. 230.

Where concurrent acts of negligence combine to produce an injury, see the titles "**Negligence;**" "**Passengers.**"

[a] Acts themselves may not be wrongful, or may be sufficient, without the concurring acts, to produce the injury. Hillman *v.* Newington, 57 Cal. 56; Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

No concert of action necessary. See cases cited *supra*, this note.

several when committed do not become joint so as to permit of a joinder of defendants at law by a subsequent union or intermingling of their consequences, where no concert of tortious action or consequence is intended by the parties or implied by law.²⁹

(B.) TORTS ARISING OUT OF CONTRACT. — If a contract must be pleaded and proved, the gist of the action being the breach of the contract, all persons jointly liable must be joined even though the action is framed as for tort, as the action is in substance one on contract.³⁰ But it is otherwise if the action is maintainable without reference to a contract, although its existence may have furnished the opportunity of committing the tort.³¹

(C.) TORTS CONCERNING REAL PROPERTY. — In tort actions concerning real property in which the title to the land will come directly in question, the tortfeasors must be joined.³² But if the title does not come into

29. **Cal.**—*Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80. **Fla.**—*Standard Phosphate Co. v. Lunn*, 66 Fla. 220, 63 So. 429; *Symmes v. Prairie Pebble Phos. Co.*, 66 Fla. 27, 63 So. 1. **Ind.**—*West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879. **Ia.**—*Tackaberry Co. v. Sioux City Service Co.*, 154 Iowa 358, 365, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276, 40 L. R. A. (N. S.) 102. **N. Y.**—*Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566. **Pa.**—*Little Schuylkill Nav. R. & C. Co. v. Richards' Admr.*, 57 Pa. 142, 98 Am. Dec. 209. **Eng.**—*Sadler v. Great Western R. R. Co.*, App. Cas. L. R. 1896, 450, 74 L. T. N. S. 561, 45 Wkly. Rep. 51, where defendants left carts on highway obstructing passage to plaintiff's shop.

[a] **Negligent Acts.**—*Mason v. Geo. H. Copeland & Co.*, 27 R. I. 232, 61 Atl. 650.

[b] **Pollution of Streams.**—**Cal.** *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254. **Compare** *Hillman v. Newington*, 57 Cal. 56. **Fla.**—*Standard Phosphate Co. v. Lunn*, 66 Fla. 220, 63 So. 429; *Symmes v. Prairie Pebble Phos. Co.*, 66 Fla. 27, 63 So. 1. **N. Y.**—*Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566. **Pa.**—*Little Schuylkill Nav. R. & C. Co. v. Richards' Admr.*, 57 Pa. 142, 98 Am. Dec. 209. **Va.**—*Pulaski A. Coal Co. v. Gibboney Sand Bar Co.*, 110 Va. 444, 66 S. E. 73, 24 L. R. A. (N. S.) 1185. See generally the title "Waters and Watercourses."

[c] Where the acts (1) combine and

constitute a public nuisance, a distinction is recognized (*West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879), (2) but this distinction has been said to have no foundation in precedent and not to be maintainable on principle. *Tackaberry Co. v. Sioux City Service Co.*, 154 Iowa 358, 373, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276, 40 L. R. A. (N. S.) 102; *Mansfield v. Bristol*, 76 Ohio St. 270, 81 N. E. 631, 118 Am. St. Rep. 852, 10 L. R. A. (N. S.) 806. See generally the title "Nuisance."

Joining separate owners of dogs which unite in causing injury, see 1 STANDARD PROC. 954.

But in equity, the parties may be joined in a suit for an injunction in a proper case. See such titles as "Nuisance;" "Waters and Watercourses."

30. *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55 (action against firm of physicians for malpractice); *Wright v. Geer*, 6 Vt. 151, 27 Am. Dec. 538.

31. *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55. See *Hill v. Harris*, 4 Bush (Ky.) 450; *Bank of Orange v. Brown*, 3 Wend. (N. Y.) 158.

In actions against freight carriers, see 10 STANDARD PROC. 239.

32. *Southard v. Hill*, 44 Me. 92, 69 Am. Dec. 85; *Low v. Mumford*, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469.

[a] **Where a nuisance on land jointly owned by several persons** (1) consists of acts of omission, the defendant owners must be joined as their duty to perform the omitted act depends on ownership. *Low v. Mum-*

question, there is no distinction between personal torts and torts concerning realty.³³

(D.) JOINT TORTS BECAUSE OF RELATION OF PARTIES. — A master and his servant,³⁴ or a principal and his agent,³⁵ or a husband and his wife,³⁶ are sometimes regarded as joint tortfeasors as to the torts of the servant, agent, or wife, and may or must be joined in accordance with rules elsewhere discussed, although there are some authorities holding otherwise.³⁷

c. *Where Plaintiff Is in Doubt as to Liability.* — Statutes sometimes provide that when a plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants to ascertain which is liable.³⁸

2. *In Equity.* — While a single complainant having distinct and independent claims to relief against two or more defendants severally cannot join both or all of them in one bill,³⁹ it may be stated as a general rule that unconnected parties may be joined as defendants in the same suit when there is a common interest among them all, centering in the one point of issue in the cause, although their interests may be otherwise unconnected.⁴⁰ Joinder is also permitted where the subject

ford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469. (2) But it is otherwise if the nuisance consists of acts of commission. *Ga.*—Connor v. Hall, 89 Ga. 257, 15 S. E. 308. *Mass.*—Sumner v. Tileston, 4 Pick. 308. See *Converse v. Symmes*, 10 Mass. 377. *N. Y.*—Low v. Mumford, 14 Johns. 426, 7 Am. Dec. 469. See generally the title "Nuisance."

33. Sumner v. Tileston, 4 Pick. (Mass.) 308; Low v. Mumford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469.

34. See the title "Master and Servant."

35. See the title "Principal and Agent."

36. See 11 STANDARD PROC. 740.

37. See *supra*, VIII, B, 1, b, (II), (A), and the title "Master and Servant."

38. See the statutes, and *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546.

[a] A joinder of two defendants on separate causes of action because the plaintiff is in doubt whether he can maintain one or the other is not permissible under this statute. *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546. See also *Sadler v. Great Western R. R. Co.*, App. Cas. L. R. 1896 (Eng.) 450, 74 L. T. N. S. 561, 45 Wkly. Rep. 51.

39. *Ga.*—Knott v. McWhirter, 140 Ga. 337, 78 S. E. 1062. *La.*—Davidson

v. Frost-Johnson Lumber Co., 126 La. 542, 52 So. 759; *Waldo v. Angomar*, 12 La. Ann. 74. *Mass.*—*Keith v. Keith*, 143 Mass. 262, 9 N. E. 560. *N. J.*—*Marselis v. Morris C. & B. Co.*, 1 N. J. Eq. 31. *N. Y.*—*Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412. *Pa.*—*Elk Brew. Co. v. Neubert*, 213 Pa. 171, 62 Atl. 782. *S. C.*—*Edwards v. Sartor*, 1 S. C. 266. *Tex.*—*Morris v. Davis* (Tex. Civ. App.), 31 S. W. 850, even though the claims arise from the same contract. *Wis.*—*Barnes v. Racine*, 4 Wis. 454.

See also the title "Multifariousness."

[a] Defendants who are not interested in the whole of the relief sought cannot be joined. *Gaither v. Bauernschmidt*, 108 Md. 1, 69 Atl. 425.

[b] Where independent acts combine to produce injury, persons may be joined. *Mayer v. Phoenix Assur. Co.*, 124 App. Div. 241, 108 N. Y. Supp. 711.

40. *U. S.*—*Union Mill & M. Co. v. Dangberg*, 81 Fed. 73, 88. *Ark.*—*State v. Turner*, 49 Ark. 311, 5 S. W. 302. *Cal.*—*Wilson v. Castro*, 31 Cal. 420, 429. *Minn.*—*State v. Knife Falls Boom Corp.*, 96 Minn. 194, 104 N. W. 817. *N. H.*—*Chase v. Searles*, 45 N. H. 511, 519. *N. Y.*—*Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Boyd v.*

of the action is so complicated and entangled that it is difficult to determine who is liable and who is not except on a full hearing.⁴¹

3. Under the Code.—The usual code provision is that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.⁴²

This is a substantial reenactment of the equity practice,⁴³ but it applies to suits at law as well as to suits in equity.⁴⁴ In determining whether there is a misjoinder of parties in particular cases, the courts

Hoyt, 5 Paige 65; *Caleo v. Goldstein*, 134 App. Div. 228, 118 N. Y. Supp. 859. **Eng.**—*Ward v. Northumberland*, 2 Anst. 469.

Similar rule in regard to plaintiffs, see *supra*, VIII, A, 2.

[a] **Rule Relaxed To Avoid Multiplicity of Suits.**—*Bailey v. Tillinghast*, 99 Fed. 801, 40 C. C. A. 93; *Fairfield v. Southport Nat. Bank*, 77 Conn. 423, 429, 59 Atl. 513. See the title "Multiplicity of Suits."

[b] A bill against several persons must relate to matters of the same nature, and having a connection with each other and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct. *Brinkerhoff v. Brown*, 6 Johns. Ch. (N. Y.) 139.

[c] **It is no objection** (1) that the defendants have no identity of interests to be affected (*Miss.*—*Selleck v. Macon Compress & W. Co.*, 72 Miss. 1019, 17 So. 603. **N. Y.**—*Brinkerhoff v. Brown*, 6 Johns. Ch. 139. **Tex.**—*Teas v. McDonald*, 13 Tex. 349, 65 Am. Dec. 65; *Vogelsang & Bro. v. G. H. Mensing & Bro.*, 1 White & W. Civ. Cas. §1165), or (2) that the interests of the defendant are in conflict with each other (*Campbell v. Shipman*, 87 Va. 655, 13 S. E. 114), or (3) that some of their claims are identical with those of the plaintiff. *Campbell v. Shipman*, 87 Va. 655, 13 S. E. 114. Position of parties as plaintiffs and defendants, see *supra*, III, C.

41. *Demarest v. Holdeman*, 157 Ind. 467, 473, 62 N. E. 17.

42. See the codes, and **Ark.**—*Leola Lumb. Co. v. Bozarth*, 91 Ark. 10, 120 S. W. 152. **Conn.**—*Fairfield v. Southport Nat. Bank*, 77 Conn. 423, 429, 59 Atl. 513. **Idaho.**—*Brady v. Linehan*, 5 Idaho 732, 51 Pac. 761. **Mo.**—*Bush v. Block*, 193 Mo. App. 704, 711, 187 S.

W. 153. **N. Y.**—*Sherman v. Parish*, 53 N. Y. 483. **Okla.**—*Edmondston v. Porter*, 162 Pac. 692; *Haynes v. City Nat. Bank*, 30 Okla. 614, 121 Pac. 182.

[a] **The word** (1) "controversy" as used in the statute is exceedingly broad and comprehensive (*Fairfield v. Southport Nat. Bank*, 77 Conn. 423, 428, 59 Atl. 513); (2) it has been defined as the claim for relief made by the plaintiff against the defendant and set up in the complaint. *Gardner v. Samuels*, 116 Cal. 84, 90, 47 Pac. 935, 58 Am. St. Rep. 135. See *Fairfield v. Southport Nat. Bank*, 77 Conn. 423, 428, 59 Atl. 513.

[b] **That the defendants have separate defenses** does not preclude a joinder. *Davis v. Rexford*, 146 N. C. 418, 59 S. E. 1002.

[c] **Mere fact that some principle of law may be determined adversely to a person** does not of itself authorize his joinder. *Clark v. Bonsal & Co.*, 157 N. C. 270, 72 S. E. 954, 48 L. R. A. (N. S.) 191.

[d] **Where plaintiff does not know which of several defendants caused an injury to him**, he cannot join them in one action (*Hannon v. Nuevo Land Co.*, 14 Cal. App. 700, 112 Pac. 1103), (2) unless the subject of the action is so complicated it is difficult to determine who is liable. *Demarest v. Holdeman*, 157 Ind. 467, 473, 62 N. E. 17, applying the rule in equity.

[e] **If the parties are united in interest** the code requires that they must be joined as defendants. See the codes.

43. *Shakespear v. Smith*, 77 Cal. 638, 641, 20 Pac. 294, 11 Am. St. Rep. 327.

44. *Demarest v. Holdeman*, 157 Ind. 467, 473, 62 N. E. 17; *Bittinger v. Bell*, 65 Ind. 445. But see *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 446, the Iowa code has reference to equitable actions only.

frequently resort to the equity practice.⁴⁵

The code has not changed the rule that persons only severally liable cannot be joined as defendants over their objection,⁴⁶ although it has made certain exceptions to it,⁴⁷ and courts in the interest of speedy and complete justice have sometimes relaxed the rule.⁴⁸ Nor has the code changed the common law rule as to joinder of joint tortfeasors.⁴⁹

C. IN LOUISIANA AND TEXAS.—Neither Louisiana,⁵⁰ nor Texas,⁵¹ have statutes regulating the question of joinder of parties, the propriety thereof resting in the discretion of the court, the aim being, within limits, to prevent a multiplicity of suits. In so far as the cases apply the general rules of the common law and equity practices,

45. See *Fairfield v. Southport Nat. Bank*, 77 Conn. 423, 428, 59 Atl. 513; *Demarest v. Holdeman*, 157 Ind. 467, 473, 62 N. E. 17.

As to equity practice, see VII, B, 2.

[a] Test for proper joinder is whether they have a connected interest, centering in the point in issue or whether they have one common point of litigation. *Harris v. Elliott*, 29 App. Div. 568, 51 N. Y. Supp. 1012. See also *supra*, VII, B, 2.

46. **U. S.**—*Iowa Lilloet Gold Min. Co. v. Bliss*, 144 Fed. 446. **Cal.**—*Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546. **Ga.**—*Shingleur v. Swift*, 110 Ga. 891, 36 S. E. 222. **Neb.**—*Cooper & Cole Bros. v. Cooper*, 90 Neb. 209, 133 N. W. 243; *Stull Bros. v. Powell*, 70 Neb. 152, 97 N. W. 249. **N. Y.**—*Le Roy v. Shaw*, 2 Duer 626.

47. See generally the codes.

Joining maker and indorser of notes, see 4 STANDARD PROC. 221.

Joining indorser and guarantor, see 4 STANDARD PROC. 243.

Joining sureties, see the title "Principal and Surety."

48. *Evergreen Cemetery Assn. v. Beecher*, 52 Conn. 551, 5 Atl. 353.

49. *Buckles v. Lambert*, 4 Metc. (Ky.) 330.

As to practice, see *supra*, VIII, B, 1, b, (II).

50. *Davidson v. Frost-Johnson Lumber Co.*, 126 La. 542, 52 So. 759.

[a] Parties cannot be joined who have not a common interest, or where the defendants would be embarrassed in their defense, or delays would be caused or complications arise, in connection with costs or otherwise. *Davidson v. Frost-Johnson Lumber Co.*, 126 La. 542, 52 So. 759; *Gill v. Lake Charles*, 119 La. 17, 43 So. 897.

51. *Rush v. Bishop*, 60 Tex. 177; *Craddock v. Goodwin*, 54 Tex. 578, 582; *Clegg v. Varnell*, 18 Tex. 294; *Farmers' Nat. Bank v. Merchants' Nat. Bank* (Tex. Civ. App.), 136 S. W. 1120; *Vogelsang & Bro. v. G. H. Mensing & Bro.*, 1 White & W. Civ. Cas. (Tex.) §1165.

[a] Rules are analogous (1) to those obtaining in equity. *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751. (2) Question may often have to be determined as a mixed matter of law and equity, although generally the question depends on rules obtaining at common law or in equity according as the relief sought is legal or equitable. *Austin v. Cahill*, 99 Tex. 172, 190, 88 S. W. 542, 89 S. W. 552. (3) But the same strict rules of pleading do not prevail here as in states where law and equity are distinct. *Craddock v. Goodwin*, 54 Tex. 578; *Missouri, K. & T. Ry. Co. v. Elias* (Tex. Civ. App.), 184 S. W. 312.

[b] If the person injured assigns (1) an undivided part of his cause of action, both he and his assignee must join in an action for a recovery of the entire amount due for the tort (*Hughes-Buie Co. v. Mendoza* [Tex. Civ. App.], 156 S. W. 328, where plaintiff assigned his attorney an undivided third interest in his cause of action), (2) unless the assignment is made after the commencement of the action. *El Paso Elec. Ry. Co. v. Telles* (Tex. Civ. App.), 99 S. W. 444.

[c] Joinder of Defendants.—It is the practice to join all who are supposed to be liable although their liability may have accrued in different ways. *O'Shea v. Twohig*, 9 Tex. 336.

[d] Test for Misjoinder of Defendants.—*Williams v. Robinson*, 63 Tex. 576.

they are discussed with the rules regulating such practices.⁵²

IX. SUING OR DEFENDING ON BEHALF OF ALL. — **A. RIGHT TO BRING REPRESENTATIVE SUIT GENERALLY.** — It is an exception⁵³ to the rule in equity requiring all who are interested in a suit to be made parties either plaintiffs or defendants,⁵⁴ which allows one or more persons to sue or defend for the benefit of all, when the question is one of common or general interest,⁵⁵ or when the parties are numerous, and it is impracticable to bring them all before the court.⁵⁶ The federal equity rule,⁵⁷ and the code provisions,⁵⁸ allowing the same have been

52. Rules at common law, see VIII, A, 1, and VIII, B, 1.

Rules in equity, see VIII, A, 2, and VIII, B, 2.

53. **Ga.**—Carey v. Hoxey, 11 Ga. 645. **N. Y.**—Bouton v. Brooklyn, 15 Barb. 375, 7 How. Pr. 198. **R. I.**—Sprague v. Stevens, 37 R. I. 1, 91 Atl. 43, 49.

54. General rule, see *supra*, IV.

55. **U. S.**—Wallace v. Adams, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. ed. 547. **Ill.**—Thickson v. Barry, 138 Ill. App. 100. **W. Va.**—Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21. **Wis.**—Newcomb v. Horton, 18 Wis. 566. **Eng.**—Taylor v. Salmon, 4 Myl. & Cr. 134, 41 Eng. Reprint 53.

56. **U. S.**—*In re Dennett*, 221 Fed. 350, 136 C. C. A. 422; *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366. **Ark.**—Porter v. Clements, 3 Ark. 364. **Cal.**—Von Schmidt v. Huntington, 1 Cal. 55. **Ga.**—Carey v. Hoxey, 11 Ga. 645. **Ill.**—Ryan v. Lynch, 68 Ill. 160; *Whitney v. Mayo*, 15 Ill. 251; *Willis v. Anderson*, 5 Ill. 13, 38 Am. Dec. 120. **Md.**—Leviness v. Consolidated Gas, E. L. & P. Co., 114 Md. 559, 80 Atl. 304, Ann. Cas. 1913C, 649. **Mass.**—Hills v. Barnard, 152 Mass. 67, 25 N. E. 96, 9 L. R. A. 211. **Miss.**—McPike v. Wells, 54 Miss. 136; *Boisgerard v. Wall, Smed. & M. Ch.* 404. **N. Y.**—Bouton v. Brooklyn, 15 Barb. 375, 7 How. Pr. 198. **R. I.**—Ver-non v. Reynolds, 20 R. I. 552, 40 Atl. 419. **Tenn.**—Lowry v. Francis, 2 Yerg. 534, where the numbers are great, any person interested in the subject of litigation may sue in equity. **Tex.**—Tunstall v. Wormley, 54 Tex. 476; *Standard L. & P. Co. v. Munsey*, 33 Tex. Civ. App. 416, 76 S. W. 931; *Carleton v. Roberts*, 1 Posey Unrep. Cas. 587. **Utah.**—Pearson v. Anderburg, 28 Utah 495, 80 Pac. 307. **Vt.**—Stimson v. Lewis, 36 Vt. 91. **Eng.**—Taylor v. Salmon, 4 Myl. & Cr. 134, 41 Eng. Reprint 53.

57. *In re Dennett*, 221 Fed. 350, 136 C. C. A. 422, citing 1 Bates Fed. Eq. Proc. §61.

[a] **The Rule in the Federal Equity Practice is Stated.**—"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Equity Rule, No. 38; *In re Engelhard & Sons Co.*, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. ed. 416; *Merchants' & M. Traffic Assn. v. United States*, 231 Fed. 292; *Little v. Tanner*, 208 Fed. 605, 608.

58. **N. Y.**—McKenzie v. L'Amoureux, 11 Barb. 516. **Ore.**—Tobin v. Portland F. Mills Co., 41 Ore. 269, 68 Pac. 743. **Wis.**—Frederick v. Douglas, 96 Wis. 411, 71 N. W. 798; *Day v. Buckingham*, 87 Wis. 215, 58 N. W. 254.

[a] **The codes provide** (1) that when the question is one of a common or general interest of many persons (see the codes, and **Cal.**—*Gieske v. Anderson*, 77 Cal. 247, 19 Pac. 421. **Ind.**—*Shoemaker v. Board of Comrs.*, 36 Ind. 175. **Wash.**—*Vashon Fruit Union v. Godwin & Co.*, 87 Wash. 384, 151 Pac. 797), or (2) when the parties are numerous and it is impracticable to bring them all before the court (**U. S.**—*Stearns Coal & Lumb. Co. v. Van Winkle*, 221 Fed. 590, 137 C. C. A. 314, under Kentucky code. **Ind.**—*Blair v. Shelby County Agr. & J. S. Assn.*, 28 Ind. 175. **Ky.**—*Hendrix v. Monev*, 1 Bush 306; *Flint v. Spurr*, 17 B. Mon. 499. **N. C.**—*Thames v. Jones*, 97 N. C. 121, 1 S. E. 692. **Ohio.**—*Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735. **Ore.**—*Trustees of M. E. Protestant Church v. Adams*, 4 Ore. 76, 88. **S. C.**—*Kelly v. Tiner*, 91 S. C. 41, 49, 74 S. E. 30. **Wis.**—*Van Brunt v. Ferguson*, 163 Wis. 540, 158 N. W. 295; *Board of Supervisors of Douglas County v. Walbridge*,

held merely declaratory of the rule which prevails in equity generally. Except under the code which makes the rule applicable to both law and equity suits,⁵⁹ the rule allowing one or more to sue or defend on behalf of all applies only to suits in equity.⁶⁰ There are two distinct cases under the rule when one or more may sue for the benefit of all, as it exists under the equity and code practices,⁶¹ although it frequently happens that a particular cause will fall within both classes of cases.⁶² The test for determining whether one can sue on behalf of all is to determine whether all the persons represented have such an interest that they ought to be before the court.⁶³ Care must be taken that the persons on the record fairly represent the interest or right involved, so that it may be fairly tried.⁶⁴

Consent of Persons Represented. — In the absence of any showing to the contrary, it will be presumed that the parties in whose behalf the suit is brought consented to the bringing of the action.⁶⁵

Disposition of Representative Suit Improperly Brought. — If the suit is not one which may be brought by or against some for all,⁶⁶ it will be

38 Wis. 179), that one or more may sue or defend for the benefit of all. (3) Some codes provide that the court may make an order that the action may be prosecuted or defended for all in the cases considered; but the majority of the codes have no such provision. See generally the codes. (4) Such a provision is not mandatory. *Adams v. Clark*, 36 Colo. 65, 91, 85 Pac. 642.

59. *Kirk v. Young*, 2 Abb. Pr. (N. Y.) 453; *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735.

60. *Lilly v. Tobbein*, 103 Mo. 477, 488, 15 S. W. 618, 23 Am. St. Rep. 887.

[a] **In Suit To Contest or Establish a Will.**—*Lilly v. Tobbein*, 103 Mo. 477, 489, 15 S. W. 618, 23 Am. St. Rep. 887.

61. See *supra*, this section.

62. *McCann v. Louisville*, 23 Ky. L. Rep. 558, 63 S. W. 446; *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543, 45 Pac. 141.

63. See the following: **U. S.**—*Cutting v. Gilbert*, 5 Blatchf. 259, 6 Fed. Cas. No. 3,519. **Ia.**—*Fleming v. Mereshon*, 36 Iowa 413, 418. **N. Y.**—*Climax Specialty Co. v. Seneca Button Co.*, 103 N. Y. Supp. 822, wherein the court said the interest of the plaintiffs was such that they could have joined or one can sue for all. **S. C.**—*Whitaker v. Manson*, 84 S. C. 29, 65 S. E. 953, 137 Am. St. Rep. 835; *Faber v. Faber*, 76 S. C. 156, 162, 56 S. E. 677.

64. **U. S.**—*McArthur v. Scott*, 113

U. S. 340, 395, 5 Sup. Ct. 652, 28 L. ed. 1015; *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179; *Smith v. Swormstadt*, 16 How. 288, 303, 14 L. ed. 942; *American Steel & Wire Co. v. Wire Drawers' & D. M. Unions*, 90 Fed. 605. **Cal.**—*Von Schmidt v. Huntington*, 1 Cal. 55, 67. **Mass.**—*Smith v. Williams*, 116 Mass. 510. **Ohio.**—*Britton v. Baker*, 2 Ohio N. P. (N. S.) 314. **Wis.**—*Linden Land Co. v. Milwaukee E. R. & L. Co.*, 107 Wis. 493, 83 N. W. 851.

[a] **Persons bringing the action must have an interest in the subject-matter of the action.** *Overton v. Overton*, 123 Ky. 311, 96 S. W. 469.

[b] **If the plaintiff's interests are hostile to those he assumes to represent, he will not be allowed to represent them.** *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647.

[c] **It is discretionary with the court as to how many representatives of a class will or ought to be regarded as a fair representation of the whole class in a given instance.** *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; *Smith v. Williams*, 116 Mass. 510.

[d] **Who May Represent Association.**—**U. S.**—*Beatty v. Kurtz*, 2 Pet. 566, 584; 7 L. ed. 521. **Ill.**—*Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009. **Tex.**—*Carleton v. Roberts*, 1 Posey Unrep. Cas. 587.

65. *Flint v. Spurr*, 17 B. Mon. 499.

66. **U. S.**—*Raich v. Traux*, 219 Fed. 273. **Cal.**—*Gibbons v. Peralta*, 21 Cal. 629. **N. Y.**—*Bouton v. Brooklyn*, 15

disposed of in the same manner as if the charges or allusions to others were stricken out.

B. WHERE ACTION INVOLVES QUESTION OF COMMON OR GENERAL INTEREST. — In the first class of cases in which one or more may sue or defend for all, it is the character of the interest which controls rather than the number of persons.⁶⁷ It is only required that there be present a question of common or general interest of many persons.⁶⁸ It is neither required, nor necessary to show that the parties are very numerous,⁶⁹ or that it would be impracticable to bring them all before the court.⁷⁰ The word "many" does not mean "numerous" or "multitudinous,"⁷¹ but "several."⁷² If the parties are united in interest they must join;⁷³ one or more cannot sue for all,⁷⁴ although it has been said that the statute extends to such cases as well.⁷⁵

Illustrations of actions in which questions of common or general interest to many persons are involved will be found in the cases cited in the notes.⁷⁶

Barb. 375, 392, 7 How. Pr. 198. **Wis.** Linden Land Co. v. Milwaukee Elec. R. & L. Co., 107 Wis. 493, 83 N. W. 851.

67. Farnam v. Barnum, 2 How. Pr. N. S. (N. Y.) 396, 404; Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140.

68. Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140. Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

69. McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516; McMichen v. Amos, 4 Rand. (25 Va.) 154.

70. McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516.

71. Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140.

72. Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140. See also McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516.

[a] Requirement satisfied (1) if the question is one of common or general interest of as low as three (Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140), (2) or four (Climax Specialty Co. v. Seneca Button Co., 103 N. Y. Supp. 822; McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516) persons.

73. See *supra*, VIII, A, 3, d, and VIII, B, 3, d.

74. McKenzie v. L'Amoureux, 11 Barb. (N. Y.) 516; Day v. Buckingham, 87 Wis. 215, 58 N. W. 254.

75. Tobin v. Portland Mills Co., 41 Ore. 269, 68 Pac. 743, 1108. See also Carey v. Brown, 58 Cal. 180.

76. See the following: **U. S.**—Penny v. Central Coal & Coke Co., 138 Fed. 769, 71 C. C. A. 135; Chew v. First Presbyterian Church, 237 Fed. 219. **Ark.**—St. Louis, I. M. & S. R. Co. v. Cumbie, 101 Ark. 172, 141 S. W. 939; Cantwell v. Pacific Express Co., 58 Ark. 487, 25 S. W. 503. **Ky.**—Gorley v. Louisville, 23 Ky. L. Rep. 1782, 65 S. W. 844; McCann v. Louisville, 23 Ky. L. Rep. 558, 63 S. W. 446. **N. Y.** Whitmore v. New York I. W. Co., 158 App. Div. 178, 142 N. Y. Supp. 1098; Climax Specialty Co. v. Seneca Button Co., 103 N. Y. Supp. 822. **S. C.**—Kelly v. Tiner, 91 S. C. 41, 49, 74 S. E. 30. **Wis.**—Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

[a] Thus questions of common or general interest to many persons are involved in (1) actions to enjoin a common nuisance (Greer v. Smith, 155 App. Div. 420, 140 N. Y. Supp. 43. Compare Linden Land Co. v. Milwaukee E. R. & L. Co., 107 Wis. 493, 507, 83 N. W. 851. See generally the title "Nuisance"), (2) actions by taxpayers or abutting owners challenging the illegal waste or squandering of public funds (Linden Land Co. v. Milwaukee E. R. & L. Co., 107 Wis. 493, 507, 83 N. W. 851; Frederick v. Douglas, 96 Wis. 411, 71 N. W. 798. See generally the title, "Municipal Corporations"), (3) actions to restrain the collection of or recover payments made under illegal taxes. Com. v. Scott, 112 Ky. 252, 65 S. W. 596, 55 L. R. A. 597; Whaley v. Com., 110 Ky. 154, 61 S. W. 35.

C. WHERE PARTIES ARE NUMEROUS. — 1. Joinder Must Be Impracticable. — The exception allowing some to sue or defend for all where the parties are numerous is based on the fact that the parties are so numerous that it is really impracticable to join them.⁷⁷ Some courts have attempted to draw a line as to the number which it is impracticable to join because of mere numerosity, but the holdings of the courts are not uniform.⁷⁸

2. Necessity of Common Interest. — The interests of the parties in a representative action where the parties are numerous may be separate and distinct;⁷⁹ but despite the fact that the rule does not expressly require a common interest, it will be found that the right to assert or protect which the suit is brought or the obligation which it is sought to enforce, is common to them all,⁸⁰ or as it has been stated, there always

Contra, *Fleming v. Mershon*, 36 Iowa 413 (injunction against collection of tax); *Newcomb v. Horton*, 18 Wis. 566. See generally the title "**Taxation.**"

[b] **Quiet Title Suit.**—*Carey v. Brown*, 58 Cal. 180. See also *Gibbons v. Peralta*, 21 Cal. 629. See the title "**Quieting Title.**"

[c] **In An Action on a Subscription Contract.**—*George v. Benjamin*, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963.

[d] **Action to restrain the enforcement of a law against employing persons of a particular class, such as aliens, is not one in which one may sue as representing a class.** *Raich v. Truax*, 219 Fed. 273, 283.

As to whether a tenant in common may sue on behalf of all, see the title, "Tenants in Common."

77. *Ga.*—*Carey v. Hoxey*, 11 *Ga.* 645. *Ore.*—*Tobin v. Portland F. Mills Co.*, 41 *Ore.* 269, 278, 68 *Pac.* 743, 1108. *Wis.*—*Castle v. Madison*, 113 *Wis.* 346, 356, 89 N. W. 156.

[a] **Mere numerosness (1) of itself is insufficient to bring a case within the rule** (*Carey v. Hoxey*, 11 *Ga.* 645); (2) it will not be assumed that it is impracticable to bring in all the parties simply because they are numerous. *Castle v. Madison*, 113 *Wis.* 346, 356, 89 N. W. 156, where the number was 256.

78. *Smith v. Swormstedt*, 16 *How.* (U. S.) 288, 303, 14 L. ed. 942 (1500); *Hodges v. Nalty*, 104 *Wis.* 464, 80 N. W. 726; *George v. Benjamin*, 100 *Wis.* 622, 76 N. W. 619, 69 Am. St. Rep. 963.

[a] **Rests in the Discretion of the Court.**—*Tobin v. Portland F. Mills Co.*, 41 *Ore.* 269, 277, 68 *Pac.* 743, 1108.

[b] **Various Numbers Considered.**

(1) *Hodges v. Nalty*, 104 *Wis.* 464, 80 N. W. 726, holding seventy-five sufficient to justify suit in representative capacity. *Compare Castle v. Madison*, 113 *Wis.* 346, 356, 89 N. W. 156, holding that a representative suit where the interested persons number 256 is not permissible where there is no showing that it is impracticable to join them. (2) Without ruling on the question of impracticability of joining the interested parties, a representative suit was held properly brought where the interested parties numbered two hundred (*Florence v. Helms*, 136 *Cal.* 613, 69 *Pac.* 429), (3) six hundred (*Small v. Attwood*, 1 *Younge* [Eng.] 407), (4) and twenty-seven hundred. *Van Brunt v. Ferguson*, 163 *Wis.* 540, 158 N. W. 295. (5) But the mere fact that the interested parties number forty (*Brainerd v. Bertram*, 5 *Abb. N. C.* [N. Y.] 102; *Bird v. Lanphear*, 11 *App. Div.* 613, 42 N. Y. Supp. 623), (6) thirty-five (*Kirk v. Young*, 2 *Abb. Pr.* [N. Y.] 453), (7) and thirty-one (*George v. Benjamin*, 100 *Wis.* 622, 76 N. W. 619, 69 Am. St. Rep. 963) does not make it impracticable to join them.

79. **U. S.**—*Smith v. Swormstedt*, 16 *How.* 288, 302, 14 L. ed. 942; *Cutting v. Gilbert*, 5 *Blatchf.* 259, 6 *Fed. Cas. No.* 3,519. **N. Y.**—*Reid v. Evergreens*, 21 *How. Pr.* 319. **Ore.**—*Tobin v. Portland F. Mills Co.*, 41 *Ore.* 269, 276, 68 *Pac.* 743, 1108.

80. **U. S.**—*Wallace v. Adams*, 204 *U. S.* 415, 27 *Sup. Ct.* 363, 51 L. ed. 547; *Scott v. Donald*, 165 *U. S.* 58, 115, 17 *Sup. Ct.* 265, 41 L. ed. 632; *Cutting v. Gilbert*, 5 *Blatchf.* 259, 6 *Fed. Cas. No.* 3,519. **Cal.**—*Wheelock v. First Presbyterian Church*, 119 *Cal.*

exists a common interest or common right or a general claim or privilege.⁸¹ If the only matter in common is an interest in the question involved, one cannot sue or be sued for all.⁸²

3. **Illustrations** of cases wherein one or more persons were permitted to sue or defend for all because the parties were very numerous will be found in the cases cited in the note.⁸³

D. **ALLEGATIONS IN BILL OR COMPLAINT.**—The fact that a suit is brought by or against a few individuals as representing a class,⁸⁴ and

477, 51 Pac. 841. **N. Y.**—Reid v. Evergreens, 21 How. Pr. 319. But see McKenzie v. L'Amoureux, 11 Barb. 516. **Wis.**—George v. Benjamin, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963.

[a] **Other statements of rule**, see **U. S.**—Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942. **Ala.**—Noble v. Gadsden Land & Imp. Co., 133 Ala. 250, 31 So. 856, 91 Am. St. Rep. 27; Morton v. New Orleans & S. Ry. Co., 79 Ala. 590, 610. **Cal.**—Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 Pac. 841.

81. **U. S.**—Smith v. Swormstedt, 16 How. (U. S.) 288, 302, 14 L. ed. 942. **Ga.**—Macon & B. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Bates v. Houston, 66 Ga. 198. **W. Va.**—Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21.

82. Scott v. Donald, 165 U. S. 58, 115, 17 Sup. Ct. 265, 41 L. ed. 632; Cutting v. Gilbert, 5 Blatchf. 259, 6 Fed. Cas. No. 3,519.

83. See *infra*, this note.

[a] **The most common illustration** is that of suits by or against voluntary associations or unincorporated companies having numerous members. **Cal.**—Geiske v. Anderson, 77 Cal. 247. **Ill.**—Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009; Thickson v. Barry, 138 Ill. App. 100. **Ia.**—Dumont v. Peet, 152 Iowa 524, 132 N. W. 955. **Mass.**—Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236. **Ohio.**—Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735; Mannix v. Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753. **Ore.**—Liggett v. Ladd, 17 Ore. 89, 21 Pac. 133. **S. C.**—Stemmermann v. Lillenthal, 54 S. C. 440, 32 S. E. 535. **Tex.**—Standard L. & P. Co. v. Munsey, 33 Tex. Civ. App. 416, 76 S. W. 931; Carleton v. Roberts, 1 Posey Unrep. Cas. 587. **Vt.**—Stimson v. Lewis, 36 Vt. 91. **Eng.**—Wallworth v. Holt, 4

M. & C. 619, 4 Jur. 814, 41 Eng. Reprint 238; Taylor v. Salmon, 4 My. & Cr. 134, 41 Eng. Reprint 53. See 3 STANDARD PROC. 162, and the title "Partnership." As to who may represent association, see IX, D.

As to labor unions, see 3 STANDARD PROC. 163, note 15; 13 STANDARD PROC. 37; and the title "Labor Unions."

[b] **But an action to enjoin interference** by members individually and by officers of a labor union with the relation between employer and employe is not a representative suit. Hitchman Coal & Coke Co. v. Mitchell (U. S.), 38 Sup. Ct. 65, 62 L. ed. 96.

[c] **The rule applies also to** (1) creditors' suits (see 6 STANDARD PROC. 190), (2) stockholders' suits (Noble v. Gadsden Land & Imp. Co., 133 Ala. 250, 31 So. 856, 91 Am. St. Rep. 27. See the title "Stock and Stockholders"), (3) suits by or against bondholders (U. S.—Campbell v. Railroad Co., 1 Woods 368, 4 Fed. Cas. No. 2,366. **Ill.**—Carter v. Rodewald, 108 Ill. 351; Ryan v. Lynch, 68 Ill. 160. **N. Y.**—Atkins v. Trowbridge, 162 App. Div. 161, 147 N. Y. Supp. 275, 162 App. Div. 629, 148 N. Y. Supp. 181. **Wash.**—Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141), and (4) suits by inhabitants of municipalities (see the titles "Municipal Corporations;" "Taxation"), (5) as well as to suits by taxpayers, and property owners (Risley v. Utica, 173 Fed. 502. See *supra*, and the title "Taxation"), (6) by patrons of water companies (Whitmore v. New York I. W. Co., 158 App. Div. 178, 142 N. Y. Supp. 1098; Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21. See the titles "Public Service Corporations;" "Waters and Watercourses"), and (7) by tenants in common. Whitaker v. Manson, 84 S. C. 29, 65 S. E. 953, 137 Am. St. Rep. 835. See generally the title "Tenants in Common."

84. **U. S.**—McArthur v. Scott, 113

facts showing his right to sue on behalf of himself and others,⁸⁵ must be alleged.

L. CHANGING INDIVIDUAL SUIT INTO REPRESENTATIVE SUIT.—A bill filed by one of a class in his own right may be so amended as to make it one on behalf of the plaintiff and all the rest of the class.⁸⁶

F. RIGHTS AND LIABILITIES OF PERSONS REPRESENTED.—**1. Status and Right To Come Into Suit.**—Those persons for whose benefit a representative suit is brought are not actual,⁸⁷ but quasi,⁸⁸ parties, who have a right to intervene and become actual parties plaintiff upon proper application to the court,⁸⁹ so long as the proceedings are in fieri, and not definitely closed by the course and practice of the court.⁹⁰ And the court will take measures to see that all have an opportunity to come in and protect their rights.⁹¹

U. S. 340, 395, 5 Sup. Ct. 652, 28 L. ed. 1015. **Tenn.**—Brown v. Brown, 86 Tenn. 277, 316, 6 S. W. 869, 7 S. W. 640. **W. Va.**—Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21.

85. **U. S.**—McArthur v. Scott, 113 U. S. 340, 395, 5 Sup. Ct. 652, 28 L. ed. 1015; American Steel & Wire Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 598. **Cal.**—Carey v. Brown, 58 Cal. 180. **N. Y.**—Redmond v. Hoge, 3 Hun 171, 5 Thomp. & C. 386, averment may be supplied by amendment. **Ohio.**—Quinlan v. Myers, 29 Ohio St. 500.

[a] **Allegation in Terms Unnecessary.**—Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140; Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735.

86. **Richmond v. Irons**, 121 U. S. 27, 51, 7 Sup. Ct. 788, 30 L. ed. 864; Larkin v. Wikoff, 75 N. J. Eq. 462, 473, 72 Atl. 98, 79 Atl. 365.

87. **Ia.**—Fleming v. Mereshon, 36 Iowa 413. **Tenn.**—Brown v. Brown, 86 Tenn. 277, 313, 6 S. W. 869, 7 S. W. 640. **Tex.**—Houston Cemetery Co. v. Drew, 13 Tex. Civ. App. 536, 36 S. W. 802.

88. **U. S.**—Campbell v. Railroad Co., 1 Woods 368, 4 Fed. Cas. No. 2,366; West v. Randall, 2 Mason 181, 192, 29 Fed. Cas. No. 17,424. **Tenn.**—Brown v. Brown, 86 Tenn. 277, 313, 6 S. W. 869, 7 S. W. 640. **W. Va.**—Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21; McCoy v. Allen, 16 W. Va. 724, 731. **Wis.**—Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

But see *Cann v. Atlanta Cotton Factory Co.*, 14 Fed. 4, 4 Woods 503.

[a] So far as the statute of limitations is concerned, see **U. S.**—*Richmond*

v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864. **N. Y.**—*Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663. **Ore.**—*Dunne v. Portland St. R. Co.*, 40 Ore. 295, 65 Pac. 1052.

89. *Belmont Nail Co. v. Columbia I. & S. Co.*, 46 Fed. 336; *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366; *Carey v. Brown*, 58 Cal. 180.

In creditors' suits, see 6 STANDARD PROC. 202.

[a] **Leave to file an amended bill stating** that other persons for whose benefit the action is brought desire to join includes leave to join and no further order of court is required. *Lee v. Casey*, 269 Ill. 604, 109 N. E. 1062.

90. *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366; *Grafton v. Holt*, 58 W. Va. 182, 52 S. E. 21, the quasi party may come into the suit at any time before decree and take the benefit of it.

[a] **Under the code**, the parties represented must intervene before trial. *Carey v. Brown*, 58 Cal. 180. As to time of intervention generally, see 14 STANDARD PROC. 317.

[b] **Under the equity practice**, (1) they may come in under the decree and take the benefit of it (*West v. Randall*, 2 Mason 181, 192, 29 Fed. Cas. No. 17,424; *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366; *Matter of City Bank*, 10 Paige [N. Y.] 378; *Thompson v. Brown*, 4 Johns. Ch. [N. Y.] 619), or (2) show it to be erroneous and entitle themselves to a rehearing. *West v. Randall*, 2 Mason 181, 192, 29 Fed. Cas. No. 17,424; *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366.

91. *Hills v. Putnam*, 152 Mass. 123,

2. Control, Settlement and Dismissal of Suit.—A representative suit is subject to the control of the party who brings the action on behalf of all, while it is pending.⁹² If the original plaintiff prosecutes the action to judgment, the rights of the persons in whose behalf the suit is brought attach,⁹³ and thereafter he ceases to have control over the suit.⁹⁴ On coming in and becoming nominal parties, the represented parties become vested with an interest in the subject-matter of the action,⁹⁵ and may take part in its management.⁹⁶

3. Effect of Death or Incapacity of Actual Parties.—The death⁹⁷ or disability⁹⁸ of some of the actual plaintiffs, or their loss of inter-

25 N. E. 40; *Libby v. Norris*, 142 Mass. 246, 7 N. E. 919.

[a] But the represented parties cannot come in to oppose and nullify the proceedings. *Forbes v. Memphis*, E. P. & P. R. Co., 2 Woods 323, 9 Fed. Cas. No. 4,926.

92. **III.**—*Lee v. Casey*, 269 Ill. 604, 109 N. E. 1062. **N. Y.**—*Beadleston v. Alley*, 55 Hun 605, 7 N. Y. Supp. 747, 28 N. Y. St. 89, 4 Silv. 595. **Eng.** *Searth v. Chadwick*, 14 Jur. 300.

[a] He may discontinue (1) the suit (**III.**—*Lee v. Casey*, 269 Ill. 604, 109 N. E. 1062. **N. Y.**—*Hirschfeld v. Fitzgerald*, 157 N. Y. 166, 180, 51 N. E. 997, 46 L. R. A. 839; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663. **Eng.**—*Scarth v. Chadwick*, 14 Jur. 300. But see *Atlas Bank v. Nahant Bank*, 23 Pick. [Mass.] 480), or (2) settle his claim with the defendant (*Lee v. Casey*, 269 Ill. 604, 607, 109 N. E. 1062; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Innes v. Lansing*, 7 Paige [N. Y.] 583; *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168), at any time before judgment and before the parties represented become actual parties, (3) although where he attempts to discontinue the action under suspicious circumstances, the court will deny the application and permit the substitution of another person similarly situated. *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, 82 N. W. 158.

93. *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Salisbury v. Binghamton Pub. Co.*, 85 Hun 99, 32 N. Y. Supp. 652, 66 N. Y. St. 35; *Mattison v. Demarest*, 1 Robt. (N. Y.) 717.

94. *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Salisbury v. Binghamton Pub. Co.*, 85 Hun 99, 32 N. Y. Supp. 652, 66 N. Y. St. 35. See *Collins v. Taylor's Exrs.*, 4 N. J. Eq. 163.

95. *Lee v. Casey*, 269 Ill. 604, 109

N. E. 1062; *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168.

96. *Hirschfeld v. Fitzgerald*, 157 N. Y. 166, 180, 51 N. E. 997, 46 L. R. A. 839; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

[a] **Thereafter the original plaintiff (1) can do nothing in derogation of their rights and interests** (*Lee v. Casey*, 269 Ill. 604, 109 N. E. 1062; *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168), though (2) he still has the right to prosecute the action if he does so in good faith (*Lee v. Casey*, 269 Ill. 604, 109 N. E. 1062; *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168), (3) but he cannot abandon or discontinue the suit without their consent (**U. S.** *Belmont Nail Co. v. Columbia I. & S. Co.*, 46 Fed. 336. **III.**—*Lee v. Casey*, 269 Ill. 604, 109 N. E. 1062. **N. Y.** *Hirschfeld v. Fitzgerald*, 157 N. Y. 166, 184, 51 N. E. 997, 46 L. R. A. 839; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168), or (4) accomplish the same result by indefinitely refusing to prosecute it. *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168.

[b] **If the original plaintiff unreasonably delays prosecution of the suit, and indicates a disinclination to proceed without any assigned cause or reason, the conduct of the action will be committed to the coplaintiff on giving bond to protect the original plaintiff as to his share of the expense.** *Manning v. Mercantile Trust Co.*, 37 Misc. 215, 75 N. Y. Supp. 168. See also *Matter of City Bank*, 10 Paige (N. Y.) 378.

97. *Lilly v. Tobbein*, 183 Mo. 477, 489, 15 S. W. 618, 23 Am. St. Rep. 887.

98. *Lilly v. Tobbein*, 183 Mo. 477, 489, 15 S. W. 618, 23 Am. St. Rep. 887.

est,⁹⁹ is immaterial, as they may be disregarded as unnecessary parties. If the sole complainant dies, or if the suit becomes abated by the death of the defendant, and the suit is not revived in a reasonable time, a person who is represented will be allowed to revive and continue the proceeding.¹

G. EFFECT OF DECREE. — The decree, in a representative suit, binds all the interests represented the same as if they were before the court,² unless they can show some ground for setting it aside which could be shown by an actual party.³ Equity rules sometimes require that the decree be without prejudice to the party standing in the same situation, but who is not named and who has not come into the suit.⁴

X. DESIGNATION AND DESCRIPTION OF PARTIES. — The names of the parties are generally required to be stated in the title of the action.⁵ And if a party sues or is sued in a representative or official capacity, the capacity in which he sues must be shown.⁶

XI. CHANGE OF PARTIES. — A. BY AMENDMENT. — 1. Adding Parties.⁷ — a. *At common law*, neither new plaintiffs,⁸ nor defendants,⁹ can be added by amendment in actions on contract, unless by express consent of the parties.¹⁰

b. *In Equity*. — Courts of chancery allow the introduction of new parties by amendment when the interests of justice require it,¹¹ at any stage of the case before decree.¹² If on appeal it appears that a nec-

99. *Lilly v. Tobbein*, 183 Mo. 477, 489, 15 S. W. 618, 23 Am. St. Rep. 887.

1. *Matter of City Bank*, 10 Paige (N. Y.) 378.

As to abatement and revival generally, see the titles "Survival" and "Revivor."

2. U. S.—*Smith v. Swormstedt*, 16 How. 288, 14 L. ed. 942; *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366. Ohio.—*Quinlan v. Myers*, 29 Ohio St. 500; *Britton v. Baker*, 2 Ohio N. P. (N. S.) 314. W. Va.—*Grafton v. Holt*, 58 W. Va. 182, 52 S. E. 21.

In creditors' suits, see 6 STANDARD PROC. 241.

3. *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods 323, 9 Fed. Cas. No. 4,926; *Campbell v. Railroad Co.*, 1 Woods 368, 4 Fed. Cas. No. 2,366.

4. *Coann v. Atlanta Cotton Factory Co.*, 14 Fed. 4, 4 Woods 503. See Fed. Eq. Rules.

5. See 6 STANDARD PROC. 648.

In bills in equity, see 4 STANDARD PROC. 112.

In judgment, see 15 STANDARD PROC. 60 et seq.

Improper description as a ground of collateral attack, see 15 STANDARD PROC. 474.

6. See 6 STANDARD PROC. 650.

7. As changing cause of action, see the title "New Cause of Action or Defense."

8. *Ayer v. Gleason*, 60 Me. 207; *Winslow v. Merrill*, 11 Me. 127; *Chouteau v. Hewitt*, 10 Mo. 131.

9. *Ayer v. Gleason*, 60 Me. 207; *Winslow v. Merrill*, 11 Me. 127; *Chouteau v. Hewitt*, 10 Mo. 131.

10. *Winslow v. Merrill*, 11 Me. 127.

11. U. S.—*De Galard v. Safe Dep. & Tr. Co.*, 196 Fed. 981; *Frese & Co. v. Bachof*, 14 Blatchf. 432, 9 Fed. Cas. No. 5,110. Ga.—*Roberts v. Atlanta Real Estate Co.*, 118 Ga. 502, 45 S. E. 308. Mich.—*Oneida v. Allen*, 137 Mich. 224, 100 N. W. 441; *Edinger v. Heiser*, 62 Mich. 598, 611, 29 N. W. 367. N. J.—*Seymour v. Long Dock Co.*, 17 N. J. Eq. 169. Tex.—*Kegans v. Allcorn*, 9 Tex. 25. Va.—*Coffman v. Sangston*, 21 Gratt. (62 Va.) 263, 269. W. Va.—*Rexroad v. Raines*, 63 W. Va. 511, 60 S. E. 495.

See also *infra*, XIV, F.

Form of order to bring in necessary parties, see 9 STANDARD PROC. 916.

12. *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; *Marsh v. Green*, 79 Ill. 385.

[a] At the Hearing.—D. C.—*Willey v. Stormont*, 38 App. Cas. 399, 412.

essary party is omitted, the court will sometimes remand the proceedings so that he may be made a party;¹³ in a proper case, it may consider the amendment as made.¹⁴

c. *Under the Code and Statutes.*—The rules of the common law against amendments as to parties have been changed by the codes and statutes in nearly all jurisdictions,¹⁵ the latter generally providing that the court may in furtherance of justice and on such terms as may be proper allow a party to amend any pleading or proceeding by adding the name of any party.¹⁶ The code provision that any person may be made defendant who has an interest adverse to the plaintiff does not relate to the bringing in of additional defendants by order of court.¹⁷ Nor do statutes conferring the right to amend as to pleadings authorize amendments adding parties.¹⁸

Construction.—As a general rule, statutes allowing such amendments are given a liberal construction and interpretation.¹⁹

Mich.—Edinger v. Heiser, 62 Mich. 598, 611, 29 N. W. 367. **N. J.**—Seymour v. Long Dock Co., 17 N. J. Eq. 169.

[b] **Discretion of Court.**—Wiley v. Stormont, 38 App. Cas. (D. C.) 399, 412.

13. See *infra*, XIV, F.

[a] **If the bill cannot be sustained on the merits**, an amendment will not be directed. Oneida v. Allen, 137 Mich. 224, 100 N. W. 441.

As to dismissal for want of parties, see *infra*, XIV, F, 3, d, and XIV, F, 4, d.

14. Edinger v. Heiser, 62 Mich. 598, 611, 29 N. W. 367.

15. See the statutes and the following: **Haw.**—Bright v. Fern, 20 Hawaii 325. **Me.**—Surace v. Pio, 112 Me. 496, 92 Atl. 621. **Mass.**—Strout v. United Shoe Mach. Co., 215 Mass. 116, 102 N. E. 312. **Minn.**—Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464. **N. C.**—Dobson v. Southern Ry. Co., 129 N. C. 289, 40 S. E. 42; Mills v. Callahan, 126 N. C. 756, 36 S. E. 164. **Tex.**—Roberson v. McIlhenny Hutchins & Co., 59 Tex. 615; Lanes v. Squyres, 45 Tex. 382; International & G. N. R. Co. v. Howell (Tex. Civ. App.), 105 S. W. 560.

16. See generally the codes and statutes, and Davis v. Seattle, 37 Wash. 223, 79 Pac. 784.

[a] **Rule applicable (1) to suits in equity** (Strout v. United Shoe Mach. Co., 215 Mass. 116, 102 N. E. 312), (2) but not restricted to them. Gittleman v. Feltman, 122 App. Div. 385, 106 N. Y. Supp. 839.

[b] **If in an order consolidating suits some parties are omitted by in-**

advertence, the court may order them to be made parties by an order nunc pro tunc. Sterling Eng. & Const. Co. v. Berg, 161 Wis. 280, 152 N. W. 851.

17. Bolton v. Donovan, 9 N. D. 575, 579, 84 N. W. 357. Compare Gibson v. Higdon, 15 B. Mon. (Ky.) 205, holding this statute confers authority on the court to cause such persons to be made defendants.

[a] **As affecting right of person to insist on being made defendant**, see Kortjohn v. Seimers, 29 Mo. App. 271; Goodrich v. Williamson, 10 Okla. 588, 617, 63 Pac. 974.

18. Billings v. Baker, 6 Abb. Pr. (N. Y.) 213; Russell v. Spear, 5 How. Pr. (N. Y.) 142, 3 Code Rep. 189.

19. **U. S.**—Portland Gold Min. Co. v. Stratton's Independence, 196 Fed. 714; Frank v. Union Cent. Life Ins. Co., 130 Fed. 224. **D. C.**—Karrick v. Wetmore, 22 App. Cas. 487. **Mo.**—Merriman v. Springfield, 142 Mo. App. 506, 127 S. W. 122. **N. J.**—Lower v. Segal, 60 N. J. L. 99, 36 Atl. 777. **Ore.**—York v. Nash, 42 Ore. 321, 71 Pac. 59, the rule being to allow amendments, the exception to refuse them. **Pa.**—White Co. v. Fayette Automobile Co., 43 Pa. Super. 532.

Compare Surace v. Pio, 112 Me. 496, 92 Atl. 621, sustaining strict construction.

[a] **Statutes Construed.**—A statute providing that on a plea of nonjoinder of a defendant, the plaintiff may on motion amend by adding defendants, the plaintiff may add parties defendant even though no plea of nonjoinder is filed. Goddard v. Pratt, 16 Pick. (Mass.) 412, 434.

d. *Limitations on Right To Amend Generally.*—It may be stated generally that the right to add parties by amendment is subject to the discretion of the court;²⁰ that statutes allowing such amendments contemplate that there shall be something to amend by,²¹ and that the rule that amendments must not change the cause of action originally set up applies to amendments as to parties.²² So also, such amendments shall not deprive the defendants of any rights of defense they may otherwise have.²³ It is sometimes provided that new parties shall not be brought in at such a time and in such a manner as to delay the trial unreasonably.²⁴

e. *Who May Be Added.*—(I.) **Generally.**—Subject to the limitations heretofore,²⁵ and hereinafter,²⁶ mentioned, it is permissible to add by amendment either parties plaintiff,²⁷ or defendant,²⁸ when necessary parties.²⁹ The plaintiff may add persons who have been dismissed with-

20. **U. S.**—Frank v. Union Cent. Life Ins. Co., 130 Fed. 224. **Kan.**—Brenner v. Luth, 28 Kan. 581. **Mass.**—Barlow v. Nelson, 157 Mass. 395, 32 N. E. 359; Smith v. Milton, 133 Mass. 369. **Mo.**—Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247. **N. Y.**—Gittleman v. Feltman, 122 App. Div. 385, 106 N. Y. Supp. 839. **N. D.**—Dedrick v. Charrier, 15 N. D. 515, 108 N. W. 38, 125 Am. St. Rep. 608. **Tex.**—Hartford F. Ins. Co. v. Houston (Tex. Civ. App.), 110 S. W. 973.

Discretion as to amendments generally, see 1 STANDARD PROC. 866.

[a] **Review of Discretion.**—Hartford F. Ins. Co. v. Houston (Tex. Civ. App.), 110 S. W. 973. See also Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247.

21. Bright v. Fern, 20 Hawaii 325. See 1 STANDARD PROC. 853.

Adding plaintiff where there is no plaintiff having a legal entity before the court, see *supra*, V, B, 1.

22. See the following: **Cal.**—Peterson v. Stockton & T. R. Co., 134 Cal. 244, 66 Pac. 304. **Ga.**—Roberts v. Atlanta Real Estate Co., 118 Ga. 503, 45 S. E. 308. **N. C.**—Richards v. Smith, 98 N. C. 509, 4 S. E. 625. **Pa.**—Power v. Grogan, 232 Pa. 387, 397, 81 Atl. 416.

See also the title "New Cause of Action or Defense."

Addition of wife who has right of action in action by husband, see 11 STANDARD PROC. 758, note 17.

23. Morrow v. Merchants' & Planters' Bank, 35 Ga. 267; Lanes, Boyce & Co. v. Squyres, 45 Tex. 382, 387.

24. Kirby v. Estill, 75 Tex. 484, 12 S. W. 807; Adams v. First Nat. Bank

(Tex. Civ. App.), 178 S. W. 993; Hume v. Perry (Tex. Civ. App.), 136 S. W. 594; Pacific Exp. Co. v. Williams, 2 Wills. Civ. Cas. §810.

25. See *supra*, XI, A, 1, d.

26. See *infra*, this section.

27. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687; Hucklebridge v. Atchison, T. & S. F. R. Co., 66 Kan. 443, 71 Pac. 814.

On application of defendant, see *infra*, XI, A, 1, e, (IV).

28. **Kan.**—Brenner v. Luth, 28 Kan. 581. **Miss.**—Murphy v. American Soda Fountain Co., 86 Miss. 791, 39 So. 100. **S. C.**—Hellams v. Prior, 64 S. C. 543, 43 S. E. 25.

On application of defendant, see *infra*, XI, A, 1, e, (IV).

29. Walker v. Miller, 139 N. C. 448, 52 S. E. 125, 111 Am. St. Rep. 805, 1 L. R. A. (N. S.) 157; Dedrick v. Charrier, 15 N. D. 515, 108 N. W. 38, 125 Am. St. Rep. 608.

[a] Thus (1) a husband or wife (See 11 STANDARD PROC. 757), or (2) omitted partners (See the title "Partnership") may be added, (3) and sometimes it is permissible to add a principal to an action by or against his agent. See the title "Principal and Agent."

[b] **Texas.**—A statute providing for the addition of necessary or proper parties does not authorize the making of parties defendant unless they were properly suable in the county where the suit is pending in the first instance. St. Louis S. W. R. Co. v. McKnight, 99 Tex. 289, 89 S. W. 755; Texas & P. Ry. Co. v. Henson, 56 Tex. Civ. App. 463, 121 S. W. 1127.

[c] **Parties neither necessary nor**

out prejudice.³⁰ He may add other uses.³¹ and he may amend by declaring that the suit is for the use of another.³² But an amendment adding a party in whose favor the cause of action exists where the plaintiff has failed to show a cause of action is not authorized.³³ And it is not allowable to amend by inserting a name where there is no plaintiff having a legal entity.³⁴ New parties cannot be added where it would create a misjoinder.³⁵ Defendants against whom the complaint states no cause of action or ground of relief may not be added;³⁶ but a plaintiff may add a defendant although no cause of action was stated against the original defendants.³⁷

(II.) Joint Tortfeasors.—The authorities are not uniform as to the right of a plaintiff to amend by adding other joint tortfeasors after having elected to sue less than all.³⁸ But it is clear that a joint tortfeasor cannot be added as a party at the instance of the defendant against plaintiff's objection.³⁹

(III.) Persons Acquiring Interest Pending Suit.—Although it is sometimes held that it is not the office of an amendment to add new parties

proper cannot be added at instance of plaintiff. *Roberts v. Atlanta Real Estate Co.*, 118 Ga. 502, 45 S. E. 308; *Hinds v. Bonner*, 52 Misc. 461, 102 N. Y. Supp. 484.

Adding persons necessary to complete determination of action, see *infra*, XI, A, 1, e, (VI).

Adding necessary parties in equity. see also *infra*, XIV, F, 3, c, (IV).

30. *In re Griggs*, 227 Fed. 795, 142 C. C. A. 319.

31. *Glenn v. Black*, 31 Ga. 393, as it does not change the cause of action or even change the party plaintiff.

[a] But where the amendment will deprive the defendant of a set-off, an amendment adding a usee will be disallowed. *Morrow v. Merchants' & Planters' Bank*, 35 Ga. 267.

32. *Buffington v. Blackwell*, 52 Ga. 129.

[a] In an action by a person in a representative capacity, an amendment adding him in an individual capacity is not permissible where it changes the cause of action. *Doyle v. Carney*, 190 N. Y. 386, 83 N. E. 37. Persons as parties in different capacities, see *supra*, III, D.

33. *State v. Rottaken*, 34 Ark. 144. Compare *Merriman v. Springfield*, 142 Mo. App. 506, 127 S. W. 122, holding that it is permissible to amend by adding the name of a new party even where the new party is the real party in interest where the ends of justice are met thereby and the defendant is not injured.

[a] If the suit is brought by a plaintiff having no interest, the objection cannot be removed by the addition of persons having interests. *Coffman v. Sangston*, 21 Gratt. (62 Va.) 263; *Sillings v. Bumgardner*, 9 Gratt. (50 Va.) 273.

34. See *supra*, V, B, 1.

35. *Clark v. Anderson*, 103 Me. 134, 68 Atl. 633.

[a] A stranger to the original cause of action cannot be brought in. *Doyle v. Carney*, 190 N. Y. 386, 83 N. E. 37.

36. *Penfield v. Wheeler*, 27 Minn. 358, 7 N. W. 364.

37. *Hilton v. Osgood*, 49 Conn. 110.

38. See *infra*, this note.

[a] In the New York supreme court (1) the different departments vary in their holdings, some holding that additional defendants cannot be brought in on motion of the plaintiff in tort actions (*Horan v. Bruning*, 116 App. Div. 482, 101 N. Y. Supp. 986; *Ten Eyck v. Keller*, 99 App. Div. 106, 91 N. Y. Supp. 169; *Heffern v. Hunt*, 8 App. Div. 535, 40 N. Y. Supp. 914, 75 N. Y. St. 307), (2) another holding otherwise. *Gittleman v. Feltman*, 122 App. Div. 385, 106 N. Y. Supp. 839; *Schun v. Brooklyn Heights R. Co.*, 82 App. Div. 560, 81 N. Y. Supp. 859.

[b] The joint tortfeasor is not a necessary party or interested in the event of the action. *Hinds v. Bonner*, 52 Misc. 461, 102 N. Y. Supp. 484.

39. *Booth v. Manchester St. Ry.*, 73 N. H. 527, 63 Atl. 578.

becoming interested after the commencement of the action or suit,⁴⁰ such amendments are allowed in some jurisdictions,⁴¹ and sometimes provided for by express provision of statute.⁴² In equity, the plaintiff may add purchasers pendente lite as new parties defendant although they are not necessary parties.⁴³ And notwithstanding a statute relating to revivor, it has been held permissible to bring in by amendment the representative of a party who dies pending action.⁴⁴

(IV.) **On Application of Defendant.** — In the absence of statute, it is not permissible to amend, at the instance of the defendant, by adding new plaintiffs,⁴⁵ or defendants,⁴⁶ although it is permissible for the plaintiff to add them after objection by the defendant.⁴⁷ Under statutes, however, a defendant may cause one against whom he has a right of action to be made a party.⁴⁸ A similar rule prevails in some states even in the absence of express statute.⁴⁹

(V.) **On Application of Person Not a Party.**⁵⁰ — The court cannot, on the application of persons not parties to a suit, compel the plaintiff to join them as coplaintiffs,⁵¹ or defendants,⁵² unless a statute so provides, as it sometimes does where a third person has an interest in the subject of the action, or in real property, the title to which may be affected.⁵³

Adding parties at the instance of the defendant, see XI, A, 1, e, (VI).

40. La.—*Duncan v. Helm*, 21 La. Ann. 303. Minn.—*Lee v. O'Shaughnessy*, 20 Minn. 173. N. Y.—*Packard v. Wood*, 17 Abb. Pr. 318.

Statutes relating to transfer of interest pending suit control this class of cases. See *infra*, XII, B.

41. *Jordan v. Duke*, 6 Ariz. 55, 53 Pac. 197 (although he might have been substituted); *Fildew v. Milner*, 57 Ore. 16, 109 Pac. 1092.

Bringing in such parties on court's own motion, see *infra*, XI, A, 1, e, (VII).

As to substitution of parties, see *infra*, XII, B.

42. See *infra*, XII, B.

43. See *infra*, IV, F, 12.

44. *Greer v. Powell*, 1 Bush (Ky.) 489, holding the statute relating to revivor does not exclude the right to add parties by amendment.

45. *Frishie v. McFarlane*, 196 Pa. 116, 46 Atl. 358, 79 Am. St. Rep. 696.

46. *Hawkins v. Collier*, 101 Ga. 145, 28 S. E. 632; *Bolton v. Donavan*, 9 N. D. 575, 84 N. W. 357.

47. See *infra*, XIV, F, 3, d, and XIV, F, 4, d and e.

48. See the statutes and codes.

[a] **Statute is permissive and application is addressed to the sound discretion of the court.** *Ertel v. Milwaukee E. R. & L. Co.*, 164 Wis. 380, 160 N. W. 263.

49. *Gulf, W. T. & P. Ry. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341.

[a] **Indemnitors may be made defendants.** *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co. (Tex. Civ. App.)*, 72 S. W. 1038.

50. **Right to intervene,** see also the title "*Intervention.*"

51. *Drake v. Goodridge*, 6 Blatchf. 151, 7 Fed. Cas. No. 4,062.

52. *Coleman v. Martin*, 6 Blatchf. 119, 6 Fed. Cas. No. 2,985; *Haynes v. Rizer*, 14 Lea (Tenn.) 246.

53. See the statutes and codes.

[a] **Statute Is Mandatory.**—*Uhlfelder v. Tamsen*, 17 Misc. 296, 40 N. Y. Supp. 372.

[b] **Statute applies to (1) legal as well as equitable actions.** *Rosenberg v. Salomon*, 144 N. Y. 92, 38 N. E. 982; *People v. Albany & V. R. Co.*, 77 N. Y. 232; *Heffern v. Hunt*, 8 App. Div. 585, 40 N. Y. Supp. 914, 75 N. Y. St. 307; *Graves Elevator Co. v. Masonic Temple Assn.*, 85 Hun 496, 33 N. Y. Supp. 362, 67 N. Y. St. 111. (2) But it does not apply to actions at law for a money judgment in which title to real property is involved. *Bauer v. Dewey*, 166 N. Y. 402, 60 N. E. 30; *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *Horan v. Bruning*, 116 App. Div. 482, 101 N. Y. Supp. 986; *Callanan v. Keeseville, A. C. & L. C. R. Co.*, 48 Misc. 476, 95 N. Y. Supp. 513.

[c] **Whether the applicant has suffi-**

(VI.) **Persons Necessary To Determination of Action.**⁵⁴—Statutes sometimes require the court to bring in other parties when a complete determination of the controversy cannot be had without their presence.⁵⁵

cient interest to bring him within the terms of the statute is a question within the court's discretion. *Uhlfelder v. Tamsen*, 17 Misc. 296, 40 N. Y. Supp. 372, construing *Hart v. Kohn*, 12 Misc. 648, 33 N. Y. Supp. 272, 67 N. Y. St. 92. See also *Pope v. Manhattan Ry. Co.*, 79 App. Div. 583, 80 N. Y. Supp. 316. As to nature of interest, see *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *Callanan v. Keeseville*, A. C. & L. C. R. Co., 48 Misc. 476, 95 N. Y. Supp. 513; *Griswold v. Caldwell*, 14 Misc. 299, 35 N. Y. Supp. 1057, 25 Civ. Proc. 122, 2 N. Y. Ann. Cas. 211, 70 N. Y. St. 682; *Boyer v. Maginnis*, 10 Ohio Dec. (Reprint) 378.

[d] Only where the third person makes application in his own behalf does the statute apply. Motions to compel the plaintiff to bring in other parties are not within the statute. *Rosenberg v. Salomon*, 144 N. Y. 92, 38 N. E. 982; *People v. Albany & V. R. Co.*, 77 N. Y. 232. See also *Tom Boy G. M. Co. v. Green*, 11 Colo. App. 447, 462, 53 Pac. 845.

[e] **Application To Be Made a Party Should Be by Motion.**—*Nevins v. Fidelity & Casualty Co.*, 12 Misc. 77, 33 N. Y. Supp. 43, 66 N. Y. St. 674.

54. **Proceedings**, see *infra*, XI, A, 1, f, (II).

55. See the codes and statutes, and **Ariz.**—*Gleeson v. Costello*, 138 Pac. 544. **Ark.**—*Arkadelphia Lumb. Co. v. Mann*, 78 Ark. 414, 94 S. W. 46; *Choctaw O. & G. R. Co. v. McConnell & Co.*, 74 Ark. 54, 84 S. W. 1043; *Smith v. Moore*, 49 Ark. 100, 4 S. W. 282. **Cal.**—*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Cassidy v. Norton*, 25 Cal. App. 433, 143 Pac. 1057. **Colo.**—*McLean v. Farmers' High Line C. & R. Co.*, 44 Colo. 184, 98 Pac. 16; *Cooper v. German Nat. Bank*, 9 Colo. App. 169, 47 Pac. 1041. **Minn.**—*Kanne v. Kanne*, 119 Minn. 265, 138 N. W. 25. **Mo.**—*Spurlock v. Burnett*, 170 Mo. 372, 70 S. W. 870. **Neb.**—*Kaplan v. Omaha*, 100 Neb. 567, 160 N. W. 960. **N. Y.**—*Brown v. Cherry*, 56 Barb. 635, 38 How. Pr. 352. **N. C.**—*Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691. **Okla.**—*Haynes v. City Nat. Bank*, 30 Okla. 614, 121 Pac. 182; *Simpson v. Hillis*, 30 Okla. 561, 120 Pac. 572, Ann. Cas.

1913C, 227. **S. D.**—*Riggs Land Co. v. Motley*, 24 S. D. 499, 124 N. W. 438. **Wis.**—*Schenck v. Sterling Eng. & Const. Co.*, 151 Wis. 266, 138 N. W. 637.

See also *infra*, XI, A, 1, f, (II), (A).

[a] **The phrase "other parties"** means persons who are not parties to the action. *Schenck v. Sterling Eng. & Const. Co.*, 151 Wis. 266, 138 N. W. 637, 769.

[b] **As to Time Interest Is Acquired.**—(1) The statute refers to parties who were necessary at the beginning of the action (*Callanan v. Keeseville*, A. C. & L. C. R. Co., 48 Misc. 476, 95 N. Y. Supp. 513; *Griswold v. Caldwell*, 14 Misc. 299, 35 N. Y. Supp. 1057, 25 Civ. Proc. 122, 2 N. Y. Ann. Cas. 211, 70 N. Y. St. 682), (2) and to those who, since the commencement of the action, purchased the interest of a party in it. **Cal.**—*People's Ditch Co. v. Seventy-Six Land & Water Co.*, 111 Cal. xvi, 44 Pac. 176. **Mo.**—*Reyburn v. Mitchell*, 106 Mo. 365, 379, 16 S. W. 592, 27 Am. St. Rep. 350. **N. C.**—*Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691. Propriety of amendments adding persons acquiring interest pending suit, see *supra*, XI, A, 1, e, (III).

[c] **Persons who have parted with their interests** need not be brought in. *Penn v. Hayward*, 14 Ohio St. 302.

[d] **"Controversy"** (1) means dispute. *Schenck v. Sterling Eng. & Const. Co.*, 151 Wis. 266, 138 N. W. 637. (2) It is "any controversy between the parties before it" and includes a controversy presented by cross-complaint, as well as that presented by original complaint. *Alpers v. Bliss*, 145 Cal. 565, 571, 79 Pac. 171. See 6 STANDARD PROC. 302. (3) It is determined by the pleadings of which the attachment proceedings constitute no part. *Boston v. Wright*, 3 Kan. 227.

[e] **To What Actions Rule Applies.** (1) As the code section requiring a court to bring in necessary parties is merely declaratory of the rule in equity (**Colo.**—*Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166. **Neb.**—*Kaplan v. Omaha*, 100 Neb. 567, 160 N. W. 960. **N. Y.**—*Osterhoudt v. Board of Suprs. of Ulster County*, 98 N. Y. 239. **S. D.**

Such statutes apply to cases where there are other persons not parties whose rights must be ascertained and settled before the rights of the parties can be determined;⁵⁶ but do not authorize the court to bring in a controversy between the defendant and strangers which is irrelevant to the action before it except for the purpose of making its determination of the action before it complete.⁵⁷ Parties entitled to litigate the same questions over again must be brought in.⁵⁸ A suit against one joint contractor is not within the rule because a judgment against one will not prejudice the other.⁵⁹

f. *Proceedings on Amendment.*—(I.) **Generally.**—Amendments as to parties must be made in accordance with general rules elsewhere discussed.⁶⁰

(II.) **Bringing in Persons Necessary to Determination of Action.**—(A.) **GENERALLY.**—Subject to the power of the court to determine the controversy before it without bringing in new parties when this can be done without prejudice to the rights of others or by saving their rights,⁶¹ it is the imperative duty of the court to order other persons brought in when it appears that a complete determination of a controversy cannot be had without their presence.⁶² This duty is not affected by the fail-

Sando v. Roberts County, 36 S. D. 556, 156 N. W. 64. **Wis.**—*McDougald v. New Richmond R. M. Co.*, 125 Wis. 121, 103 N. W. 244. As to rule in equity, see *supra*, IV), (2) it has been held to refer only to parties in what, under the old practice, would have been suits in equity. **U. S.**—*Springfield F. & M. Ins. Co. v. Richmond & D. R. Co.*, 48 Fed. 360. **N. Y.**—*Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *Horan v. Bruning*, 116 App. Div. 482, 101 N. Y. Supp. 986; *Ten Eyck v. Denison*, 99 App. Div. 106, 91 N. Y. Supp. 169 (actions for conversion not included); *Goldstein v. Shapiro*, 85 App. Div. 83, 82 N. Y. Supp. 1038, (replevin suits not included); *Heffern v. Hunt*, 8 App. Div. 585, 40 N. Y. Supp. 914, 75 N. Y. St. 307. **N. D.**—*Bolton v. Donavan*, 9 N. D. 575, 84 N. W. 357. **Okla.**—*Goodrich v. Williams*, 10 Okla. 588, 617, 63 Pac. 974. **S. D.**—*Bankers' Nat. Bank v. Security Trust Co.*, 19 S. D. 418, 103 N. W. 654.

56. **Neb.**—*Kaplan v. Omaha*, 100 Neb. 567, 160 N. W. 960, citing cases. **N. Y.**—*Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471, 65 N. E. 281; *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *Sturtevant v. Brewer*, 17 How. Pr. 571, 9 Abb. Pr. 414; *McMahon v. Allen*, 12 How. Pr. 39; *Goldstein v. Shapiro*, 85 App. Div. 83, 82 N. Y. Supp. 1038. **S. D.** *Bankers' Nat. Bank v. Security Trust Co.*, 19 S. D. 418, 103 N. W. 654.

57. **Cal.**—*Alpers v. Bliss*, 145 Cal.

565, 570, 79 Pac. 171. **Conn.**—*Allen v. Chase*, 81 Conn. 474, 71 Atl. 367; *Lowndes v. City Nat. Bank*, 79 Conn. 693, 66 Atl. 514; *Carroll v. Weaver*, 65 Conn. 76, 84, 31 Atl. 489; *State v. Wright*, 50 Conn. 580. **Ind.**—*Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299, 11 N. E. 792; *Heaton v. Lynch*, 11 Ind. App. 408, 38 N. E. 224. **N. Y.**—See *People v. Albany & V. R. Co.*, 15 Hun 126.

58. *Penn v. Hayward*, 14 Ohio St. 302.

59. *Osterhoudt v. Board of Suprs. of Ulster County*, 98 N. Y. 239, the judgment may relieve the nonjoined contractor from liability. See 11 STANDARD PROC. 975.

60. See 1 STANDARD PROC. 890.

61. *Merchants' Trust Co. v. Bentel*, 10 Cal. App. 75, 101 Pac. 31; *Northwestern Tel. Exch. Co. v. Northern Pac. Ry. Co.*, 9 N. D. 339, 83 N. W. 215.

[a] The statute is permissive that the "court may determine any controversy between the parties before it, when it can be done without prejudice," etc. *Penn v. Hayward*, 14 Ohio St. 302.

[b] In court's discretion when and under what circumstances suit may proceed without prejudice to other persons interested in the questions. *Bloom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293; *Penn v. Hayward*, 14 Ohio St. 302.

62. See the codes, and **Ark.**—*Choc-*

ure of the defendant to raise the question of nonjoinder by demurrer or answer,⁶³ or by the fact that the necessary parties reside without the state.⁶⁴ Nor is the power of the court affected by a statute allowing the parties to intervene in the action.⁶⁵

(B.) AT WHAT STAGE OF PROCEEDINGS.—The court must order persons necessary to the determination of the case to be brought in, if the necessity therefor appears at any time during the progress of the case.⁶⁶ As the appellate court has no authority to order in new parties, it will, where the equities justify it, remand the cause to the trial court to bring in necessary parties.⁶⁷

taw O. & G. R. Co. v. McConnell, 74 Ark. 54, 84 S. W. 1043; Smith v. Moore, 49 Ark. 100, 4 S. W. 282. **Neb.**—Phoenix Mut. L. Ins. Co. v. Lincoln, 87 Neb. 626, 127 N. W. 1069. **N. Y.**—Mahr v. Norwich U. F. Ins. Soc., 127 N. Y. 452, 28 N. E. 391; Shaver v. Brainard, 29 Barb. 25. **Ohio.**—Reformed Presby. Church v. Nelson, 35 Ohio St. 638; Penn v. Hayward, 14 Ohio St. 302. **Ore.** See Beasley v. Shively, 20 Ore. 508, 26 Pac. 846. **Wis.**—McDougald v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244.

See also *supra*, XI, A, 1, e, (VI).

[a] **Duty of court (1) to act whenever it receives the information from whatever source it may be derived.** Tom Boy G. M. Co. v. Green, 11 Colo. App. 447, 462, 53 Pac. 845. (2) It may act on its own motion (McDougald v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244), or (3) on the application of the defendant. Choctaw O. & G. R. Co. v. McConnell & Co., 74 Ark. 54, 84 S. W. 1043; Tom Boy G. M. Co. v. Green, 11 Colo. App. 447, 462, 53 Pac. 845.

[b] **The remedy for failure (1) to bring in necessary parties** is not by plea in abatement, but by motion asking the court to order them brought in (Searles v. Northwestern Mut. L. Ins. Co., 148 Iowa 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405), or (2) by answer. Taylor v. Lytle, 26 Idaho 97, 141 Pac. 92.

[c] **Any judgment rendered (1) in the absence of necessary parties is erroneous** (Cal.—O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236. **Neb.**—Phoenix Mut. L. Ins. Co. v. Lincoln, 87 Neb. 626, 127 N. W. 1069. **Wis.**—McDougald v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244), (2) but it is not void as in cases of want of power. See 15 STANDARD PROC. 473.

[d] **Dismissal without prejudice**

where parties cannot be brought in. Penn v. Hayward, 14 Ohio St. 302.

63. **Ariz.**—Gleeson v. Costello, 138 Pac. 544. **Cal.**—O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Colo.** Great West Min. Co. v. Woodmas, 12 Colo. 46, 64, 20 Pac. 771, 13 Am. St. Rep. 204. **Nev.**—Robinson v. Kind, 23 Nev. 330, 338, 47 Pac. 1, 997. **N. Y.** Shaver v. Brainard, 29 Barb. 25. **Wis.** McDougald v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244.

[a] **Statute providing that a failure to object to defects in pleading operates as a waiver thereof with certain exceptions, does not apply to a defect as regards failure to bring in necessary parties.** McDougald v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244. See also Steinbach v. Prudential Ins. Co., 172 N. Y. 471, 65 N. E. 281; Osterhoudt v. Board of Supervisors of Ulster County, 98 N. Y. 239; Elias v. Schweyer, 13 App. Div. 336, 43 N. Y. Supp. 55; Riggs Land Co. v. Motley, 24 S. D. 499, 124 N. W. 438, and *infra*, XIV, F, 4, a.

64. Sturtevant v. Brewer, 17 How. Pr. (N. Y.) 571; Penn v. Hayward, 14 Ohio St. 302.

65. Brown v. Brown, 71 Neb. 200, 98 N. W. 718, 115 Am. St. Rep. 568.

66. De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349.

[a] **At any time while the court has jurisdiction of the case, it may entertain an objection that necessary parties are omitted.** McDougald v. New Richmond R. M. Co., 125 Wis. 121, 103 N. W. 244.

[b] **Proper to vacate a judgment and add necessary parties.** Greenwood L. & G. Assn. v. Williams, 71 S. C. 421, 51 S. E. 272.

67. Shaver v. Brainard, 29 Barb. (N. Y.) 25. But see Beasley v. Shively, 20

(C.) **REVIEW OF ORDER.** — The propriety of an order of court directing a person to be brought in cannot be reviewed on demurrer for misjoinder of parties;⁶⁸ but must be reviewed by appeal.⁶⁹

g. *Effect of Unauthorized Amendment Made Without Objection.* If an unauthorized amendment as to parties is made without objection, the suit may proceed in the name of the new parties, and a recovery had on proof of liability.⁷⁰

2. **Striking Out Parties.**⁷¹ — a. *Generally.* — At common law, in actions of assumpsit or on contracts, amendments by striking out the names of plaintiffs,⁷² or defendants,⁷³ were not allowable. But in tort actions, it is allowable to strike out a plaintiff who has no title to sue,⁷⁴ as well as a defendant.⁷⁵

In equity persons improperly joined may be stricken out by amendment.⁷⁶

The statutes and codes generally have changed the common law rules as to striking out parties.⁷⁷

b. *Who May Be Stricken Out.* — (I.) *Generally.* — When permissible at all, it is generally permissible to strike out either plaintiffs,⁷⁸ or defendants,⁷⁹ provided that the cause of action itself is not changed

Ore. 508, 26 Pac. 846, holding that the appellate court will dismiss the case.

68. *Sims v. Bonner*, 16 N. Y. Supp. 801, 21 Civ. Proc. 379, 42 N. Y. St. 14, 28 Jones & S. 70.

69. *Sims v. Bonner*, 16 N. Y. Supp. 801, 21 Civ. Proc. 379, 42 N. Y. St. 14, 18 Jones & S. 70.

70. *Norcross B. & C. Mfg. Co. v. Summerour*, 114 Ga. 156, 39 S. E. 870; *Black v. Downs*, 176 Ill. App. 358.

71. In admiralty, see 1 STANDARD PROC. 436.

Striking out parties as changing the cause of action, see the title "New Cause of Action or Defense."

72. *Glover Co. v. Rollins*, 87 Me. 434, 32 Atl. 999; *Ayer v. Gleason*, 60 Me. 207.

73. *Glover Co. v. Rollins*, 87 Me. 434, 32 Atl. 999; *Ayer v. Gleason*, 60 Me. 207.

74. *Lillard v. Rucker*, 9 Yerg. (Tenn.) 64.

75. *Winslow v. Merrill*, 11 Me. 127; *Redington v. Farrar*, 5 Greenl. (Me.) 379.

76. *Victor Talking Mach. Co. v. American Graphophone Co.*, 118 Fed. 50; *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 57, 30 C. C. A. 520; *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59, 43 Am. Dec. 773.

77. See the statutes and codes, and *Plunkett v. Dendy*, 197 Ala. 262, 72 So. 525; *York v. Nash*, 42 Ore. 321, 326, 71 Pac. 59.

78. *Cal.*—*Ware v. Walker*, 70 Cal. 591, 12 Pac. 475. *Ga.*—*Wilson v. First Presbyterian Church*, 56 Ga. 554. *Ill.* *American Home Circle v. Schneider*, 134 Ill. App. 600. *N. Y.*—*Mallory v. Virginia Hot Springs Co.*, 157 App. Div. 253, 141 N. Y. Supp. 961. *N. C.*—*Campbell v. Washington L. & P. Co.*, 166 N. C. 488, 82 S. E. 842; *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272. *Pa.*—*Ribblett v. Cambria Steel Co.*, 251 Pa. 253, 96 Atl. 649. *Tex.*—*Walker v. Howard*, 34 Tex. 478, 508.

[a] A coplaintiff who is an alien enemy may be stricken. *Arnold v. Sergeant*, 1 Root (Conn.) 86.

79. *U. S.*—*Greeley v. Smith*, 3 Story 76, 10 Fed. Cas. No. 5,747, defendant whose joinder would oust court of jurisdiction. *Ala.*—*Vanderford v. Stovall*, 117 Ala. 344, 23 So. 30; *Goss v. Aug. Weiman & Co.*, 5 Ala. App. 404, 59 So. 364. *Ark.*—*King v. Caldwell*, 26 Ark. 405. *Ga.*—*Pearson v. Courson*, 129 Ga. 656, 59 S. E. 907. *N. J.*—*Lambeck v. Stiefel*, 70 N. J. L. 180, 56 Atl. 132; *Farrier v. Schroeder*, 40 N. J. L. 601. *Compare Fleming v. Freese*, 26 N. J. L. 263.

[a] One of two or more defendants sued jointly in an action of contract may be stricken. *Lambeck v. Stiefel*, 70 N. J. L. 180, 56 Atl. 132. Effect of discontinuance as to one defendant in actions upon contract, see 7 STANDARD PROC. 667.

[b] **Defendants Interposing Per-**

thereby,⁸⁰ that there is another plaintiff or defendant from whom the party discontinued may be severed,⁸¹ and, if the person to be stricken is a defendant, that he has asked no cross-relief against the plaintiff and against whom other defendants have asked for no relief.⁸² Necessary parties cannot be dismissed from a suit at the pleasure of the plaintiff, however.⁸³ It is permissible to strike out on such terms as the court deems just,⁸⁴ nominal parties,⁸⁵ parties for whose benefit an action is brought,⁸⁶ persons made defendants on their refusal to join as plaintiffs,⁸⁷ and trustees on termination of their trust.⁸⁸

(II.) Persons Misjoined and Without Interest. — The plaintiff may strike out parties who have no interest,⁸⁹ and persons improperly joined,⁹⁰ whether the necessity therefor is shown by the record or by the evidence.⁹¹

Personal Defenses.—*Beecher v. Henderson*, 4 Ala. App. 543, 58 So. 805. Dismissal for matters of personal defense, see 7 STANDARD PROC. 668.

Filing amended complaint omitting a defendant as equivalent to a dismissal as to such defendant, see 7 STANDARD PROC. 654.

80. *Slaughter v. Davenport*, 151 Mo. 26, 33, 51 S. W. 471, *overruling* *Davis v. Ritchie*, 85 Mo. 501. See generally the title "**New Cause of Action or Defense.**"

81. *Zukowski v. Armour*, 107 Ill. App. 663.

82. *Pearson v. Courson*, 129 Ga. 656, 59 S. E. 907. But see *Vandeford v. Stovall*, 117 Ala. 344, 23 So. 30, holding that the plaintiff may strike out defendants as a matter of right although they have filed cross bills.

Counterclaims as affecting plaintiff's right to dismiss action, see 7 STANDARD PROC. 657.

83. *De La Vega v. League*, 64 Tex. 205, 213.

In admiralty, see 1 STANDARD PROC. 437.

84. *Andrus v. Pettus*, 36 Tex. 108.

85. **Fla.**—*Hamburg v. Liverpool & L. & G. Ins. Co.*, 42 Fla. 86, 27 So. 872. **Ga.**—*Wilson v. First Presbyterian Church*, 56 Ga. 554. **Ill.**—*McDowell v. Town*, 90 Ill. 359, on appeal from justices' court.

As to substitution of use plaintiffs, see *infra*, XI, A, 3, a, (III).

As to nominal and use plaintiffs, see *supra*, V, C, 5.

86. *Anderson v. Robertson*, 32 Miss. 241; *McDaniel v. Atlantic Coast Line R. R.*, 76 S. C. 15, 56 S. E. 543.

87. *Ware v. Walkef*, 70 Cal. 591, 12 Pac. 475.

88. *Rothschild v. Goldenberg*, 33 Misc. 646, 68 N. Y. Supp. 955. See the title "**Trusts and Trustees.**"

89. *Babeock v. Heenan*, 193 Mich. 229, 159 N. W. 494.

90. **U. S.**—*Tobey v. Clafin*, 3 Sumn. 379, 23 Fed. Cas. No. 14,066. **Ala.**—*Plunkett v. Dendy*, 197 Ala. 262, 72 So. 525; *Evans Marble Co. v. McDonald & Co.*, 142 Ala. 130, 37 So. 830; *Caldwell v. Smith*, 77 Ala. 157; *Hughes v. Albertville Merc. Co.*, 3 Ala. App. 462, 57 So. 98. **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. Cumbe*, 101 Ark. 172, 141 S. W. 939. **Cal.**—*Gillam v. Sigman*, 29 Cal. 637. **Fla.**—*Little v. Bradley*, 43 Fla. 402, 31 So. 342. **Ga.**—*Western & A. R. Co. v. Blackford*, 131 Ga. 784, 63 S. E. 289. **Ia.**—*Bort v. Yaw*, 46 Iowa 223. **Mass.**—*Finney v. Bedford Com. Ins. Co.*, 8 Metc. 348, 41 Am. Dec. 515. **Mich.**—*Hudson v. Feige*, 58 Mich. 148, 24 N. W. 863. **N. M.**—*Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236. **N. J.**—*Fleming v. Freese*, 26 N. J. L. 263. **N. O.**—*Campbell v. Washington L. & P. Co.*, 166 N. C. 488, 82 S. E. 842. **Tex.**—*Birmingham v. Griffin*, 42 Tex. 147; *Andrus v. Pettus*, 36 Tex. 108; *Emmons v. Oldham*, 12 Tex. 18, 26.

In admiralty, see 1 STANDARD PROC. 436.

[a] But the defendant cannot move to strike out a plaintiff against the will of the plaintiffs themselves. *Hurd v. Hotchkiss*, 72 Conn. 472, 45 Atl. 11.

[b] A relator improperly joined may be stricken out. *Fleenor v. Taggart*, 116 Ind. 189, 18 N. E. 606.

91. *Plunkett v. Dendy*, 197 Ala. 262, 72 So. 525 (citing local cases); *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 139 Am. St. Rep. 19, 28 L. R. A. (N. S.) 450.

(III.) **Joint Tortfeasors.** — In actions ex delicto, when the evidence makes out a case against only one of the defendants, it is proper to strike out the other defendants.⁹²

(IV.) **Deceased Parties.** — Where one of the plaintiffs,⁹³ or defendants⁹⁴ is shown to have died before the commencement of the action, he may be stricken out.

3. **Substitution of Parties.** — a. *Plaintiff.* — (I.) **Rule Stated.** — It is a general rule under the statutes and codes that amendments which work a complete change as to parties plaintiff cannot be made,⁹⁵ unless the parties consent thereto,⁹⁶ or the defendant waives the irregularity.⁹⁷

(II.) **Rule Applied.** — (A.) **GENERALLY.** — There are amendments which may be made without affecting a complete change of parties plaintiff within the meaning of the rule.⁹⁸

92. **U. S.**—Atlantic & P. R. Co. v. Laird, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485. **Ala.**—Louisville & N. R. Co. v. Stanley, 186 Ala. 95, 65 So. 39; Strickland v. Wedgeworth, 154 Ala. 654, 45 So. 653; Roman v. Dreher, 1 Ala. App. 429, 55 So. 1015. **Mass.** Fifty Associates v. Howland, 5 Cush. 214; Fitch v. Stevens, 2 Mete. 505. **Mo.** Weathers v. Kansas City So. Ry. Co., 111 Mo. App. 315, 86 S. W. 908. **Pa.** Sturzebecker v. Inland Traction Co., 211 Pa. 156, 60 Atl. 583; Rowland v. Philadelphia, 202 Pa. 50, 51 Atl. 589; Minnich v. Lancaster & L. Electric R. Co., 203 Pa. 632, 53 Atl. 501.

Dismissal as to joint tortfeasors, see 7 STANDARD PROC. 649.

93. **Ala.**—Jemison v. Smith, 37 Ala. 185. **N. Y.**—Pink v. Manhattan Ry. Co., 24 Abb. N. C. 81, 18 Civ. Proc. 141, 15 Daly 479, 8 N. Y. Supp. 327, 29 N. Y. St. 153. **Vt.**—Hold & Co. v. Thacher, 52 Vt. 592, it is simply the inclusion of an improper party.

94. Winn v. Averill, 24 Vt. 283.

95. **U. S.**—Lusk's Admr's v. Kimball, 87 Fed. 545. **Ala.**—McCrory v. Guyton, 164 Ala. 365, 51 So. 312; Vinegar Bend L. Co. v. Chicago Title & T. Co., 131 Ala. 411, 30 So. 776. **Ark.** Schiele v. Dillard, 94 Ark. 277, 126 S. W. 835. **Ga.**—Norcross Mfg. Co. v. Summerour, 114 Ga. 156, 39 S. E. 870; Atlantic Coast L. R. R. Co. v. Hart Lumb. Co., 2 Ga. App. 83, 58 S. E. 316. **Idaho.**—Hallett v. Larcum, 5 Idaho 492, 51 Pac. 108. **Ill.**—Black v. Downs, 176 Ill. App. 358; Zukowski v. Armour, 107 Ill. App. 663. **Ia.**—Myers v. Chicago, B. & Q. R. Co., 152 Iowa 330, 131 N. W. 770. **La.**—Duncan v. Helm, 21 La. Ann. 303. **Me.**—Surace v. Pio, 112 Me. 496, 92 Atl. 621; Clark v. Anderson,

103 Me. 134, 68 Atl. 633. **Miss.**—Shaw v. Alexander, 32 Miss. 229. **Neb.**—Flanders v. Lyon, 51 Neb. 102, 70 N. W. 524. **N. Y.**—Concrete Pub. Co. v. Reed, 70 Misc. 22, 126 N. Y. Supp. 653. **Vt.** Emerson v. Wilson, 11 Vt. 357, 34 Am. Dec. 695.

[a] It cannot be done either directly by one amendment or indirectly by first adding a new party and then later striking out the original party plaintiff. **U. S.**—Southern Ry. Co. v. Blunt, 165 Fed. 258. **Ala.**—Reynolds v. Caldwell, 80 Ala. 232; Tarver v. Smith, 38 Ala. 135. **Ind. Ter.**—Brooks v. Collier, 3 Ind. Ter. 468, 58 S. W. 559. **N. C.**—Bullard v. Johnson, 65 N. C. 436 query.

[b] This would be tantamount to a new suit between entirely different parties. Schiele v. Dillard, 94 Ark. 277, 126 S. W. 835.

[c] Especially on allegations of ownership in conflict with the original petition, the substitution of a new plaintiff will not be allowed. Duncan v. Helm, 21 La. Ann. 303.

Substitution of corporations on consolidation of corporations, see the title "Winding Up Corporations."

96. Richards v. Smith, 98 N. C. 509, 4 S. E. 625.

97. Black v. Downs, 176 Ill. App. 358.

[a] **Pleading and going to the trial on the merits** is a waiver of amendments completely changing the parties. Black v. Downs, 176 Ill. App. 358.

98. See *infra*, this note.

[a] **Thus** (1) an amendment does not substitute a new plaintiff or work a complete change of plaintiffs which strikes out some of the parties and inserts others (Benoliel v. Homae, 87

(B.) **SUBSTITUTION OF REAL PARTY IN INTEREST.**⁹⁹ — While it is not permissible to substitute in place of the original plaintiff suing in his own right a person who was the real and only party in interest at the commencement of the action,¹ where a cause of action exists on the part of or on behalf of a particular person or class of persons, and an action to enforce it is begun by one whom the law does not recognize as the proper party to bring it, an amendment substituting the proper person is permissible.² Cases in which a substitution has been permitted are collected in the notes.³

N. J. L. 375, 94 Atl. 605), or (2) which strikes out all the parties plaintiff except one and changes the capacity in which he sues (*Randolph v. Hubbert*, 190 Ala. 610, 67 So. 416), or (3) which makes it clear that the plaintiff sues on behalf of another as well as himself. *Delisle v. Bourriague*, 105 La. 77, 29 So. 731, 54 L. R. A. 420. See also *supra*, IX, J.

99. In admiralty, see 1 STANDARD PROC. 437.

1. **Alaska.**—*In re Nagao*, 4 Alaska 678; *Willamette Tent & A. Co. v. West Coast Groc. Co.*, 2 Alaska 4. **Cal.**—*Dubbers v. Goux*, 51 Cal. 153, attempt to substitute wife in place of husband who brought action. **Idaho.**—*Hallett v. Larcom*, 5 Idaho 492, 51 Pac. 108. **Ill.** *Lake v. Morse*, 11 Ill. 587. **Neb.**—*Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719, 73 N. W. 15; *Flanders v. Lyon*, 51 Neb. 102, 70 N. W. 524. **Utah.**—*Wilson v. Kiesel*, 9 Utah 397, 411, 35 Pac. 488; *Skews v. Dunn*, 3 Utah 186, 2 Pac. 64.

Compare *Hanlin v. Baxter*, 20 Kan. 134, holding it permissible to substitute the owner of the land in an action of trespass.

[a] **Another Statement of Rule.** A substitution of a plaintiff with a right to sue for one who has no right to sue is not permissible. *Dubbers v. Goux*, 51 Cal. 153; *East River Bank v. Cutting*, 1 Bosw. (N. Y.) 636.

[b] **Must Be Something To Amend By.**—*Lake v. Morse*, 11 Ill. 587.

2. **U. S.**—*McDonald v. Nebraska*, 101 Fed. 171, 41 C. C. A. 278, where the state was substituted for the state treasurer); *Benson v. San Diego*, 100 Fed. 158, substituting trustee of mortgage for bondholder. **Ark.**—*Snowden v. Thompson*, 106 Ark. 517, 153 S. W. 823, substituting drainage district for directors. **Conn.**—See *Bowen v. Nat. L. Assn.*, 63 Conn. 460, 470, 27 Atl. 1059, construing statute as to substitu-

tion. **Mich.**—*Board of Supervisors of Gratiot Co. v. Munson*, 157 Mich. 505, 122 N. W. 117, substituting county for board of supervisors. **Miss.**—*Grand Lodge Colored Knights of P. v. Hill*, 110 Miss. 249, 70 So. 347. **Mo.**—*Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887; *Glover & Son Com. Co. v. Abilene M. Co.*, 136 Mo. App. 365, 116 S. W. 1112; *Hackett v. Van Frank*, 119 Mo. App. 648, 96 S. W. 247, reviewing cases. **N. Y.**—*Hulbert v. Hohman*, 22 Misc. 248, 49 N. Y. Supp. 633, substituting receiver for corporation plaintiff. **N. C.**—*Brooks v. Holton*, 136 N. C. 306, 48 S. E. 737; *Board of County Comrs. v. Candler*, 123 N. C. 682, 31 S. E. 858 (substituting proper relator in action on official bond); *Reynolds v. Smathers*, 87 N. C. 24 (substituting trustee for creditors for an assignee of a claim); *State v. Cauble*, 70 N. C. 62 (substituting state for road overseer); *Bullard v. Johnson*, 65 N. C. 436. **Ohio.**—*Lake Shore & M. S. Ry. Co. v. Elyria*, 69 Ohio St. 414, 69 N. E. 738. **Okla.**—*Farrell v. Puthoff*, 13 Okla. 159, 74 Pac. 96.

See the title, "New Cause of Action or Defense."

[a] In an action by a person as city solicitor and taxpayer on behalf of the city as the real party in interest, the relief sought is in the interest of the city and a substitution of the city does not change the cause of action. *Lake Shore & M. S. Ry. Co. v. Elyria*, 69 Ohio St. 414, 422, 69 N. E. 738.

Substitution of guardian ad litem for infant plaintiff, see 10 STANDARD PROC. 729, note 2.

[b] In an action by an attorney in fact, the person he represents may be substituted by amendment. *Brooks v. Holton*, 136 N. C. 306, 48 S. E. 737; *Adams v. Edwards*, 115 Pa. 211, 8 Atl. 425.

3. See *infra*, this note.

[a] **Personal representatives (1) for**

(C.) **SUBSTITUTION WHERE PLAINTIFF HAS NO LEGAL ENTITY.** — In an action brought in a name that stands for no legal entity, it is not permissible to substitute the name of a legal entity.⁴

(III.) **Substitution of Nominal and Use Plaintiffs.** — When the action is by a nominal plaintiff for the use of the real party in interest, an amendment substituting the real party may be made when necessary.⁵

the widow and heirs or devisees (Ill. Emmerson v. Merritt, 249 Ill. 538, 543, 94 N. E. 955; Teutonia L. Ins. Co. v. Mueller, 77 Ill. 22. **Ia.**—Hook v. Garfield Coal Co., 112 Iowa 210, 83 N. W. 963. **Mass.**—Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958. **Miss.**—Grand Lodge Colored Knights of Pythias v. Hill, 110 Miss. 249, 70 So. 347. **Okla.** Farrell v. Puthoff, 13 Okla. 159, 74 Pac. 96. See also the title “**New Cause of Action or Defense**”), or (2) conversely (**Mass.**—Barlow v. Nelson, 157 Mass. 395, 32 N. E. 359, but in its discretion the court may deny the amendment. **N. Y.**—Van Tuyl v. New York Real Estate Sec. Co., 153 App. Div. 409, 138 N. Y. Supp. 541, amendment should not be nunc pro tunc. **Pa.**—Bender v. Luckenbach, 162 Pa. 18, 29 Atl. 296. **Tenn.**—Flatley v. Memphis & C. R. Co., 9 Heisk. 230), (3) although some courts hold such amendments are not permissible. **Ga.**—Tillman v. Banks, 116 Ga. 250, 42 S. E. 517. **Me.**—Fleming v. Courtenay, 98 Me. 401, 414, 57 Atl. 592, 99 Am. St. Rep. 414, the amendment substitutes a new plaintiff. **N. J.** Lower v. Segal, 60 N. J. L. 99, 36 Atl. 777. **Pa.**—Wildermuth v. Long, 196 Pa. 541, 46 Atl. 927, the cause of action would be changed by the amendment. In actions of death by wrongful act, see 6 STANDARD PROC. 434, 435.

[b] **Duly qualified personal representative for one who brought the action without having qualified as such.** Person v. Fidelity & Cas. Co., 92 Fed. 965, 35 C. C. A. 117.

[c] **Substituting partnership in action by one of partners.** Van Dyk v. Mosterdt, 171 Iowa 3, 153 N. W. 206. See the titles “**New Cause of Action or Defense**,” “**Partnership**.”

[d] **Where partnership sues as a corporation, it may insert the names of the partners.** Key v. Goodall, Brown & Co., 7 Ala. App. 227, 60 So. 986. See the title “**Partnership**.”

[e] **In an action by a quasi-artificial person, such as an association, it is permissible to amend by making certain members parties suing on behalf of all.**

Lilly v. Tobbein, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887.

[f] **In an action by the officers of a corporation** (1), it is proper to substitute the corporation owning the cause of action. Dean v. Gilbert, 92 Hun 427, 36 N. Y. Supp. 1004, 72 N. Y. St. 106; Tackett v. Mutual Realty Co. (Tex. Civ. App.), 143 S. W. 347. See also Van Tuyl v. New York Real Estate Sec. Co., 153 App. Div. 409, 138 N. Y. Supp. 541, where the action was brought by the superintendent of banks. (2) The amendment should be treated as a correction of the name of the plaintiff rather than a substitution of plaintiffs. Van Tuyl v. New York Real Estate Sec. Co., 153 App. Div. 409, 138 N. Y. Supp. 541.

[g] **Substituting Husband and Wife.** See Dubbers v. Goux, 51 Cal. 153; Weaver v. Young, 37 Kan. 70, 14 Pac. 458; also 11 STANDARD PROC. 757.

Substituting Principal for Agent. See the title “**Principal and Agent**.”

[h] **Assignee of instrument for payee in case of mistake in bringing action originally.** **Kan.**—Service v. Farmington Sav. Bank, 62 Kan. 857, 62 Pac. 670. **Miss.**—Kelly v. Continental Casualty Co., 87 Miss. 438, 40 So. 1. **Mo.**—Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247. **N. C.** Bullard v. Johnson, 65 N. C. 436.

4. See *supra*, V, B, 1.

5. **Fla.**—Hamburg v. Liverpool & L. & G. Ins. Co., 42 Fla. 86, 27 So. 872. **Ga.**—McEachern & Co. v. Edmondson, 122 Ga. 80, 49 S. E. 798; McLewis v. Furgerson, 59 Ga. 644; Wilson v. First Presbyterian Church, 56 Ga. 554; Bales v. First Nat. Bank, 10 Ga. App. 703, 73 S. E. 1076. **Kan.**—Hudson v. Barratt, 62 Kan. 137, 61 Pac. 737, citing local cases. **Mass.**—Buckland v. Green, 133 Mass. 421. **Mich.**—Wood v. Lenawee Circuit Judge, 84 Mich. 521, 47 N. W. 1103. **Mo.**—Pickel Stone Co. v. McClinton, 177 Mo. App. 494, 160 S. W. 833, where the nominal plaintiff was without capacity to sue. **Ore.**—Hume v. Kelly, 28 Ore. 398, 407, 43 Pac. 380. **Pa.**—Miller v. Pollock, 99 Pa. 202. **Tex.**

Conversely, when necessary to enforce his rights, a plaintiff may amend by substituting the name of another suing for his use.⁶ It is permissible also to substitute other uses for those named on the record.⁷ If the nominal plaintiff is dead at the commencement of the suit, it is proper to substitute his representatives according to some authorities.⁸

b. *Defendant*.—It may be stated generally that it is not permissible to amend so as to work a complete change of parties defendant.⁹

Martel v. Somers, 26 Tex. 551; *Heard v. Lockett*, 20 Tex. 162.

See also the title "New Cause of Action or Defense."

[a] **Rule does not apply (1) in tort actions** (*McEachern & Co. v. Edmondson*, 122 Ga. 80, 49 S. E. 798; *Willis v. Burch*, 116 Ga. 374, 42 S. E. 718), since (2) there cannot be a use; and if one is named his rights must be disregarded. *Willis v. Burch*, 116 Ga. 374, 42 S. E. 718.

As to nominal and use plaintiffs, see *supra*, V, C, 5.

6. **Ala.**—*Birmingham Ry. L. & P. Co. v. Aetna A. & L. Co.*, 184 Ala. 601, 64 So. 44; *Southern Ry. Co. v. Stonewall Ins. Co.*, 163 Ala. 161, 50 So. 940; *American Union Tel. Co. v. Daughtry*, 89 Ala. 191, 7 So. 660. **Ga.** *Union City R. & T. Co. v. Wright*, 138 Ga. 703, 76 S. E. 35; *Swilley v. Hooker*, 126 Ga. 353, 55 S. E. 31; *Germania Bank v. Collins*, 113 Ga. 1010, 39 S. E. 421; *Metropolitan L. Ins. Co. v. Morrow*, 10 Ga. App. 433, 73 S. E. 607; *Musgrove v. Luther Pub. Co.*, 10 Ga. App. 650, 73 S. E. 695. **Miss.**—*McCue v. Massey*, 90 Miss. 124, 43 So. 2.

[a] **Amendment Does Not Make New Cause of Action.**—*Estes v. Thompson*, 90 Ga. 698, 17 S. E. 98.

[b] **An illustration of the rule exists** where an equitable owner substitutes the legal owner as nominal plaintiff suing for his use. *Union City R. & T. Co. v. Wright*, 138 Ga. 703, 76 S. E. 35. To same effect, *Cowan v. Campbell*, 131 Ala. 211, 31 So. 429.

Substituting trustee for cestui, see the title "Trusts and Trustees."

[c] **Some showing should be made** that some right of the original plaintiff is connected with the cause of action he desires to assert in the name of the nominal party to be substituted. This right need not be so perfect as to be capable of direct enforcement either in law or equity, however. *Hall v. Harris*, 6 Ga. App. 822, 65 S. E. 1086; *Atlantic Coast Line R. Co. v.*

Hart Lumb. Co., 2 Ga. App. 88, 58 S. E. 316.

[d] **Where assignor is not within the jurisdiction** to receive notice and when the validity of the assignment may be questioned, he will not be substituted without his formal consent on the record. *Frank v. Union Cent. Life Ins. Co.*, 130 Fed. 224.

7. *Demington v. Douglass*, 43 Ga. 353.

8. *Lewis v. Austin*, 144 Mass. 383, 11 N. E. 538; *Denton v. Stephens*, 32 Miss. 194. *Compare Humphreys v. Irvine*, 6 Smed. & M. (Miss.) 205. *Contra*, *Karrick v. Wetmore*, 22 App. Cas. (D. C.) 487, 494.

As to right of dead person to sue, see *supra*, V, B, 1.

9. **U. S.**—*Portland Gold Min. Co. v. Stratton's Independence*, 196 Fed. 714. **Ala.**—*Birmingham v. Darden*, 1 Ala. App. 479, 55 So. 1014. **Ark.**—*Schiele v. Dillard*, 94 Ark. 277, 126 S. W. 835. **Cal.**—*Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Dubbers v. Goux*, 51 Cal. 153; *Altpeter v. Postal Tel. Cable Co.*, 26 Cal. App. 705, 148 Pac. 241. **Colo.** *Denver & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, 64 Pac. 381. **Ia.** *Myers v. Chicago, B. & Q. R. Co.*, 152 Iowa 330, 131 N. W. 770. **Me.**—*Surace v. Pio*, 112 Me. 496, 92 Atl. 621; *Glover Co. v. Rollins*, 87 Me. 434, 32 Atl. 999. **Mo.**—*Hajek v. Bohemian-Slavonian Benev. Soc.*, 66 Mo. App. 568. **Nev.** *Little v. Virginia & G. H. Water Co.*, 9 Nev. 317. **N. Y.**—*Fleishner v. Sacks*, 140 N. Y. Supp. 409; *New York State M. M. P. Assn. v. Remington Agr. Wks.*, 89 N. Y. 22. **S. D.**—*Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037.

[a] **Especially Without Consent of Plaintiff.**—*Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719, 73 N. W. 15; *Flanders v. Lyon*, 51 Neb. 102, 70 N. W. 524.

[b] **Even where it is done indirectly** by two amendments, the first adding a party and the second striking out the original party. *Rarden Merc. Co. v. Whiteside*, 145 Ala. 617,

Even where plaintiff sues the wrong party, he cannot ordinarily amend by substituting the right one.¹⁰ But there are some cases in which a substitution of defendants has been held proper.¹¹ So, where a defendant sued as a corporation answers that it is a partnership or an association, an amendment substituting the names of the partners or the proper officers is permissible.¹² The converse of this proposition has been maintained to a certain extent.¹³ The rule is otherwise, however, if there exist both a corporation and a partnership or association having very similar names and the wrong one is sued.¹⁴ And where an action is brought against an officer of a corporation in his individual

39 So. 576; *Glover Co. v. Rollins*, 87 Me. 434, 32 Atl. 999.

[c] **Remedy for Unauthorized Amendment.**—(1) Court must discontinue the action on the motion of the last defendant (*Rarden Merc. Co. v. White-side*, 145 Ala. 617, 39 So. 576), (2) but an order allowing an amendment substituting another person as defendant is not prejudicial to the original defendant so as to enable him to appeal. *Hambright v. Southern Ry.* 98 S. C. 219, 82 S. E. 416.

10. **Ky.**—*Teets v. Snider Head. Mfg. Co.*, 120 Ky. 653, 87 S. W. 803. **Mo.** *Thompson v. Allen*, 86 Mo. 85; *G. B. Allen & Co. v. Frumet M. & S. Co.*, 73 Mo. 688. **N. Y.**—*New York State M. M. P. Co. v. Remington Agr. Wks.*, 89 N. Y. 22, reversing 25 Hun 475.

[a] **Where right party answers** the plaintiff may substitute the real wrongdoer for the person mistakenly sued. *Boehmke v. Northern Ohio T. Co.*, 88 Ohio St. 156, 102 N. E. 700. See also *Bainum v. American Bridge Co.*, 141 Fed. 179, where for a corporation of one state another corporation with the same name but of another state was substituted.

11. See *infra*, this section.

[a] **Real Party in Interest.**—*Greenwood L. & G. Assn. v. Williams*, 71 S. C. 421, 51 S. E. 272, dictum.

[b] **Where a party intending to sue the owner of a railroad** is mistaken as to the real owner, it has been held that he may amend by substituting the real owner. *Adams v. Weeks*, 174 Mass. 45, 54 N. E. 350.

[c] **Where quasi artificial person sued as such** when statute does not authorize it. *Pickett v. Walsh*, 192 Mass. 572, 590, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. (N. S.) 1067; *Becker v. Woodcock*, 136 App. Div. 589, 121 N. Y. Supp. 71.

12. **Ind.**—*Fargo & Co. v. Cutshaw*, 12 Ind. App. 392, 39 N. E. 532. **Kan.** *Anglo-American P. & P. Co. v. Turner Cas. Co.*, 34 Kan. 340, 8 Pac. 403. **Ky.** *Teets v. Snider Head. Mfg. Co.*, 120 Ky. 653, 87 S. W. 803; *Pike Morgan & Co. v. Wathen*, 25 Ky. L. Rep. 1264, 78 S. W. 137. **N. Y.**—*Munzinger v. Courier Co.*, 82 Hun 575, 31 N. Y. Supp. 737, 24 Civ. Proc. 175, 64 N. Y. St. 368, 1 N. Y. Ann. Cas. 32. **S. D.**—*Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037.

[a] **Reason.**—Plaintiff has not sued the wrong party but has merely failed to join all necessary parties. *Teets v. Snider Head. Mfg. Co.*, 120 Ky. 653, 87 S. W. 803.

13. See *infra*, this note.

[a] **Illustrations.**—(1) A complaint against L. Co., a firm composed of A. and B., may be amended by striking out the words "a firm," etc., and inserting the words "a corporation organized," etc. *Lewis Lumb. Co. v. Camody*, 137 Ala. 578, 35 So. 126. (2) But a complaint against A. and B. doing business as A. Bros. cannot be amended so as to be a complaint against A. Bros., a corporation. *Steiner Bros. v. Stewart*, 134 Ala. 568, 33 So. 343. (3) An action against individuals as agents or a committee or trustees of a lodge may be amended to charge them as a corporation on discovering they are such. *Board of Trustees of Prairie Lodge v. Smith*, 58 Miss. 301.

14. **Mo.**—*Thompson v. Allen*, 86 Mo. 85; *G. B. Allen & Co. v. Frumet M. & S. Co.*, 73 Mo. 688. See *Hajek v. Bohemian-Slavonian Benev. Soc.*, 66 Mo. App. 563. **N. Y.**—*New York State M. M. P. Assn. v. Remington Agr. Wks.*, 89 N. Y. 22, reversing 25 Hun 475. **Pa.**—See *White Co. v. Fayette Automobile Co.*, 43 Pa. Super. 532, where the exact character of the first named defendant was not shown.

capacity, a substitution of the corporation cannot be had;¹⁵ but in an action against him in his official capacity, the corporation may be substituted.¹⁶

Consolidated corporations may be substituted for original corporation parties in a proper case.¹⁷

c. *Substitution on Transfer of Interest Pending Suit.*—On the transfer of the interest of a party pending suit, statutes allow the substitution of the transferee on proper application.¹⁸

4. Changing Capacity in Which Party Sues or Defends.—A party plaintiff may generally amend by changing the capacity in which he sues.¹⁹ So also, it is sometimes permissible to change by amendment the capacity in which a person is charged,²⁰ especially where the plaintiff intended to sue him in the particular capacity.²¹ But some cases deny the application of the rule and hold that such an amendment works an entire change of parties.²²

15. *Licausi v. Ashworth*, 78 App. Div. 486, 79 N. Y. Supp. 631.

16. *Latonia v. Hopkins*, 104 Ky. 419, 47 S. W. 248.

17. See the following cases: **Ala.** *Birmingham v. Darden*, 1 Ala. App. 479, 55 So. 1014. **Colo.**—*Solomonovich v. Denver Consol. T. Co.*, 39 Colo. 282, 89 Pac. 57. **N. Y.**—*Burrow v. Marceau*, 132 App. Div. 797, 117 N. Y. Supp. 537; *Tyler v. Lansinborough*, 76 App. Div. 165, 78 N. Y. Supp. 433. **S. C.**—*Stewart v. Walterboro & W. Ry. Co.*, 64 S. C. 92, 41 S. E. 827. **Tex.**—*Barber v. East Dallas*, 83 Tex. 147, 18 S. W. 438. And see the title "**Winding Up Corporations.**"

18. See *infra*, XII.

19. **U. S.**—*St. Louis & S. F. R. Co. v. Herr*, 193 Fed. 950, 113 C. C. A. 578. **Ala.**—*Lucas v. Pittman*, 94 Ala. 616, 10 So. 603. **Conn.**—See *Dunn's Appeal*, 81 Conn. 127, 70 Atl. 703. **Ia.**—*Myers v. Chicago, B. & Q. R. Co.*, 152 Iowa 330, 131 N. W. 770; *Hunt v. Collins*, 4 Iowa 56. **Ky.**—*Gray v. Alderson's Admr.*, 123 S. W. 317. **Me.**—See *Bragdon v. Harmon*, 69 Me. 29, where plaintiff struck out words descriptio personae. **Mo.**—*Harkness v. Julian*, 53 Mo. 238, where plaintiff suing as administrator of A. amended to sue as administrator of B. **Neb.**—*Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719, 724, 73 N. W. 15. **N. H.**—*Mann v. Marshall*, 76 N. H. 162, 80 Atl. 336. **Pa.**—*Power v. Grogan*, 232 Pa. 387, 81 Atl. 416. **S. C.**—*Glenn v. Gerald*, 64 S. C. 236, 42 S. E. 155. **S. D.**—*Hardy v. Woods*, 33 S. D. 416, 146 N. W. 568, Ann. Cas. 1916C, 398. **Tex.**—*Whitehead v. Her-*

ron, 15 Tex. 127, 65 Am. Dec. 145. **Va.** *Coffman v. Sangston*, 21 Gratt. (62 Va.) 263; *Sillings v. Bumgardner*, 9 Gratt. (50 Va.) 273.

Such Amendment Does Not Change the Cause of Action.—See the title "**New Cause of Action or Defense.**"

[a] **One suing as agent** may amend so as to sue in his individual capacity. *Cirwithin v. Mills*, 2 Marv. (Del.) 232, 43 Atl. 151. See the title "**Principal and Agent.**"

In actions for death by wrongful act, see 6 STANDARD PROC. 435.

20. **U. S.**—*In re Griggs*, 227 Fed. 795, 142 C. C. A. 319. **Ala.**—*Lucas v. Pittman*, 94 Ala. 616, 10 So. 603, we perceive no just ground for distinguishing between the rule as applied to the plaintiffs and defendants. **Conn.**—*McDonald v. Ward*, 57 Conn. 304, 18 Atl. 51. **Mass.**—*Hutchinson v. Tucker*, 124 Mass. 240. **Ohio.**—*Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1.

21. *Eddy v. Powell*, 49 Fed. 814, 1 C. C. A. 448.

[a] **Changing Descriptive Words.** An action against E. & C., Receivers, may be amended to one against E. & C. as receivers. *Eddy v. Powell*, 49 Fed. 814, 1 C. C. A. 448. *Contra*, *United Press v. A. S. Abell Co.*, 73 App. Div. 240, 76 N. Y. Supp. 692. See generally the title "**Receivers.**"

22. **Cal.**—*Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695. **Ga.**—*Moore v. Smith*, 121 Ga. 479, 49 S. E. 601. **Mich.**—*Weise v. Rich*, 77 Mich. 325, 43 N. W. 979. **N. Y.**—*Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257; *United Press v. A. S. Abell Co.*, 73 App. Div. 240, 76 N. Y.

5. Transposing Parties From One Side to the Other.—If a court of equity deems it proper to do so, parties may be transferred from one side of a suit to the other.²³ Transposition of parties is also permissible under a statute authorizing amendments to strike out and add names of parties.²⁴ Accordingly a transposition of parties may be had to remove an impediment to the jurisdiction of a federal court,²⁵ or where one of several defendants acquires the interest of the plaintiff.²⁶ But a transposition will not be allowed at the mere caprice of the parties,²⁷ or to enable the party transposed to remove the cause into another and foreign jurisdiction.²⁸

B. BY CROSS-COMPLAINT OR CROSS-BILL.—New parties cannot be brought into a case by cross-complaint,²⁹ though they may sometimes be brought in by cross-bill.³⁰

C. BY SUPPLEMENTAL BILL OR LIBEL.—In equity,³¹ and in admiralty,³² new parties may be brought in by supplemental bill or libel, in accordance with general rules elsewhere discussed.

D. BY INTERPLEADER AND INTERVENTION.—New parties are sometimes brought into actions by interpleading them,³³ or by intervention.³⁴

XII. PROCEEDINGS WHERE INTEREST OF PARTY IS TRANSFERRED PENDING SUIT.—**A. IN EQUITY.**—**1. On Transfer of Plaintiff's Interest.**—Where a transfer of the interest of a sole complainant suing in his own right is made pendente lite, the suit cannot be carried on in the name of the original complainant,³⁵ especially when the defendant objects and applies for an order that the assignee come in.³⁶ Before the assignee can proceed, he must make

Supp. 692. **Pa.**—*White Co. v. Fayette Automobile Co.*, 43 Pa. Super. 532. **Tex.** *McIlhenny v. M. C. Lee & Co.*, 43 Tex. 205.

23. U. S.—*Kelly v. Dolan*, 218 Fed. 966. **Ala.**—*Tatum Bros. v. Walker*, 77 Ala. 563. **Md.**—*Farmers' & M. Bank v. Wayman*, 5 Gill 336. **N. J.**—*Thompson v. Fisler*, 33 N. J. Eq. 480; *Elmer v. Loper*, 25 N. J. Eq. 475. **W. Va.** *McConaughy & Co. v. Bennett's Exrs.*, 50 W. Va. 172, 40 S. E. 540; *Burlew v. Quarrier*, 16 W. Va. 108.

[a] At final hearing, the court will arrange the parties and administer relief as their respective rights may require, but prior thereto it will not rearrange them. *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197.

24. Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co., 5 Okla. 32, 47 Pac. 484; *Liggett v. Ladd*, 23 Ore. 26, 31 Pac. 81.

25. Insurance Co. of North America v. Svendsen, 74 Fed. 346.

26. Nev.—*Bullion Min. Co. v. Croesus Gold & Silver M. Co.*, 2 Nev. 168, 90 Am. Dec. 526. **N. Y.**—*McLean v.*

Tompkins, 18 Abl. Pr. 24. **Okla.**—*Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 5 Okla. 32, 42, 47 Pac. 484.

27. Burlew v. Quarrier, 16 W. Va. 108, 143.

28. Burlew v. Quarrier, 16 W. Va. 108, 148.

29. Reed v. Wing, 168 Cal. 706, 712, 144 Pac. 964; *Clark v. Kelley*, 163 Cal. 207, 124 Pac. 846; *Alpers v. Bliss*, 145 Cal. 565, 570, 79 Pac. 171; *Merchants' Trust Co. v. Bentel*, 10 Cal. App. 75, 101 Pac. 31. *Compare Chicago, S. B. & N. I. Ry. Co. v. Dunnahoo* (Ind. App.), 112 N. E. 552. See generally 6 STANDARD PROC. 302.

30. See 6 STANDARD PROC. 276.

31. See the title "Supplemental Pleading."

32. See 1 STANDARD PROC. 436.

33. See 14 STANDARD PROC. 225.

34. See the title "Intervention."

In admiralty, see 1 STANDARD PROC. 436.

35. See the title "Survival."

As to nominal and use plaintiffs in equity, see supra, V, C, 5.

36. Sedgwick v. Cleveland, 7 Paige

himself a party by an original bill in the nature of a supplemental bill or a bill in the nature of a bill of revivor and supplement as it has been more appropriately named.³⁷ If the original complainant transfers only a part of his interest, the assignee has a right to file an original bill in the nature of a supplemental bill.³⁸

Statutes in many jurisdictions have abolished this rule.³⁹

2. On Transfer of Defendant's Interest.—If the interest of a defendant in the subject of the litigation becomes vested in another pendente lite, without actual abatement of the suit,⁴⁰ the assignee cannot be heard unless he brings himself before the court by a supplemental bill in the nature of a cross-bill, which he may sometimes do.⁴¹

B. UNDER THE CODE.—**1. Generally.**⁴²—The codes generally pro-

Ch. (N. Y.) 287, notice of application for order to assignee and original complainant required.

[a] **Defendant may waive right to urge the objection.** *Wright v. Meek*, 2 G. Gr. (Iowa) 472; *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287.

37. U. S.—*Pittsburgh, S. & N. R. Co. v. Fiske*, 178 Fed. 66, 101 C. C. A. 560; *Automatic Switch Co. v. Cutler-Hammer Co.*, 147 Fed. 250, 77 C. C. A. 176; *Tappan v. Smith*, 5 Biss. 73, 23 Fed. Cas. No. 13,748. **Ia.**—*Wright v. Meek*, 2 G. Gr. 472, 480. **Me.**—*Mason v. York & Cumberland R. Co.*, 52 Me. 82. **Mich.**—*Perkins v. Perkins*, 16 Mich. 162; *Webster v. Hitchcock*, 11 Mich. 56. **Minn.**—*Chisholm v. Clitherall*, 12 Minn. 375. **Mo.**—*Gamble v. Johnson*, 9 Mo. 605, 623. **N. J.**—*Fulton v. Greacen*, 44 N. J. Eq. 443, 15 Atl. 827. **N. Y.**—*Springer v. Vanderpool*, 4 Edw. Ch. 362; *Van Hook v. Throckmorton*, 8 Paige Ch. 33; *Sedgwick v. Cleveland*, 7 Paige Ch. 287. But see *Talmage v. Pell*, 9 Paige Ch. 410, holding under statute relating to dissolution of corporations an original bill in the nature of a supplement is not required; a summary application by the receiver is sufficient. For present law in New York, see *infra*, XII, B. **Tenn.**—*Haynes v. Rizer*, 14 Lea 246. See also *Paul v. Williams*, 12 Lea 215; *Wills v. Whitmore*, 9 Baxt. 198; *Trabue v. Bankhead*, 2 Tenn. Ch. 412.

[a] **The benefit of the proceedings (1) cannot be had by supplemental bill** (*Tappan v. Smith*, 5 Biss. 73, 23 Fed. Cas. No. 13,748; *Fulton v. Greacen*, 44 N. J. Eq. 443, 15 Atl. 827. See *Haynes v. Rizer*, 14 Lea [Tenn.] 246, remedy is not by becoming a party to the original suit unless the opposing party consents), or (2) bill of revivor (*Wright*

v. Meek, 2 G. Gr. [Iowa] 472, 480, because the suit does not abate), or (3) original bill in the nature of a bill of revivor (*Fulton v. Greacen*, 44 N. J. Eq. 443, 15 Atl. 827), (4) though whether the pleading be called an original bill or supplemental bill is not very material. *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287. Compare *Fulton v. Greacen*, 44 N. J. Eq. 443, 15 Atl. 827. See generally the title "**Supplemental Pleading.**"

[b] **Previous leave of court is not required to the filing of the bill.** *Webster v. Hitchcock*, 11 Mich. 56.

[c] **Contents of Bill.**—*Webster v. Hitchcock*, 11 Mich. 56.

[d] **Former complainant need not be a party to the supplemental bill where his entire interest passes to the assignee.** *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287.

38. *Wright v. Meek*, 2 G. Gr. (Iowa) 472, 482.

[a] **Original complainant is a necessary party to the suit.** *Hoxie v. Carr*, 1 Sumn. 173, 12 Fed. Cas. No. 6,802.

39. See *infra*, XII, B.

40. **Transfer as an abatement of a pending suit, see the title "Survival."**

41. U. S.—*Barnard v. Hartford, P. & F. R. Co.*, 2 Fed. Cas. No. 1,003. **Ill.**—*Lunt v. Stephens*, 75 Ill. 507, 514. **Minn.**—*Steele v. Taylor*, 1 Minn. 274. **N. Y.**—*Sedgwick v. Cleveland*, 7 Paige Ch. 287. **Tenn.**—*Haynes v. Rizer*, 14 Lea 246, 251. **Wash.**—*Powell v. Nolan*, 27 Wash. 318, 335, 67 Pac. 712, 68 Pac. 389.

Assignee as a necessary or proper party, see *supra*, IV, F, 12.

42. **Substitution of officers, see the titles "Officers;" "Receivers;" "Sheriffs, Constables and Marshals;" "Trusts and Trustees."**

vide that actions shall not abate by the transfer of any interest therein, if the action survive or continue,⁴³ and most,⁴⁴ but not all,⁴⁵ codes contain a provision that in such case the court may allow the transferee to continue the action in the name of the original party or to be substituted as a party or added to the action.⁴⁶ This provision must be construed with the statute requiring actions to be prosecuted by the real party in interest.⁴⁷

2. Code Is Permissive.—a. *Generally.*—The code provision regulating proceedings on transfers of the interests of parties pending suit is permissive in its terms.⁴⁸ It is not necessary that the assignee be substituted as a party, if the assignor is in esse, is not subject⁴⁹ to any dis-

43. See generally the codes and the title "Survival."

44. See the codes and the following: **U. S.**—French v. Edwards, 4 Sawy. 125, 9 Fed. Cas. No. 5,097. **Ariz.**—Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197. **Cal.** Camarillo v. Fenlon, 49 Cal. 202; Moss v. Shear, 30 Cal. 467, 477. **Ky.**—Western Bank v. Coldeaway's Exr., 29 Ky. L. Rep. 651, 94 S. W. 1. **Mo.**—Spurlock v. Sproule, 72 Mo. 503. **Neb.**—Parker v. Taylor, 3 Neb. (Unof.) 318, 91 N. W. 537. **Ohio.**—Lowry v. Anderson, 57 Ohio St. 179, 48 N. E. 810. **Okla.** Purcell M. & E. Co. v. Canadian Valley Const. Co., 160 Pac. 485; Gillett v. Romig, 17 Okla. 324, 87 Pac. 325; Anderson v. Ferguson, 12 Okla. 307, 71 Pac. 225. **Utah.**—Wilson v. Kiesel, 9 Utah 397, 410, 35 Pac. 488. **Wis.**—Andrews v. Thayer, 30 Wis. 228.

See also 3 STANDARD PROC. 130.

[a] **Equity practice is superseded** by this statute. Packard v. Wood, 17 Abb. Pr. (N. Y.) 318. See also Sykes v. Beck, 12 N. D. 242, 96 N. W. 844. As to equity practice, see *supra*, XII, A.

Adding party by amendment, see *supra*, XI, A, 1, c, (III).

45. See the codes, and Dundee M. & T. Inv. Co. v. Hughes, 89 Fed. 182; Elliot v. Teal, 5 Sawy. 249, 8 Fed. Cas. No. 4,396, under Oregon practice.

46. See the authorities cited in the preceding note; also *infra*, this section.

[a] **Right to continue the action necessarily follows** from the provision that the action shall not abate in such case. Dundee M. & T. Inv. Co. v. Hughes, 89 Fed. 182; Elliot v. Teal, 5 Sawy. 188, 8 Fed. Cas. No. 4,389; Burns v. Kennedy, 49 Ore. 588, 90 Pac. 1102; Merriam v. Victory P. Min. Co., 37 Ore. 321, 329, 56 Pac. 75, 53 Pac. 37, 60 Pac. 997.

[b] **Right of the transferee (1) to**

be substituted does not exist (Dundee M. & T. Co. v. Hughes, 89 Fed. 182; Elliot v. Teal, 5 Sawy. 188, 8 Fed. Cas. No. 4,389), or (2) is at least doubtful (Fildew v. Milner, 57 Ore. 16, 109 Pac. 1092; Burns v. Kennedy, 49 Ore. 588, 90 Pac. 1102; Culyer v. Randle, 45 Ore. 491, 78 Pac. 394), in the absence of a specific provision allowing it. (3) He may be added as a party in such case, however. Fildew v. Milner, 57 Ore. 16, 109 Pac. 1092.

[c] **To What Actions Applicable.**

(1) Although general in terms (see the code), (2) it has been held inapplicable to transfers of the interest of a party in replevin suits. Meyer v. Omaha Furn. & C. Co., 76 Neb. 405, 107 N. W. 767; Flanders v. Lyon, 51 Neb. 102, 70 N. W. 524. See generally the title "Replevin."

[d] **Refers to Both Parties.**—Walldorph v. Bortle, 4 How. Pr. (N. Y.) 358.

47. Dundee M. & T. Inv. Co. v. Hughes, 89 Fed. 182.

As to real party in interest generally, see *supra*, V, C, 4.

[a] **So construed**, the word "prosecuted" doubtless refers to the commencement and not to the continuance of the action after it has been properly commenced. French v. Edwards, 4 Sawy. 125, 9 Fed. Cas. No. 5,097. See Dundee M. & T. Inv. Co. v. Hughes, 89 Fed. 182. Compare Matthews v. Cantey, 48 S. C. 588, 26 S. E. 894.

48. Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156; Emerson v. McWhirter, 128 Cal. 268, 60 Pac. 774; Renfro v. Prior, 25 Mo. App. 402.

49. **Cal.**—Anglo-Californian Bank v. Field, 146 Cal. 644, 654, 80 Pac. 1080; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Stuffbeem v. Adelsbach, 135 Cal. 221, 67 Pac. 140. **Ia.**—Kringlev.

ability, and had a right to commence the action.⁵⁰ But if the assignee is a necessary party to the complete determination of the action, he must be brought in by amendment.⁵¹ Whether there shall be a substitution is a matter left to the election of the transferee.⁵²

b. *Where Transferor Dies or Becomes Insolvent.*—Where the transferor dies after the transfer, the action cannot proceed in his name,⁵³ or in the name of his personal representatives;⁵⁴ the action should be revived in the name of the transferee.⁵⁵ But the appointment of a receiver for a corporation after the transfer does not dissolve it and necessitate a substitution of the transferee.⁵⁶

3. *Transfer Authorizing Substitution.*—a. *As to Time Made.* The transfer of interest to authorize a substitution of parties must be

Rhomberg, 120 Iowa 472, 480, 94 N. W. 1115. **Neb.**—McCague Sav. Bank v. Croft, 80 Neb. 702, 115 N. W. 315. **N. Y.**—Lawson v. Woodstock, 37 Hun 352; Emmet v. Bowers, 23 How. Pr. 300. **Tex.**—Matthews v. Boydstun (Tex. Civ. App.), 31 S. W. 814. **Utah.**—Oberndorfer v. Moyer, 30 Utah 325, 84 Pac. 1102.

Effect of death of party after transfer, see *infra*, XII, B, 2, b.

[a] **Even Though the Suit Is for an Injunction.**—Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. 140.

[b] **Foreclosure Suit.**—Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080; National Bank v. Hapgood, 9 Utah 85, 33 Pac. 241.

[c] **Where plaintiff makes an assignment for the benefit of creditors pending suit,** the assignee may continue the suit in the name of the original plaintiff. Lawson v. Woodstock, 37 Hun (N. Y.) 352.

50. Mutual Bank v. Burrell, 29 Misc. 322, 60 N. Y. Supp. 522.

51. Burnett v. Lyman, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691.

As to bringing in of parties by the court when necessary to a complete determination of the controversy cannot be had, see *supra*, XI, A, 1, c, (VII).

[a] **In ejectment,** the grantee of the plaintiff must be joined as a party plaintiff if not substituted. Burnett v. Lyman, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691.

52. **Cal.**—Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69; Walker v. Felt, 54 Cal. 386. **Utah.**—Lowell v. Parkinson, 4 Utah 64, 6 Pac. 58. **Wyo.** Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803.

[a] **Adverse party has no interest**

(1) in the matter and no right to insist on the substitution (**Ia.**—Kringler v. Rhomberg, 120 Iowa 472, 480, 94 N. W. 1115. **Mo.**—Renfro v. Prior, 25 Mo. App. 402. **Utah.**—Lowell v. Parkinson, 4 Utah 64, 6 Pac. 58), though (2) whether an application for a substitution shall be allowed is within the discretion of the court. See *infra*, XII, B, 7, c, (VI), (B).

53. Taylor v. Elliott, 52 Ind. 588; La Pointe v. O'Malley, 47 Wis. 332, 339, 2 N. W. 632. But see Tuffree v. Stearns Ranches Co., 124 Cal. 306, 57 Pac. 69. See the titles "**Revival**;" "**Survival**."

Dead person as plaintiff, see *supra*, V, B, 1.

54. Reynolds v. Quaely, 18 Kan. 361. See Andrews v. Thayer, 30 Wis. 228, query. *Contra*, Betts v. De Selding, 81 App. Div. 161, 80 N. Y. Supp. 799.

55. Reynolds v. Quaely, 18 Kan. 361; La Pointe v. O'Malley, 47 Wis. 332, 2 N. W. 632. See also Higgins v. Kay, 168 Cal. 468, 143 Pac. 710; Anderson v. Schloesser, 153 Cal. 219, 94 Pac. 885; and *infra*, XII, B, 3.

56. McCague Sav. Bank v. Croft, 80 Neb. 702, 115 N. W. 315. See generally the title "**Receivers**."

[a] **The rule that the effect of appointing a receiver is to suspend all rights of action by the corporation applies only to cases in which the corporation is the real party in interest at the time of the appointment, not to a case where a suit is being continued in its name after a transfer pending suit.** McCague Sav. Bank v. Croft, 80 Neb. 702, 706, 115 N. W. 315.

made pending the action,⁵⁷ and during the lifetime of the party.⁵⁸ Cases where one succeeds to the interest of another by reason of death or disability are not within the statute.⁵⁹ If, however, the transfer was made during the lifetime of the party, his subsequent death is immaterial so far as the right to substitution is concerned.⁶⁰

b. *As to Character of.*—The term "transfer of interest" means such a transfer as would enable the transferee to claim under the original party.⁶¹ In addition thereto, to authorize a substitution, the transfer must be absolute.⁶²

57. *St. Anthony Mill Co. v. Vandall*, 1 Minn. 246; *East River Bank v. Cutting*, 1 Bosw. (N. Y.) 636. See *infra*, XII, B, 4, c, (1).

[a] Transfer before service on co-defendant does not authorize a substitution of his transferee. *East River Bank v. Cutting*, 1 Bosw. (N. Y.) 636.

[b] Transfer after judgment but before right of appeal has expired is a transfer pendente lite. *Sykes v. Beck*, 12 N. D. 242, 250, 96 N. W. 844.

[c] An assignment of judgment is within the statute. *Neilon v. Kansas City, St. J. & C. B. Ry. Co.*, 85 Mo. 599; *Schroeder v. Pratt*, 21 Utah 176, 60 Pac. 512. Compare *infra*, XII, B, 4, c, (1).

58. *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885.

59. *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885.

60. *Higgins v. Kay*, 168 Cal. 468, 143 Pac. 710; *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885.

As affecting right to continue action in name of original party, see *supra*, XII, B, 2, b.

61. *Matthews v. Cantey*, 48 S. C. 588, 26 S. E. 894, transferee must derive his title or interest from or under the original party.

[a] This includes (1) a transfer of his interest by one joint plaintiff to the other (*Gillespie v. St. Paul F. & M. Ins. Co.*, 168 Mo. App. 320, 153 S. W. 1079; *Luebbering v. Oberkoetter*, 1 Mo. App. 393), and (2) a transfer of a sole plaintiff's interest to one of the defendants. *Bullion Min. Co. v. Croesus Gold & S. M. Co.*, 2 Nev. 168, 90 Am. Dec. 526; *National Bank v. Hapgood*, 9 Utah 85, 33 Pac. 241. See also *Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 5 Okla. 32, 42, 47 Pac. 484.

(3) If an officer (*Ex parte Tinkum*, 54 Cal. 201, county treasurer. See generally the title "Officers"), (4) trustee

(*Stout v. Betts*, 74 Hun 266, 26 N. Y. Supp. 809, 56 N. Y. St. 356. See generally the title "Trusts and Trustees"), or (5) personal representative (*Hamilton v. Crawford*, 73 Misc. 23, 132 N. Y. Supp. 277), ceases to be such, his successor may be substituted under this statute. (6) The same is true of road districts and the like on the organization of the territory embraced by them into other districts. *Good Road Dist. No. 2 v. Washington County*, 27 Idaho 732, 152 Pac. 183, action for tax collections.

[b] A transfer of the property attached in a personal action for a general judgment is not a transfer of interest authorizing a substitution of the transferee. *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885.

62. Colo.—*Winchester v. Walker*, 59 Colo. 17, 147 Pac. 343. Conn.—*Judson v. Metropolitan Wash. Mach. Co.*, 33 Conn. 467. Ia.—*Price v. Baldauf*, 90 Iowa 205, 57 N. W. 710. Minn.—*Walker v. Sanders*, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276. Mo.—*Springfield v. Weaver*, 137 Mo. 650, 670, 37 S. W. 509, 39 S. W. 276. N. C.—*Davis v. Higgins*, 92 N. C. 203.

See also *Bank of Commerce v. Timbrell*, 113 Iowa 713, 84 N. W. 519; *Todd v. Crutsinger*, 30 Mo. App. 145.

[a] If the plaintiff retains any interest in the cause of action, he remains an interested party with the right to contest the action jointly with his assignee. *Walker v. Sanders*, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276.

[b] Where Assignment Is Only for Collateral Security. — *Winchester v. Walker*, 59 Colo. 17, 147 Pac. 343; *Davis v. Higgins*, 92 N. C. 203. See also *Peek v. Yorks*, 75 N. Y. 421; *Dowling v. Bucking*, 52 N. Y. 658, 15 Abb. Pr. (N. S.) 190; *Wolcott v. Holcomb*, 31 N. Y. 125.

[c] Although the assignee previous-

4. **Proceedings.** — a. *In General.* — After transferring his entire interest in a controversy, a party is only a nominal one;⁶³ if a plaintiff, he is no longer a real party in interest.⁶⁴ By his act he divested himself of the control of the action which vests in the transferee,⁶⁵ who must thereafter prosecute the action, either in the name of the original party, or, after substitution of himself, in his own name.⁶⁶

b. *Continuing Action in Name of Original Party.* — Even if no application is made therefor, the action will usually go on in the name of the original party as if no transfer had been made.⁶⁷ Under some codes, the transferor may require indemnity if the cause is continued in his name.⁶⁸

Control of Proceedings, etc. — Although the assignee will be recognized in all further proceedings in the cause,⁶⁹ it has been held that all notices in the cause must be served on the original party.⁷⁰ A judgment for the assignee is erroneous,⁷¹ and he cannot appeal in his own name.⁷² But a fraudulent judgment entered by the original parties prejudicial to the transferee will be set aside.⁷³

c. *Substitution and Amendment.* — (I.) **When Substitution May Be Had.** The provision authorizing substitution of transferees pending suit re-

ly held the instrument sued on as collateral security, he may be substituted as a party on an absolute assignment to him. *Springfield v. Weaver*, 137 Mo. 650, 670, 37 S. W. 509, 39 S. W. 276; *Howell v. Alma Milling Co.*, 36 Neb. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

63. *Tuffree v. Stearns Ranchos*, 124 Cal. 396, 57 Pac. 69; *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703; *Renfro v. Prior*, 25 Mo. App. 402.

64. *Elliot v. Teal*, 5 Sawy. 188, 8 Fed. Cas. No. 4,389; *McCague Sav. Bank v. Croft*, 80 Neb. 702, 706, 115 N. W. 315.

[a] **Transferee Is Real Party in Interest.** — *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 Pac. 69; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703.

65. **Cal.** — *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 57 Pac. 69; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 142, 56 Pac. 797; *Walker v. Felt*, 54 Cal. 386. **Ky.** — *Cantrell v. Hewlett*, 2 Bush 311. **Minn.** — *Chisholm v. Clitherall*, 12 Minn. 375. **Mo.** — *Ashby v. Winston*, 26 Mo. 210. **N. Y.** — *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

Rights of nominal and use plaintiffs generally, see *supra*, V, C, 5, a, (III), (D).

66. *Chisholm v. Clitherall*, 12 Minn.

375. See also *supra*, XII, B, 1; *infra*, XII, B, 4, b and c.

67. *Malone v. Big Flat Gravel M. Co.*, 93 Cal. 384, 390, 28 Pac. 1063. Compare *Chisholm v. Clitherall*, 12 Minn. 375, holding that if the assignee desires to proceed in the name of the original party or otherwise, he must establish the fact of the transfer in a proper proceeding, and obtain leave of court to continue the suit in the name of the original party or to be added or substituted in the action.

68. See the codes and statutes, and *Asher v. St. Louis, I. M. & S. Ry. Co.*, 89 Mo. 116, 1 S. W. 123, defendant cannot complain if plaintiff waives his right.

69. *Chisholm v. Clitherall*, 12 Minn. 375.

Right to control suit, see *supra*, XII, B, 4, a.

70. *Schroeder v. Pratt*, 21 Utah 176, 60 Pac. 512.

71. *Lowell v. Parkinson*, 4 Utah 64, 6 Pac. 58.

72. *Hanks v. Matthews*, 16 Utah 325, 52 Pac. 7.

73. *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797. See also *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703; *Walker v. Felt*, 54 Cal. 386.

As to setting aside judgments generally, see 15 STANDARD PROC. 151, et seq.

fers to every stage of the action,⁷⁴ and authorizes a substitution of parties in the trial court,⁷⁵ and according to some authorities in the appellate court,⁷⁶ although some cases hold that the provision has reference only to transfers of interest made before judgment.⁷⁷

A substitution may be had as often as a transfer is made.⁷⁸

(II.) **Who May Apply for Substitution.**—The application for substitution of a transferee pendente lite is made ordinarily by the party in interest, the grantee, or transferee;⁷⁹ but sometimes it is made by the original party.⁸⁰ The adverse party cannot, as a rule, apply for substitution of a transferee pending suit.⁸¹

(III.) **Motion and Notice.**—The application for substitution of a transferee of the interest of a party pending suit, is made by motion,⁸² upon notice,⁸³ supported by an affidavit, stating facts showing the transfer

74. *Waldorpha v. Bortle*, 4 How. Pr. 380, 5 Duer 604; *Packard v. Wood*, 17 Abb. Pr. 318. **N. D.**—*Sykes v. Beck*, 12 N. D. 242, 251, 96 N. W. 844. **Wyo.**—*Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803.

As to time of transfer, see *supra*, XII, B, 3, a.

[a] **On new trial**, a substitution may be had. *Brown v. Cody*, 115 Ind. 484, 18 N. E. 9.

75. *Keough v. McNitt*, 7 Minn. 29.

76. **Kan.**—*McKinnis v. Scottish American Mtg. Co.*, 55 Kan. 259, 39 Pac. 1018. **Minn.**—*Keough v. McNitt*, 7 Minn. 29. **Mo.**—*Neilon v. Kansas City, St. J. & C. B. Ry. Co.*, 85 Mo. 599. **Neb.**—*Howell v. Alma Milling Co.*, 36 Neb. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

[a] **Court of original jurisdiction must have lost control** of the case in order that the supreme court may order a substitution. *Keough v. McNitt*, 7 Minn. 29.

77. *Emerson v. McWhirter*, 128 Cal. 268, 60 Pac. 774; *Golden Terra Min. Co. v. Smith*, 2 Dak. 374, 11 N. W. 97, the statute has no application to the court of appeal especially where the motion is contested and no application was made in the trial court. See also *Culver v. Randle*, 45 Ore. 491, 78 Pac. 394.

[a] **Unless upon a consent order**, a substitution cannot be had on appeal. *Golden Terra Min. Co. v. Smith*, 2 Dak. 374, 11 N. W. 97.

78. *Temple v. Smith*, 13 Neb. 513, 14 N. W. 527.

79. **U. S.**—*Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. A. 650. **Cal.**—*Campbell v. West*, 93 Cal. 653, 29 Pac. 219, 645; *Hestres v. Brennan*, 37 Cal. 385. **Ia.**—*Crary v. Kurtz*, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549. **N. Y.**—*Smith v. Zalinski*, 94 N. Y. 519;

Howard v. Taylor, 11 How. Pr. 380, 5 Duer 604; *Packard v. Wood*, 17 Abb. Pr. 318. **N. D.**—*Sykes v. Beck*, 12 N. D. 242, 251, 96 N. W. 844. **Wyo.**—*Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803.

80. *Campbell v. West*, 93 Cal. 653, 29 Pac. 219, 645; *Hestres v. Brennan*, 37 Cal. 385; *Firman v. Bateman*, 2 Utah 268. But see *Packard v. Wood*, 17 Abb. Pr. (N. Y.) 318 (holding the transferee is the only party who can make application for substitution); *Howard v. Taylor*, 11 How. Pr. (N. Y.) 380, 5 Duer 604, denying motion by original party made without notice to the purchaser.

81. **Cal.**—*Hestres v. Brennan*, 37 Cal. 385. **Mo.**—*Renfro v. Prior*, 25 Mo. App. 402. **N. Y.**—*Packard v. Wood*, 17 Abb. Pr. 318. *Contra*, *De Bost v. Albert Palmer Co.*, 1 How. Pr. N. S., 508; *Shearman v. Coman*, 22 How Pr. 517.

82. **U. S.**—*Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. A. 650. **Conn.**—*Fish v. Smith*, 73 Conn. 377, 385, 47 Atl. 718, by written application. **Ia.**—*Crary v. Kurtz*, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549. **Mont.**—*Campbell v. Irvine*, 17 Mont. 476, 43 Pac. 626. **N. Y.**—*Smith v. Zalinski*, 94 N. Y. 519. **Utah.**—*Firman v. Bateman*, 2 Utah 268.

83. **Cal.**—*Higgins v. Kay*, 168 Cal. 468, 143 Pac. 710, order without notice void. **N. Y.**—*Smith v. Zalinski*, 94 N. Y. 520; *Schell v. Devlin*, 82 N. Y. 333. **Wyo.**—*Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803.

But see *Firman v. Bateman*, 2 Utah 268.

[a] **To Whom Given.**—(1) Notice to the adverse party (*Howard v. Taylor*, 11 How. Pr. [N. Y.] 380, 5 Duer 604;

of interest pending suit.⁸⁴

Resisting Motion.—The adverse party may question the right of a transferee to an order of substitution, contesting the facts on which the motion is based.⁸⁵

(IV.) **Hearing and Determination of Motion.**—Whether the application for substitution shall be allowed rests in the discretion of the court to which the application is made.⁸⁶ Unless admitted by the adverse party, the moving party must first establish the fact of the transfer to him.⁸⁷ If there be any doubt about it, the court may deny the motion and direct the cause to proceed.⁸⁸ But if there is no doubt about it, or the defendant admits it, the court may order the substitution,⁸⁹ or, under some statutes, may direct that he be made a party by amendment or otherwise.⁹⁰ According to some authorities, the court may order sup-

Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803), (2) except where defendant is in default (Farrell v. Jones, 63 Cal. 194), and (3) if the application is made by the transferee, then to the transferor (Howard v. Taylor, 11 How. Pr. [N. Y.] 380, 5 Duer 604; Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803), or (4) if he be dead, to his personal representatives (McLaughlin v. New York, 8 Daly [N. Y.] 474, 58 How. Pr. 105; Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803) must be given.

[b] **Waiver of Notice.**—Ford v. Bushard, 116 Cal. 273, 48 Pac. 119.

[c] **Notice Presumed.**—Ford v. Bushard, 116 Cal. 273, 48 Pac. 119.

84. **Nome & Sinook Co. v. Ames Merc. Co.**, 187 Fed. 928, 109 C. C. A. 650; Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803.

85. **Higgins v. Kay**, 168 Cal. 468, 143 Pac. 710.

86. **Cal.**—Higgins v. Kay, 168 Cal. 468, 143 Pac. 710; Emerson v. McWhirter, 128 Cal. 268, 60 Pac. 774. **Ia.** Snyder v. Phillips, 66 Iowa 481, 24 N. W. 6. **N. Y.**—Harris v. Bennett, 6 How. Pr. 220; Packard v. Wood, 17 Abb. Pr. 318; McNamara v. Harris, 4 Civ. Proc. 76. **Utah.**—Oberndorfer v. Moyer, 30 Utah 325, 84 Pac. 1102.

See 3 STANDARD PROC. 130.

[a] **If a substitution cannot be made** (1) without prejudice to the defendant, the motion therefor will be denied (Snyder v. Phillips, 66 Iowa 481, 24 N. W. 6 [denying substitution where defendant filed counterclaim for wrongful suing out of attachment]; Fannon v. Robinson, 10 Iowa 272; Howard v. Taylor, 11 How. Pr. [N. Y.] 380, 5 Duer 604), or (2) granted only on such terms as to protect him from

injury. Howard v. Taylor, 11 How. Pr. (N. Y.) 380, 5 Duer 604.

[b] **Court may impose conditions to the granting of an order of substitution.** **Ia.**—Crary v. Kurtz, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549. **N. Y.**—Howard v. Taylor, 11 How. Pr. 380, 5 Duer 604. **N. D.**—Sykes v. Beck, 12 N. D. 242, 251, 96 N. W. 844. **Wyo.**—Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803.

[c] **Where an application for security for costs would be defeated by allowing a substitution**, it will not be ordered. McNamara v. Harris, 4 Civ. Proc. (N. Y.) 76.

[d] **A substitution will not be made unless the transferee could have sued on the cause of action had the transfer been made before the commencement of the suit.** Fannon v. Robinson, 10 Iowa 272.

87. **U. S.**—Nome & Sinook Co. v. Ames Merc. Co., 187 Fed. 928, 109 C. C. A. 650. **Ia.**—Ferry v. Page, 8 Iowa 455. **N. Y.**—Smith v. Zalinski, 94 N. Y. 519.

[a] **Court may inspect conveyance or transfer and determine whether or not it is absolute in its terms.** Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803.

88. **Smith v. Zalinski**, 94 N. Y. 519.

89. **Tuffree v. Stearns Ranchos Co.**, 124 Cal. 306, 57 Pac. 69; Smith v. Zalinski, 94 N. Y. 519.

[a] **Substitution is effected when the order that it be made is passed.** Fish v. Smith, 73 Conn. 377, 386, 47 Atl. 718.

[b] **Order of substitution should be entered in the minutes as a distinct order made before judgment.** Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

90. **Smith v. Zalinski**, 94 N. Y. 519.

plemental pleadings to carry the issue as to the transfer over to the trial.⁹¹

(V.) **Rights of Parties After Substitution, and Necessity of Additional Pleadings.**—The transferee, on substitution, takes up the prosecution or defense of the action at the point where the original party left off.⁹² The issues are those formed by the original parties;⁹³ no change in pleading is necessary according to some authorities.⁹⁴ It has been held, however, that if on the motion the adverse party raises the issue of assignment, the court may decide it, or it may order supplemental pleadings to carry the issue over to the trial.⁹⁵ If the court orders the substitution without changing the pleadings, the issue cannot be raised again on the hearing,⁹⁶ though according to some authorities, the defendant is not precluded thereby from denying the assignment.⁹⁷

Such a substitution does not release the sureties on bonds from liability.⁹⁸

d. *Intervention.*—According to some authorities, a transferee pendente lite of the interest of a party to an action may intervene in the action.⁹⁹

XIII. AMENDMENT CORRECTING MISNOMER.¹—A misnomer

[a] **An amendment adding the transferee is really a substitution.** *Bush v. Block*, 193 Mo. App. 704, 713, 187 S. W. 153.

91. See *infra*, XII, B, 4, c, (V).

92. **U. S.**—*Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. C. A. 650. **Ia.**—*Crary v. Kurtz*, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549. **Mo.**—*Bush v. Block*, 193 Mo. App. 704, 713, 187 S. W. 153.

[a] **Acquires All the Rights of the Original Plaintiff.**—*Hanks v. Matthews*, 16 Utah 325, 52 Pac. 7.

[b] **Pleadings Inure to His Benefit.** *Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. C. A. 650.

[c] **Assumption of Burdens.**—*Wise v. Collins*, 121 Cal. 147, 53 Pac. 640; *Crary v. Kurtz*, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549.

93. *Virgin v. Brubaker*, 4 Nev. 31.

94. *Virgin v. Brubaker*, 4 Nev. 31; *Firman v. Bateman*, 2 Utah 268. See also *Keller v. Miller*, 17 Ind. 206, no additional pleading is required except perhaps to show the transfer.

95. *Smith v. Zalinski*, 94 N. Y. 519. See also *Crary v. Kurtz*, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549.

[a] **Better Practice Is To Direct the Filing of Supplemental Complaint.** *Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. C. A. 650.

[b] **Mere omission (1) to file addi-**

tional pleadings, unless in disobedience to the court's order, does not render the cause subject to judgment on the pleadings (*Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. C. A. 650), or (2) furnish grounds for revoking the order of substitution. *Nome & Sinook Co. v. Ames Merc. Co.*, 187 Fed. 928, 109 C. C. A. 650.

96. *Smith v. Zalinski*, 94 N. Y. 519. See *Crary v. Kurtz*, 132 Iowa 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549, if the transfer is admitted or is not disputed at the motion, the ruling is an adjudication of the question.

[a] **On appearing without objection the adverse party cannot be heard against it.** *Firman v. Bateman*, 2 Utah 268.

97. *Ford v. Bushard*, 116 Cal. 273, 48 Pac. 119.

[a] **Assignee is still bound to make out his title to the satisfaction of the jury.** *Fish v. Smith*, 73 Conn. 377, 386, 47 Atl. 718. See *Campbell v. Irvine*, 17 Mont. 476, 43 Pac. 626, holding it proper to show on the trial the assignment.

98. *Howell v. Alma Milling Co.*, 36 Neb. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

99. **Right of assignee pendente lite to intervene**, see 14 STANDARD PROC. 297.

1. **Amendment of parties generally**, see *supra*, XI, A.

Manner of raising objection, see *infra*, XIV, D.

of a party may be corrected by an amendment made either at the instance of a party,² or by the court on its own motion,³ provided it merely corrects the name of the party to the action, and does not change the party or introduce a different one.⁴ The mere fact that there is another person who bears the name mistakenly used is immaterial.⁵ The right to amend depends upon the fact that actual service of the complaint and summons has been made upon the person intended to be sued as defendant,⁶ and that he was fairly apprised that the action was brought against him as the party intended to be affected.⁷

Illustrations of amendments permitted under the foregoing rules will be found in the note.⁸

2. Beavers v. Baucum, 33 Ark. 722.

[a] **By Motion of Defendant.**—*Boland v. Claudel*, 181 Ind. 295, 104 N. E. 577.

3. Beavers v. Baucum, 33 Ark. 722.

4. U. S.—*Clemmens v. Washington Park S. Co.*, 171 Fed. 168. **Ala.**—*King Land & Imp. Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22. **Alaska.**—*Willamette Tent & A. Co. v. West Coast Groc. Co.*, 2 Alaska 4. **Colo.**—*Solmonovich v. Denver Consol. T. Co.*, 39 Colo. 282, 89 Pac. 57; *Denver & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, 64 Pac. 381. **Del.**—*Carr v. Buchanan*, 5 Boyce 254, 92 Atl. 875. **Ga.**—*Atlantic Coast Line R. Co. v. Cook*, 6 Ga. App. 128, 64 S. E. 665. **Ill.**—*Malleable Iron Range Co. v. Pusey*, 244 Ill. 184, 91 N. E. 51. **Ind.**—*Weaver v. Jackson*, 8 Blackf. 5. **Me.**—*Surace v. Pio*, 112 Me. 496, 92 Atl. 621; *Berry v. Atlantic Ry.*, 109 Me. 330, 84 Atl. 740. **Md.**—*Thanhauser v. Savins*, 44 Md. 410 (code allows correction of defendant's name only); *Union Bank v. Tillard*, 26 Md. 446. **Mo.**—*Chouteau v. Hewitt*, 10 Mo. 131; *School District v. Wallace*, 75 Mo. App. 317; *Hajek v. Bohemian-Slav. Ben. Soc.*, 66 Mo. App. 568. **Neb.**—*Davis v. Jennings*, 78 Neb. 462, 111 N. W. 128. **Nev.**—*Little v. Virginia & Gold H. W. Co.*, 9 Nev. 317. **N. H.**—*Wheeler v. Cantoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265. **N. J.**—*Jefferson v. Hotel Cape May*, 82 N. J. L. 32, 81 Atl. 349; *Saunders v. Adams Express Co.*, 71 N. J. L. 270, 57 Atl. 899; *Abrahams v. Jacoby*, 69 N. J. L. 178, 54 Atl. 525. **N. Y.**—*Ward v. Terry & Tench Const. Co.*, 118 App. Div. 80, 102 N. Y. Supp. 1066; *Munzinger v. Courier Co.*, 82 Hun 575, 31 N. Y. Supp. 737, 24 Civ. Proc. 175, 64 N. Y. St. 368, 1 N. Y. Ann. Cas. 32; *Ivy Courts Realty Co. v. Barker*, 71 Misc. 460, 128 N. Y. Supp. 715. **Pa.**—*White Co. v.*

Fayette Automobile Co., 43 Pa. Super. 532.

Correcting misnomer of plaintiff as changing the cause of action, see the title "New Cause of Action or Defense."

Substituting parties, see supra, XI, A, 2.

5. Ala.—*King Land & Imp. Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22. **Ga.**—*Atlantic Coast Line R. Co. v. Cook*, 6 Ga. App. 128, 64 S. E. 665. **Mass.**—*Crafts v. Sikes*, 4 Gray 194, 64 Am. Dec. 62.

6. Colo.—*Denver & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, 64 Pac. 381. **Mo.**—*Hajek v. Bohemian-Slavonian Ben. Soc.*, 66 Mo. App. 568. **N. Y.**—*Licausi v. Ashworth*, 78 App. Div. 486, 79 N. Y. Supp. 631; *Fleishner v. Sacks*, 140 N. Y. Supp. 409; *Jacobson v. Semel*, 129 N. Y. Supp. 95. **Pa.**—*White Co. v. Fayette Automobile Co.*, 43 Pa. Super. 532, the party must be in court.

7. Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; *Holman v. Goslin*, 63 App. Div. 204, 71 N. Y. Supp. 197; *Jacobson v. Semel*, 129 N. Y. Supp. 95.

8. Thus, it is permissible to amend (1) by correcting and changing the Christian name of the party (Ala. Ewton v. McCracken, 9 Ala. App. 619, 64 So. 177, from "George" to "Georgia." Ind. — Weaver v. Jackson, 8 Blackf. 5, from "William" to "Boston." Me. — Fogg v. Greene, 16 Me. 282, from "Augustus" to "Augustine." Mass. — Cain v. Rockwell, 132 Mass. 193, from "Mary" to "Ann." N. Y. — Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562, from "Emma J." to "Mary J." Tex. — McIlhenny v. M. C. Lee & Co., 43 Tex. 205. But see Horbach v. Knox, 8 Watts & S. [Pa.] 30), (2) by inserting a proper Christian name in

XIV. OBJECTIONS AND WAIVER. — **A. ABSENCE OF LEGAL ENTITY.** — **1. Of Plaintiff.** — At common law, an objection that the plaintiff's disability is such that it cannot be removed at any time in the future may be pleaded either in abatement or in bar.⁹ Under the modern practice, the objection that an action is not brought by a real person possessing a legal entity cannot be reached by demurrer;¹⁰ but it may be raised by motion to dismiss in the lower court,¹¹ or by motion to dismiss the appeal.¹² If one of several plaintiffs has no legal or actual existence and no power to sue, defendant will be permitted to move to have him stricken out.¹³

That a quasi-artificial person brings an action as such, in the absence of a statute authorizing it, may be availed of by plea in abatement,¹⁴ although some cases hold that there is a defect of parties justifying the interposition of a demurrer.¹⁵

If an action is brought in the name of a fictitious person, the defendant may plead in abatement that there never was such a person in *rerum naturae*,¹⁶ or he may interpose a plea in bar.¹⁷

That the plaintiff died before commencement of the action¹⁸ may be

place of an initial letter (*Mich.*—*Stever v. Brown*, 119 *Mich.* 196, 77 *N. W.* 704. *Minn.*—*Kenyon v. Semon*, 43 *Minn.* 180, 45 *N. W.* 10. *Neb.*—*Walgamood v. Randolph*, 22 *Neb.* 493, 35 *N. W.* 217. *N. J.*—*Abrahams v. Jacoby*, 69 *N. J. L.* 178, 54 *Atl.* 525), (3) though at common law, a plaintiff's name was not thus amendable (*Thanhauser v. Savins*, 44 *Md.* 410), (4) by striking out an initial letter (*Wentworth v. Sawyer*, 76 *Me.* 434), or (5) even by changing the surname of a party. *Crafts v. Sikes*, 4 *Gray (Mass.)* 194, 64 *Am. Dec.* 62, from "Crafts" to "Stark."

[a] Where a defendant is sued by a fictitious name (1), an amendment inserting his real name when it is discovered is permissible (*Farris v. Merritt*, 63 *Cal.* 118; *Davis v. Jennings*, 78 *Neb.* 462, 111 *N. W.* 128), but (2) a failure to make a formal amendment in this respect does not make the proceeding objectionable (*Moore v. Lewis*, 76 *Mich.* 300, 43 *N. W.* 11), or (3) subject to collateral attack. See 15 *STANDARD PROC.* 474, note 1.

Mistake in Name of Corporation. See 5 *STANDARD PROC.* 605, 652.

9. *Jenks v. Edwards*, 6 *Ala.* 143.

10. *Mexican Mill v. Yellow Jacket S. M. Co.*, 4 *Nev.* 40, 97 *Am. Dec.* 510, either on the ground of defect of parties or want of capacity to sue. *Contra*, *Hill v. Armour Fertilizer Wks.*, 14 *Ga. App.* 106, 80 *S. E.* 294, he may demur on the ground the name does

not import a corporation and that the suit is a nullity.

11. *Richardson v. Smith & Co.*, 21 *Fla.* 336; *Mexican Mill v. Yellow Jacket S. M. Co.*, 4 *Nev.* 40, 97 *Am. Dec.* 510.

12. *Mexican Mill v. Yellow Jacket S. M. Co.*, 4 *Nev.* 40, 97 *Am. Dec.* 510.

[a] A motion to dismiss made after reversal on appeal and on new trial on the ground that the name of the plaintiff does not import a corporation, partnership, or natural person is properly overruled, especially where it appears that the plaintiff is a corporation in fact. *Gate City Cotton Mills v. Cherokee Mills*, 128 *Ga.* 170, 57 *S. E.* 320.

13. *District Tp. of White Oak v. District Tp. of Oskaloosa*, 44 *Iowa* 512.

14. *Sims, Harrison & Co. v. Jacobson & Co.*, 51 *Ala.* 186.

15. *Gilman & Co. v. Cosgrove*, 22 *Cal.* 356; *Iroquois Mfg. Co. v. Annanburg Milling Co.*, 179 *Mo. App.* 87, 161 *S. W.* 320.

16. *N. Y.*—*Doe v. Penfield*, 19 *Johns.* 308, where the action was brought by "John Doe." *Pa.*—*Campbell v. Galbreath*, 5 *Watts* 423. *Vt.*—*Boston Type & S. Foundry v. Spooner*, 5 *Vt.* 93.

17. *Northumberland County Bank v. Eyer*, 60 *Pa.* 436; *Boston Type & S. Foundry v. Spooner*, 5 *Vt.* 93. See *Campbell v. Galbreath*, 5 *Watts (Pa.)* 423.

18. *Hurst v. Fisher*, 1 *Watts & S. (Pa.)* 438; *Campbell v. Galbreath*, 5 *Watts (Pa.)* 423, 428; *McCabe v.*

pleaded in abatement or in bar, or it may be availed of by writ of error coram nobis.¹⁹

2. Of Defendant.—An objection that a defendant, a quasi artificial person, is sued as such in the absence of a statute authorizing it may be called to the attention of the court at any stage of the proceeding.²⁰ Where the defendant died before action brought, it has been held that a plea in abatement is proper.²¹

B. ABSENCE OF REMEDIAL INTEREST.—**1. At Common Law.**—An objection at common law that an action is brought by a person not holding the legal title need not be pleaded in abatement.²²

2. In equity the want of interest in the plaintiff is fatal;²³ and objection on that account may be taken by demurrer,²⁴ by answer or plea,²⁵ or at the hearing.²⁶

3. Under the Code.—**a. Generally.**—An objection that the plaintiff in an action is not the real party in interest must be raised by demurrer if apparent on the pleading,²⁷ or if not so apparent, then

United States, 4 Watts (Pa.) 325.

Form of plea setting up plaintiff is dead, see 9 STANDARD PROC. 3.

[a] **Defense that a nominal plaintiff** was dead at the commencement of an action may be pleaded either in abatement or in bar. *Tait v. Frow*, 8 Ala. 543; *Jenks v. Edwards*, 6 Ala. 143; *Hawkins v. Bowie*, 9 Gill & J. (Md.) 428, holding that it should be pleaded in abatement.

[b] **Fact that one of several plaintiffs died** before the commencement of the action is available only by plea in abatement. *Camden v. Robertson*, 3 Ill. 507. But see *Crump v. Wallace*, 27 Ala. 277, holding it available either in abatement or in bar.

[c] **But in ejectment** in the name of a fictitious plaintiff, death of a portion of the lessors of the plaintiffs does not abate the suit or destroy the rights of the survivors to proceed. *Crump v. Wallace*, 27 Ala. 277.

19. *Hurst v. Fisher*, 1 Watts & S. (Pa.) 438.

20. *Metropolitan St. Ry. Co. v. Adams Express Co.* (Mo. App.), 130 S. W. 101. See also the title "Partnership."

[a] **Plea in Abatement Is Not Required.**—*Standard L. & P. Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931.

[b] **May be raised** (1) by special demurrer if apparent on the petition (*United Mine Workers v. Cromer*, 159 Ky. 605, 167 S. W. 891; *Metropolitan St. Ry. Co. v. Adams Express Co.* [Mo. App.], 130 S. W. 101), or (2) by answer in the nature of a plea in abate-

ment if not so apparent. *United Mine Workers v. Cromer*, 159 Ky. 605, 167 S. W. 891.

Striking out quasi-artificial person and substituting individuals composing it, see *supra*, XI, A, 3, a, (II), (C).

21. *Massey v. Steele's Admr.*, 11 Ala. 340; *McLaughlin v. De Young*, 3 Gill & J. (Md.) 4. See *Young v. Citizens' Bank*, 31 Md. 66.

[a] **A replication** to the plea that the defendant appeared by attorney is demurrable as a dead man cannot appear by attorney. *Massey v. Steele's Admr.*, 11 Ala. 340.

22. *McLean County Coal Co. v. Long*, 91 Ill. 617, may be made under the general issue as that puts the plaintiff on proof of his claim.

23. Ill.—*Hoare v. Harris*, 11 Ill. 24. Me.—*Haskell v. Hilton*, 30 Me. 419. Va. *Sillings v. Bumgardner*, 9 Gratt. (50 Va.) 273.

24. Alaska.—*Dryden v. Sewell*, 2 Alaska 182. Me.—*Haskell v. Hilton*, 30 Me. 419. Mo.—*Mechanics' Bank v. Gilpin*, 105 Mo. 17, 16 S. W. 524. N. Y. *Spooner v. Delaware L. & W. R. R. Co.*, 115 N. Y. 22, 21 N. E. 696. Va. *Carter v. Carter*, 82 Va. 624; *Coffman v. Sangston*, 21 Gratt. (62 Va.) 263, 268.

See 6 STANDARD PROC. 898.

25. *Southern L. Ins. & T. Co. v. Lanier*, 5 Fla. 110, 149, 58 Am. Dec. 448; *Coffman v. Sangston*, 21 Gratt. (62 Va.) 263, 268.

26. *Haskell v. Hilton*, 30 Me. 419; *Coffman v. Sangston*, 21 Gratt. (62 Va.) 263, 269.

27. Alaska.—*Dryden v. Sewell*, 2

by answer;²⁸ if not presented by demurrer or answer it is waived.²⁹ This rule does not apply, however, when the plaintiff has no interest, legal or equitable, and no right to represent it.³⁰

b. *How Defense Is Plead.*—The defense that the plaintiff is not the real party in interest cannot be raised by a general denial;³¹ it is new matter,³² which must be specially pleaded in bar.³³ The defendant must allege in direct terms that the plaintiff is not the real party in interest,³⁴ alleging facts showing why he is not,³⁵ and tending to show that some person other than the plaintiff is the real party.³⁶

Alaska 182, 188. **N. Y.**—*Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y. 22, 30, 21 N. E. 696, there is a defect of parties. **N. C.**—*Davidson v. Elms*, 67 N. C. 228.

But not on the ground of want of capacity to sue. See 6 STANDARD PROC. 894.

28. See the following: **Ind.**—*Swift v. Ellsworth*, 16 Ind. 205, 71 Am. Dec. 316. **N. Y.**—*Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y. 22, 21 N. E. 696; *Horton v. Shepherd*, 1 Civ. Proc. 26. **Ore.**—*Dufur Oil Co. v. Enos*, 59 Ore. 528, 117 Pac. 457, plea in abatement.

How pleaded, see *infra*, XIV, B, 3, b.

29. Alaska.—*Dryden v. Sewell*, 2 Alaska 182, 188. **Mo.**—*New England L. & T. Co. v. Brown*, 59 Mo. App. 461. **N. Y.**—*Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y. 22, 21 N. E. 696; *Savage v. Corn Exchange F. & I. N. Ins. Co.*, 4 Bosw. 1; *Straight v. Shaw*, 56 Misc. 426, 107 N. Y. Supp. 1036. **Ore.**—*Triphonoff v. Sweeney*, 65 Ore. 299, 130 Pac. 979. **Wash.**—*Harris v. Johnson*, 75 Wash. 291, 134 Pac. 1048.

[a] Cannot be raised for the first time (1) on the trial (*Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y. 22, 21 N. E. 696), or (2) on appeal. **Ind.**—*Standard Forgings Co. v. Holmstrom*, 58 Ind. App. 306, 104 N. E. 872. **Mo.**—*Mechanics' Bank v. Gilpin*, 105 Mo. 17, 16 S. W. 524; *Giraldin v. Howard*, 103 Mo. 40, 15 S. W. 383. **N. C.**—*Davidson v. Elms*, 67 N. C. 228. **Wash.**—*Harris v. Johnson*, 75 Wash. 291, 134 Pac. 1048.

[b] Who May Interpose Defense. See *Moore v. Leigh-Head & Co.*, 48 Okla. 228, 149 Pac. 1129; also *Price v. Dunlap*, 5 Cal. 483.

30. *De Witt v. Chandler*, 11 Abb. Pr. (N. Y.) 459 (where president of society brought suit to recover money bequeathed to treasurer, he has no standing in court. He is neither a real party in interest nor a trustee of an

express trust, and a cause of action in his favor is not stated); *Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999. See also *Prankard v. Cooley*, 147 App. Div. 145, 132 N. Y. Supp. 289.

31. *Gibson v. Shull*, 251 Mo. 480, 158 S. W. 322; *Straight v. Shaw*, 56 Misc. 426, 107 N. Y. Supp. 1036.

32. *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856; *Simon v. Trummer*, 57 Ore. 153, 161, 110 Pac. 786.

33. **Ind.**—*State ex rel. Ruhlman v. Ruhlman*, 111 Ind. 17, 11 N. E. 793; *Curtis v. Gooding*, 99 Ind. 45; *Standard Forgings Co. v. Holmstrom*, 58 Ind. App. 306, 104 N. E. 872. **Mont.**—*MacGinniss v. Boston & M. C. C. & S. M. Co.*, 29 Mont. 428, 463, 75 Pac. 89. **Neb.**—*Levy v. Cunningham*, 56 Neb. 348, 76 N. W. 882. **N. Y.**—*Savage v. Corn Exchange F. & I. N. Ins. Co.*, 4 Bosw. 1. **Ore.**—*Simon v. Trummer*, 57 Ore. 153, 161, 110 Pac. 786; *Sturgis v. Baker*, 43 Ore. 236, 72 Pac. 744; *Overholt v. Dietz*, 43 Ore. 194, 72 Pac. 695. **Wis.**—*Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999.

34. *Simon v. Trummer*, 57 Ore. 153, 161, 110 Pac. 786.

35. **Ind.**—*Curtis v. Gooding*, 99 Ind. 45; *Hereth v. Smith*, 33 Ind. 514; *Raymond v. Pritchard*, 24 Ind. 318. **Ia.**—*Cottle v. Cole*, 20 Iowa 481. **N. Y.**—*Russell v. Clapp*, 7 Barb. 482, 4 How. Pr. 347, 3 Code Rep. 64. **Ore.**—*Triphonoff v. Sweeney*, 65 Ore. 299, 130 Pac. 979.

[a] Setting Up Assignment Without Consideration.—*Deuel v. Newlin*, 131 Ind. 40, 30 N. E. 795; *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378.

[b] Setting Up Ownership in Another.—*Hereth v. Smith*, 33 Ind. 514.

36. **Ind.**—*Garrison v. Clark*, 11 Ind. 369. **Ore.**—*Overholt v. Dietz*, 43 Ore. 194, 72 Pac. 695. **Wis.**—*National Distilling Co. v. Cream City Import. Co.*,

If the person claimed to be the real party in interest is not a natural person, the defendant must allege that it is a partnership or corporation and so a legal entity capable of suing.³⁷ A mere allegation that the plaintiff is not the real party in interest is not sufficient.³⁸ In addition thereto, the defendant must allege some substantial matter of defense against the real party which he cannot set up against the plaintiff.³⁹

c. *Determination and Effect.*—An issue presented by answer that the plaintiff is not the real party in interest can be disposed of only by the ordinary proceedings of a trial.⁴⁰ The determination that the plaintiff is not the real party in interest bars the action.⁴¹

C. WANT OF CAPACITY TO SUE.—1. *Objections Generally.*⁴²—At common law, a plea in abatement is the proper remedy to raise the objection of the absence of plaintiff's legal capacity to sue.⁴³ In equity and under the codes, however, the proper remedy is a demurrer, if the objection is apparent,⁴⁴ and an answer, if not so apparent.⁴⁵

86 Wis. 352, 357, 56 N. W. 864, 39 Am. St. Rep. 902.

[a] Where the plaintiff has the legal title to the claim sued on, an answer denying his ownership, without setting forth a state of facts requiring the court to examine into the relation of trust between him and his grantor is insufficient. *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678.

37. *National Distilling Co. v. Cream City Import. Co.*, 86 Wis. 352, 357, 56 N. W. 864, 39 Am. St. Rep. 902.

38. *Alaska.*—*Dryden v. Sewell*, 2 Alaska 182. *Ind.*—*Curtis v. Gooding*, 99 Ind. 45; *Raymond v. Pritchard*, 24 Ind. 318; *Garrison v. Clark*, 11 Ind. 369. *N. Y.*—*Russell v. Clapp*, 7 Barb. 482, 4 How. Pr. 347, 3 Code Rep. 64.

39. *Gushee v. Leavitt*, 5 Cal. 160, 63 Am. Dec. 116.

[a] Except that the defendant pleads payment or set-off against the person he says is the owner of the note sued on, the right of the payee to sue cannot be questioned. *Price v. Dunlap*, 5 Cal. 483.

40. *Horton v. Shepherd*, 1 Civ. Proc. (N. Y.) 26, cannot be disposed of by a motion to substitute the real party.

[a] Presumption is in favor of the right of a plaintiff to sue. *Midland Valley R. Co. v. Le Moyne*, 104 Ark. 327, 148 S. W. 654.

As to right to substitute real party in interest, see *supra*, XI, A, 3, a, (II), (B).

41. *Ala.*—*Willis v. Neal*, 39 Ala. 464; *Bryan v. Wilson*, 27 Ala. 208, even where the suit is by the payee of a

note. *Ind.*—*Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378; *State ex rel. Ruhlman v. Ruhlman*, 111 Ind. 17, 11 N. E. 793; *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211; *Pixley v. Van Nostern*, 100 Ind. 34; *Cutshaw v. Fargo*, 8 Ind. App. 691, 34 N. E. 276, 36 N. E. 650. *N. Y.* *James v. Chalmers*, 6 N. Y. 209, 1 Code Rep. (N. S.) 413. *Ohio.*—*Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644. *Ore.*—*Sturgis v. Baker*, 43 Ore. 236, 72 Pac. 744. See *Simon v. Trummer*, 57 Ore. 153, 160, 110 Pac. 786, query.

42. As a ground for vacation of judgments, see 15 STANDARD PROC. 157.

Objecting to alienage, see the titles "Aliens," "War."

43. *U. S.*—*Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, 7 Fed. Cas. No. 3,810. *Miss.*—*Simmons v. Thomas*, 43 Miss. 31, 5 Am. Rep. 470. *Tex.*—*O'Neal v. Tisdale*, 12 Tex. 40; *St. Louis, S. F. & T. Ry. Co. v. Seale* (Tex. Civ. App.), 148 S. W. 1099; *McCormick v. Jester*, 53 Tex. Civ. App. 306, 115 S. W. 278.

[a] By sworn plea denying the authority of the plaintiff to prosecute the suit. *Crouch v. Posey* (Tex. Civ. App.), 69 S. W. 1001.

[b] A demurrer or plea in bar waives the objection. *Simmons v. Thomas*, 43 Miss. 31, 5 Am. Rep. 470.

[c] An oral objection is the proper mode of objecting to a new party offered during trial in place of a party who had died. *O'Neal v. Tisdale*, 12 Tex. 40.

44. See 6 STANDARD PROC. 894.

45. *Cal.*—*Crittenden v. Superior*

Failure to raise the objection by demurrer or answer is deemed a waiver thereof.⁴⁶ Indeed, by pleading to the merits,⁴⁷ defendant admits

Court, 166 Cal. 340, 136 Pac. 287; Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451. **Ky.** Fentzka's Admr. v. Warwick Const. Co., 162 Ky. 580, 172 S. W. 1060. **Mo.** Crowl v. American Linseed Co., 255 Mo. 305, 164 S. W. 618. **N. Y.**—Perkins v. Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659; Independent Trem-bowler Y. M. B. Assn. v. Somach, 102 N. Y. Supp. 495. **Ohio.**—Walsh v. Thomas' Sons, 91 Ohio St. 210, 110 N. E. 454; Smith v. Weed Sew. Mach. Co., 26 Ohio St. 562. **Okla.**—Chicago, R. I. & P. R. Co. v. Brooks, 156 Pac. 362. **Ore.**—Scholl v. Belcher, 63 Ore. 310, 127 Pac. 968. **S. C.**—Patterson v. Pagan, 18 S. C. 584. **S. D.**—Davis v. Cramer, 38 S. D. 64, 159 N. W. 886. **Wash.** Crosier v. Cudihee, 85 Wash. 237, 147 Pac. 1146.

Where it does not appear that plaintiff has no capacity to sue, the objection must be raised by answer. See 6 STANDARD PROC. 894.

[a] **Answer Is in Nature of Plea in Abatement.**—Jones v. Cincinnati Type Foundry Co., 14 Ind. 89.

[b] **Defense Should Be Separately Stated.**—Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; California S. N. Co. v. Wright, 8 Cal. 585.

[c] **In Louisiana** (1) the objection must be raised by formal plea tendered in limine. Eames v. Woodson, 120 La. 1031, 46 So. 13; Gualden v. Kansas City S. Ry. Co., 106 La. 409, 30 So. 889; Silvernagle & Co. v. Fluker, 21 La. Ann. 188. Even (2) before issue joined, an exception to the plaintiff's capacity to sue must be pleaded. Texas & P. Ry. Co. v. Lacey, 185 Fed. 225, 107 C. C. A. 331.

46. **Cal.**—Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451. **Idaho.**—Trask v. Boise King Placers Co., 26 Idaho 290, 142 Pac. 1073; Anthes v. Anthes, 21 Idaho 305, 121 Pac. 553. **Ia.**—Dumont v. Peet, 152 Iowa 524, 132 N. W. 955. **Kan.**—Howell v. Iola Portland Cement Co., 86 Kan. 450, 121 Pac. 346. **Minn.**—McNair v. Toler, 21 Minn. 175. **Mo.** Barnes v. Stanley, 95 Mo. App. 688, 69 S. W. 682. **Neb.**—Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077; State ex rel. Broatch v. Moores, 58 Neb. 285, 78 N.

W. 529. **N. Y.**—Coffin v. Grand Rapids H. Co., 136 N. Y. 655, 32 N. E. 1076; Perkins v. Stimmel, 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659. **Ohio.** Smith v. Weed Sewing Mach. Co., 26 Ohio St. 562. **Ore.**—Beamish v. Noon, 76 Ore. 415, 149 Pac. 522; Butts v. Purdy, 63 Ore. 150, 125 Pac. 313, 127 Pac. 25. **Wash.**—State ex rel. Pierce County v. Superior Court, 86 Wash. 685, 151 Pac. 108; Pierson v. Northern Pac. Ry. Co., 61 Wash. 450, 112 Pac. 509.

See 6 STANDARD PROC. 894, note 26.

[a] **Defense cannot be raised** (1) by general issue or general denial (**Cal.**—Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; California S. N. Co. v. Wright, 8 Cal. 585. **La.**—Eames v. Woodson, 120 La. 1031, 46 So. 13. **Me.** Rockland, Mt. D. & S. S. Co. v. Sewall, 78 Me. 167, 3 Atl. 181. **Tex.**—Crouch v. Posey [Tex. Civ. App.], 69 S. W. 1001. See 7 STANDARD PROC. 72. *Compare* Mosler, Bahmann & Co. v. Potter, 121 Mass. 89), (2) by motion for dismissal after the evidence is in (Rothchild Bros. v. Mahoney, 51 Wash. 633, 99 Pac. 1031), or (3) by motion for judgment on the pleadings. See 14 STANDARD PROC. 936. (4) It cannot be raised for the first time after verdict (Crowe v. American Linseed Co., 255 Mo. 305, 164 S. W. 618), (5) as by collateral attack on the judgment (see 15 STANDARD PROC. 472), or (6) by a suit in equity for relief from the judgment (see 15 STANDARD PROC. 309), (7) nor on appeal. Succession of Landry, 128 La. 333, 54 So. 870; San Antonio & A. P. Ry. Co. v. Jones, 30 Tex. Civ. App. 316, 70 S. W. 349; Rankin v. Busby (Tex. Civ. App.), 25 S. W. 678, by motion to dismiss appeal.

47. **U. S.**—Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 555, 7 Fed. Cas. No. 3,810. **Ind.**—Heaton v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430. **La.**—Silvernagle & Co. v. Fluker, 21 La. Ann. 188. **Okla.**—Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242. **W. Va.**—McDonald v. Cole, 46 W. Va. 186, 32 S. E. 1033.

[a] **Thus** (1), a plea in bar admits plaintiff's ability to sue. (Yeaton v. Lynn, 5 Pet. [U. S.] 224, 8 L. ed. 105; Rider v. Duval, 28 Tex. 622), as (2) does a general denial (Jones v. Cincinnati Type Foundry Co., 14 Ind. 89), or

plaintiff's capacity to sue. And it has been held that a default has the same effect.⁴⁸

2. Where Plaintiff Fails To Allege Filing of Certificate of Fictitious Name.—Where the plaintiff is a person, partnership or association doing business under a fictitious name, and the complaint does not show the names of those interested, an allegation of compliance with the statute as to the filing and publication of a certificate of doing business under a fictitious name is essential.⁴⁹ But where the name used shows the names of the partners interested, such an allegation is not required, and a demurrer for legal incapacity to sue will not lie if it is omitted.⁵⁰

D. MISNOMER.⁵¹—**1. Objections Generally.**—A misnomer of a party is not fatal to the jurisdiction of the court,⁵² and an objection on this ground must be taken specially.⁵³ At common law a misnomer of parties plaintiff,⁵⁴ or defendant,⁵⁵ must always be pleaded

(3) plea of general issue. See 7 STANDARD PROC. 72.

48. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

49. *Holden v. Mensinger* (Cal.), 165 Pac. 950; *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 577, 112 Pac. 454; *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444. *Compare* *Pierson v. Northern Pac. Ry. Co.*, 61 Wash. 450, 112 Pac. 509, holding that waiving the question whether the name is an assumed name, the objection goes to the capacity to sue and is waived unless presented by demurrer or answer.

Necessity of allegation in partnership cases generally, see the title "Partnership."

50. *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; *Kinsey & Co. v. Ohio Southern Ry. Co.*, 3 Ohio Dec. 249, 2 Ohio N. P. 175.

[a] **Defect must be taken advantage of by answer** in the nature of plea in abatement or it will be waived. *Kinsey & Co. v. Ohio Southern Ry. Co.*, 3 Ohio Dec. 249, 2 Ohio N. P. 175. See *Pierson v. Northern Pac. Ry. Co.*, 61 Wash. 450, 112 Pac. 509.

[b] **If plaintiff attempts to show a compliance with the statute**, and the facts alleged fall short thereof, a demurrer on the ground of legal incapacity to sue will lie. *Kinsey & Co. v. Ohio Southern Ry. Co.*, 3 Ohio Dec. 249, 2 Ohio N. P. 175.

51. **In indictment**, see 12 STANDARD PROC. 368, 666.

Improper description of a person as a ground of collateral attack, see 15 STANDARD PROC. 474.

52. *Davis v. Jennings*, 78 Neb. 462, 111 N. W. 128; *Smelt v. Knapp*, 16 Neb. 53, 20 N. W. 20; *State v. Bell Tele. Co.*, 36 Ohio St. 296, 308, 38 Am. Rep. 583.

53. *French v. Donohue*, 29 Minn. 111, 12 N. W. 354.

54. **Ill.**—*Springfield Consol. Ry. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884. **Mich.**—*Stever v. Brown*, 119 Mich. 196, 77 N. W. 704; *Fisher v. Northrup*, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629. **Miss.**—*Hudson v. Poindexter*, 42 Miss. 304. **N. J.**—*Seeley v. Boon*, 1 N. J. L. 138. **Pa.**—*Porter v. Cresson*, 10 Serg. & R. 257.

55. **U. S.**—*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451. **Ala.**—*Oates v. Clendenard*, 87 Ala. 734, 6 So. 359. **Ga.**—*Comrs. of McIntosh County v. Aiken Canning Co.*, 123 Ga. 647, 51 S. E. 585. **Ill.**—*Proctor v. Wells Bros. Co.*, 262 Ill. 77, 104 N. E. 186, Ann. Cas. 1915B, 273; *North American Restaurant & O. House v. McElligott*, 129 Ill. App. 498, 507. **Ia.**—*Wilson & Co. v. Baker*, 52 Iowa 423, 3 N. W. 481; *Smith v. Barrett*, *Morris* 492. **Me.**—*Marston v. Tibbetts Merc. Co.*, 110 Me. 533, 87 Atl. 220; *Fogg v. Greene*, 16 Me. 282. **Md.**—*Rich v. Boyce*, 39 Md. 314; *Union Bank v. Tillard*, 26 Md. 446. **Mass.**—*Com. v. Fredericks*, 119 Mass. 199; *Minot v. Curtis*, 7 Mass. 441. **Mo.**—*Carpenter v. State*, 8 Mo. 291. **N. H.**—*Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265. **Pa.**—*Northumberland County Bank v. Eyer*, 60 Pa. 436. **Tenn.**—*Dixon's Lessee v. Cave-nough*, 1 Overt. 365. **Tex.**—*Forbes Bros. Teas & S. Co. v. McDougle* (Tex. Civ. App.), 150 S. W. 745; *Houston L. & L.*

in abatement, whether the party is a corporation or natural person, or the objection is waived.⁵⁶ Under the codes, the objection should be presented by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name;⁵⁷ and if the defendant takes issue on the merits,⁵⁸ or appears generally,⁵⁹ he waives the objection. Misnomer of parties is not a ground of demurrer,⁶⁰ or for vacation of the judgment;⁶¹ and it cannot be availed of by motion to dismiss,⁶² or by motion to quash service of summons.⁶³ Nor can the defendant plead in abatement that an alias dictus is subjoined to his name.⁶⁴ Statutes sometimes provide that no plea in abatement for a misnomer shall be allowed in any action.⁶⁵

2. Form of Plea.—In accordance with the rule that the plea should give the plaintiff a better writ, a plea of misnomer should state the

Co. v. Danley (Tex. Civ. App.), 131 S. W. 1143.

[a] **Insertion of a middle initial** in the name of a defendant is immaterial and a plea in abatement will not lie. Carr v. Buchanan, 5 Boyce (Del.) 254, 92 Atl. 875.

56. **U. S.**—Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451. **Ala.**—Atlanta, B. & A. R. Co. v. McGill, 184 Ala. 562, 63 So. 1009. **Ill.**—Proctor v. Wells Bros. Co., 262 Ill. 77, 104 N. E. 186, Ann. Cas. 1915B, 273; North American Restaurant & O. House v. McElligott, 129 Ill. App. 498, 507. **Md.**—Rich v. Boyce, 39 Md. 314. **Mich.**—Stever v. Brown, 119 Mich. 196, 77 N. W. 704. **Mo.**—Carpenter v. State, 8 Mo. 291. **Ohio.**—State v. Bell Tele. Co., 36 Ohio St. 296, 308, 38 Am. Rep. 583.

[a] **Whether the defendant (1) appears** (Marston v. Tibbetts Merc. Co., 110 Me. 533, 87 Atl. 220), or (2) makes default. Marston v. Tibbetts Merc. Co., *supra*; Waldrop v. Leonard, 22 S. C. 118, reviewing numerous cases. Effect of misnomer on judgment by default where service is had on party intended to be sued, see 15 STANDARD PROC. 62.

[b] **After filing and withdrawal of a plea** to the merits, defense of misnomer cannot be interposed. People *ex rel.* Shanley v. O'Connor, 239 Ill. 272, 87 N. E. 1016.

57. **Ind.**—Bird v. St. John's Episcopal Church, 154 Ind. 138, 151, 56 N. E. 129. **Ky.**—Studebaker Corp. v. Dodds, 161 Ky. 542, 171 S. W. 167. **Mont.**—Clark v. Oregon S. L. R. Co., 29 Mont. 317, 74 Pac. 734. **Ohio.**—Slocum v. McBride, 17 Ohio 607.

Compare Davis v. Jennings, 78 Neb. 462, 111 N. W. 128 (holding that ob-

jection should be raised by motion in the nature of a plea in abatement); Bank of Havana v. Magee, 20 N. Y. 355, by motion to set aside the proceeding and not by answer.

Form of answer in abatement, see 9 STANDARD PROC. 4.

58. French v. Donohue, 29 Minn. 111, 12 N. W. 354; Bank of Havana v. Magee, 20 N. Y. 355.

59. Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 Atl. 265.

60. **Ind.**—Bird v. St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129 (not by demurrer for want of facts); Morningstar v. Wiles, 96 Ind. 458. **Ky.**—Studebaker Corp. v. Dodds, 161 Ky. 542, 171 S. W. 167. **Md.**—Rich v. Boyce, 39 Md. 314, 324; Union Bank v. Tillard, 26 Md. 446. **Miss.**—Hudson v. Poindexter, 42 Miss. 304. **N. Y.**—Bank of Havana v. Magee, 20 N. Y. 355. **Ohio.**—Slocum v. McBride, 17 Ohio 607. See 6 STANDARD PROC. 921.

61. See 15 STANDARD PROC. 157.

62. Comrs. of McIntosh County v. Aiken Canning Co., 123 Ga. 647, 51 S. E. 585; Kenyon v. Semon, 43 Minn. 180, 45 N. W. 10.

[a] **But in a justice's court**, see Fisher v. Northrup, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629, referred to in Stever v. Brown, 119 Mich. 196, 77 N. W. 704.

63. Davis v. Jennings, 78 Neb. 462, 111 N. W. 128.

64. Reid v. Lord, 4 Johns. (N. Y.) 118.

65. See generally the statutes.

[a] **A plea interposed in spite of the statute** will be rejected. Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53.

true name of the party.⁶⁶

3. **Replication.**—The plaintiff may reply to a plea of misnomer in accordance with the general rules elsewhere discussed.⁶⁷

4. **Determination.**—When an objection that a person is not sued by his proper name is made, the court will allow an amendment inserting his true name.⁶⁸

E. **MISJOINDER.**⁶⁹—1. **Effect on Jurisdiction.**—A joinder of improper parties cannot affect the jurisdiction of a court as to the parties properly before it.⁷⁰

2. **Who May Make Objection.**—As a general rule, the defendant who is misjoined is the only person who can take advantage of his misjoinder.⁷¹ If the interests of the other parties are affected, however, they may object to the misjoinder.⁷²

3. **At Common Law.**—a. *Of Plaintiffs.*—(I.) In Actions *Ex Contractu.*—At common law, the joinder of too many parties plaintiff in actions *ex contractu* is fatal to a recovery, whether such is disclosed on the record or by the evidence offered on the trial.⁷³ If not

66. **Colo.**—Taylor v. Insley, 7 Colo. App. 175, 42 Pac. 1046. **Ia.**—Smith v. Barrett, Morris 492. **Md.**—Union Bank v. Tillard, 26 Md. 446.

Form of plea, see 1 STANDARD PROC. 51; 9 STANDARD PROC. 3.

67. See the title "**Replication and Reply.**"

[a] **A sufficient replication** is that the party was well known by the name set forth in the pleadings. Springfield Consol. Ry. Co. v. Hoeffner, 175 Ill. 634, 644, 51 N. E. 884.

68. Davis v. Jennings, 78 Neb. 462, 111 N. W. 128; Jefferson v. Hotel Cape May, 82 N. J. L. 32, 81 Atl. 349, on payment of costs. See generally *supra*, XIII.

[a] **A dismissal (1) of the action** on such objection is reversible error (Davis v. Jennings, 78 Neb. 462, 111 N. W. 128), (2) unless the plaintiff does not or cannot amend. Fisher v. Northrup, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629, dismissing action where the agent bringing the action did not know plaintiff's correct name and could not amend.

[b] **Error to render a judgment on the pleadings** against the defendant on an answer setting up a misnomer. Clark v. Oregon S. L. R. Co., 29 Mont. 317, 74 Pac. 734.

69. In admiralty, see 1 STANDARD PROC. 436.

As to notice of objection, see *infra*, XIV, G.

70. Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Wormley v.

Wormley, 8 Wheat. 421, 5 L. ed. 651; Gordon v. Estate of Simonton, 10 Fla. 179, 196. See the titles, "**Jurisdiction**," "**United States Courts**."

71. **U. S.**—Northern Pac. Ry. Co. v. Lee, 199 Fed. 621. **Ala.**—Lacey v. Pearce, 191 Ala. 258, 68 So. 46. **Cal.**—Gardner v. Samuels, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135; Madary v. Fresno, 20 Cal. App. 91, 128 Pac. 340. **Mont.**—Reid v. Hennessy Co., 45 Mont. 462, 124 Pac. 273. **N. J.**—McCullough v. Ward, 76 N. J. Eq. 454, 79 Atl. 438. **N. Y.**—Brownson v. Gifford, 8 How. Pr. 389. Compare Bailey v. Eastery, 7 How. Pr. 495, where the husband moved to strike out the wife. **Ohio.**—Niven v. Smith, 2 Ohio Dec. (Reprint) 337. **Ore.**—Burggraf v. Brocha, 74 Ore. 381, 145 Pac. 639. **Tex.**—Morris v. Davis (Tex. Civ. App.), 31 S. W. 850.

Right to interpose demurrer, see 6 STANDARD PROC. 855.

72. Gardner v. Samuels, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135; Madary v. Fresno, 20 Cal. App. 91, 128 Pac. 340; Johnson v. Davis, 7 Tex. 173.

[a] **But a plaintiff who causes the improper joinder** cannot insist on the objection. Hoffman v. Silverthorn, 137 Mich. 60, 100 N. W. 183, the court will not consider the objection.

73. **Ala.**—Bell v. Allen, 53 Ala. 125. **Ill.**—Snell v. De Land, 43 Ill. 323. **Ky.**—Brent's Exrs. v. Tivebaugh, 12 B. Mon. 87. **Mass.**—Cofran v. Shepard, 148 Mass. 582, 20 N. E. 181. **Pa.**—Heron v. Hoffner, 3 Rawle 393. **Tex.**—Goodale

apparent of record, the objection may be availed of either by plea in abatement,⁷⁴ or as a ground of nonsuit under the general issue.⁷⁵ But if the objection appears on the record, it may be taken by demurrer,⁷⁶ in arrest of judgment,⁷⁷ or on error.⁷⁸

(II.) In Actions *Ex Delicto*. — Misjoinder of parties plaintiff in actions *ex delicto* need not be pleaded in abatement, at common law;⁷⁹ but may be taken advantage of at any stage of the case at which it appears.⁸⁰

(III.) In Real Actions. — The same rule pertaining to misjoinder of parties plaintiff in tort actions applies to real actions at common law.⁸¹

(IV.) In Actions for Penalties. — If there is a misjoinder of plaintiffs in an action of debt for a penalty, the plaintiffs will be nonsuited.⁸²

b. *Of Defendants*. — (I.) In Actions *Ex Contractu*. — A misjoinder of defendants in actions on contract, at common law, is fatal to the action.⁸³ If too many persons are made defendants and the defect appear upon the face of the record, the objection may be raised by demurrer,⁸⁴ or by a motion in arrest of judgment,⁸⁵ or on proceedings

v. Frost's Admr., 59 Vt. 491, 8 Atl. 280. Vt.—*Goodale v. Frost's Admr.*, 59 Vt. 491, 8 Atl. 280; *Dennison v. Boyleston*, 48 Vt. 439.

74. *Snell v. De Land*, 43 Ill. 323.

[a] In Texas a misjoinder of parties must be taken advantage of by a plea in abatement or by special exception in the nature of such plea where it is apparent on the pleading. After an answer to the merits raising either issues of fact or law, the objection cannot be raised by exception or plea in abatement. *Garner v. Jamison* (Tex. Civ. App.), 162 S. W. 940; *Brooks v. Galveston City Ry. Co.* (Tex. Civ. App.), 74 S. W. 330.

75. *Snell v. De Land*, 43 Ill. 323; *Cline v. Buddemeier*, 164 Ill. App. 79; *McKone v. Williams*, 37 Ill. App. 591; *Ulmer v. Cunningham*, 2 Me. 117. See also 7 STANDARD PROC. 72.

76. Governor, to use of *Moore v. Hicks*, 12 Ga. 189; *State v. Chandler*, 79 Me. 172, 8 Atl. 553. See 6 STANDARD PROC. 900.

77. Governor, to use of *Moore v. Hicks*, 12 Ga. 189.

78. Governor, to use of *Moore v. Hicks*, 12 Ga. 189.

79. *Bullock v. Hayward*, 10 Allen (Mass.) 460.

80. Ia.—*Rhoads v. Booth*, 14 Iowa 575. Mass.—*Bullock v. Hayward*, 10 Allen 460. Mich.—*Rogers v. Raynor*, 102 Mich. 473, 60 N. W. 980.

[a] Thus (1), if apparent on the record, it may be raised by demurrer (*Campbell v. Wallace*, 12 N. H. 362, 37

Am. Dec. 219; *Lockhart v. Power*, 2 Watts [Pa.] 371. See 6 STANDARD PROC. 900), (2) in arrest of judgment (Ia.—*Rhoads v. Booth*, 14 Iowa 575. N. H.—*Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219. Pa.—*Lockhart v. Power*, 2 Watts 371), or (3) by appeal or writ of error (*Rhoads v. Booth*, 14 Iowa 575; *Lockhart v. Power*, 2 Watts [Pa.] 371), or (4) if not so apparent, then under the general issue. *Bullock v. Hayward*, 10 Allen (Mass.) 460; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219, on a motion for a nonsuit.

81. *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219; *Lockhart v. Power*, 2 Watts (Pa.) 371.

As to ejectment suits, see 7 STANDARD PROC. 1013.

As to rule in cases of tort, see *supra*, XIV, E, 3, a, (II).

82. *Vinton v. Welsh*, 9 Pick. (Mass.) 87. See generally the title "Penalties, Forfeitures and Fines."

83. Ill.—*Supreme Lodge v. Zuhlke*, 129 Ill. 298, 21 N. E. 789. N. H.—*Peebles v. Rand*, 43 N. H. 337. Pa.—*Heron v. Hoffner*, 3 Rawle 393. W. Va.—*Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092.

[a] Where a declaration charges two persons jointly, there can be no recovery unless a joint liability is proved. *Rowan v. Rowan*, 29 Pa. 181.

84. *Waits v. McClure*, 10 Bush (Ky.) 763; *Wooster v. Northrup*, 5 Wis. 245.

85. *Waits v. McClure*, 10 Bush (Ky.)

in error.⁸⁶ If not so apparent, it will be available under the general issue;⁸⁷ and the plaintiff will be nonsuited,⁸⁸ or if the evidence is proper to be submitted to the jury, they will be instructed, that if the evidence is insufficient to establish a joint contract between the defendants, the verdict shall be for the defendants.⁸⁹

(II.) In Actions *Ex Delicto*. — In an action on a personal tort unconnected with contract and such that in point of fact and of law several persons might have jointly committed it, a joinder of more persons than are liable constitutes no objection to a partial recovery.⁹⁰ But when the tort is such that it cannot be committed by several persons, the declaration is demurrable, if too many persons are sued;⁹¹ and if a verdict is taken against all, the judgment may be arrested,⁹² or reversed on error.⁹³ The defect may be cured, by taking a verdict against one only,⁹⁴ or if several damages be assessed against each, by entering a *nolle prosequi* before judgment as to those misjoined.⁹⁵

An improper joinder of the personal representative of a deceased tortfeasor and the surviving wrongdoer may be objected to.⁹⁶

4. In equity a misjoinder of plaintiffs or defendants is a ground of demurrer if apparent on the face of the bill;⁹⁷ or if it is not so apparent, the objection may be taken by answer or plea.⁹⁸ Failing to object by demurrer or answer to a misjoinder of plaintiffs, the defendant waives the objection, if a decree can be made without prejudice to the rights of the parties.⁹⁹

763; *Wooster v. Northrup*, 5 Wis. 245, 257.

86. *Wooster v. Northrup*, 5 Wis. 245, 257.

87. *Wooster v. Northrup*, 5 Wis. 245, 257.

88. *Ky.*—*Waits v. McClure*, 10 Bush 763. *Mass.*—*Tuttle v. Cooper*, 10 Pick. 281. *N. J.*—*Fleming v. Freese*, 26 N. J. L. 263. *N. Y.*—*Livingston's Exrs. v. Tremper*, 11 Johns. 101.

89. *Tuttle v. Cooper*, 10 Pick. (Mass.) 281.

90. *Mass.*—*Tuttle v. Cooper*, 10 Pick. 281. *N. J.*—*Keer v. Oliver*, 61 N. J. L. 154, 38 Atl. 693. *Ohio.*—*Orr v. Bank of United States*, 1 Ohio 36, 13 Am. Dec. 588. *Va.*—*McMullin v. Church*, 82 Va. 501.

[a] The objection is not available as matter of abatement (1) and cannot be taken advantage of in any way. *Tandrup v. Sampsell*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852; *Yeazel v. Alexander*, 58 Ill. 254. (2) The proper plea for those not guilty is the general issue. *Yeazel v. Alexander*, 58 Ill. 254. As to general issue generally, see 7 STANDARD PROC. 62 et seq.

91. *Ill.*—*Tandrup v. Sampsell*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N.

S.) 852; *Yeazel v. Alexander*, 58 Ill. 254. *Ohio.*—*Orr v. Bank of United States*, 1 Ohio 36, 13 Am. Dec. 588. *Va.*—*McMullin v. Church*, 82 Va. 501.

92. *Ill.*—*Yeazel v. Alexander*, 58 Ill. 254. *Ohio.*—*Orr v. Bank of United States*, 1 Ohio 36, 13 Am. Dec. 588. *Va.*—*McMullin v. Church*, 82 Va. 501.

93. *Orr v. Bank of United States*, 1 Ohio 36, 13 Am. Dec. 588; *McMullin v. Church*, 82 Va. 501.

94. *Yeazel v. Alexander*, 58 Ill. 254; *McMullin v. Church*, 82 Va. 501.

95. *Yeazel v. Alexander*, 58 Ill. 254; *McMullin v. Church*, 82 Va. 501.

As to *nolle prosequi* generally, see the title "*Nolle Prosequi*."

96. *Johnson v. Cunningham*, 56 Ill. App. 593, by demurrer, motion in arrest of judgment, or on error.

97. See 6 STANDARD PROC. 900; and the title "*Multifariousness*."

98. *U. S.*—*Snelling v. Richard*, 166 Fed. 635; *Bunce v. Gallagher*, 5 Blatchf. 481, 492, 4 Fed. Cas. No. 2,133. *Vt.*—*Cunningham v. Blanchard*, 85 Vt. 494, 83 Atl. 469. *W. Va.*—*Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241.

99. *U. S.*—*Bunce v. Gallagher*, 5 Blatchf. 481, 492, 4 Fed. Cas. No. 2,133. *N. J.*—*Henderson v. Champion*, 83 N.

As at law, all the parties who join must be entitled to recover; if one has no cause of action or interest in the suit, the misjoinder is fatal;¹ and on proper objection the bill will be dismissed.² And if the misjoinder prevents the court from giving appropriate relief, it will dismiss the bill on its own motion.³

If a person against whom no relief is sought is made a defendant, the bill may be dismissed as to him with costs;⁴ but it is not ground for dismissal of a suit against those properly sued.⁵

5. Under the Codes and Practice Acts.—Statutory provisions have so relaxed the common law rules as to misjoinder of plaintiffs and defendants,⁶ that under the modern practice, misjoinder of parties is not always fatal to the action.⁷ The general rule is that an objection on the ground of a misjoinder of parties plaintiff, or of parties plaintiff or defendant as some codes provide, must be taken advantage of by demurrer, if it is apparent on the face of the complaint;⁸ and if the misjoinder does not so appear, then by answer,⁹ or the objection

J. Eq. 554, 91 Atl. 332; *Hendrickson v. Wallace's Exr.*, 31 N. J. Eq. 604. **Vt.** *Cunningham v. Blanchard*, 85 Vt. 494, 83 Atl. 469. **W. Va.**—*Snyder v. Cabell*, 29 W. Va. 48, 53, 1 S. E. 241.

1. *Lovelace v. Hutchinson*, 106 Ala. 417, 17 So. 623; *Butler v. Gazzam*, 81 Ala. 491, 1 So. 16; *Broughton v. Mitchell*, 64 Ala. 210; *Standard Pav. Co. v. Elgin*, 164 Ill. App. 396.

[a] But where an assignor and assignee join as plaintiffs the rule is not applied. *Broughton v. Mitchell*, 64 Ala. 210.

[b] Only remedy of the plaintiff is to amend by striking out the name of the one who has no cause of action. *Lovelace v. Hutchinson*, 106 Ala. 417, 17 So. 623; *Lillard v. Mitchell (Tenn.)*, 37 S. W. 702.

2. **Ala.**—*Zadek v. Burnett*, 176 Ala. 80, 57 So. 447; *Larkin v. Mason*, 71 Ala. 227 (without prejudice, in the absence of any proposed amendment to correct the misjoinder); *Moore v. Moore*, 17 Ala. 631. **Ia.**—*De Louis v. Meek*, 2 G. Gr. 55, 50 Am. Dec. 491. **Ohio.**—*Armstrong v. Athens Co.*, 10 Ohio 235.

[a] Dismissal at Trial Term.—*Neil v. Dow Law Bank*, 138 Ga. 158, 74 S. E. 1027.

3. *Hendrickson v. Wallace's Exr.*, 31 N. J. Eq. 604. See also *Michan v. Wyatt*, 21 Ala. 813, 827.

4. **Ark.**—*Gossett v. Kent*, 19 Ark. 602. **N. Y.**—*Covenhoven v. Shuler*, 2 Paige 122, 21 Am. Dec. 73. **Va.**—*Sulphur Mines Co. v. Boswell*, 94 Va. 480, 27 S. E. 24.

[a] Such a dismissal causes a cross-bill against him to fall with the dismissal. *Sulphur Mines Co. v. Boswell*, 94 Va. 480, 27 S. E. 24.

5. *Emmons v. Oldham*, 12 Tex. 18.

6. See generally the statutes, and *Fairchild v. Llewellyn Realty Co.*, 82 N. J. L. 423, 82 Atl. 924; *Fleming v. Freese*, 26 N. J. L. 263; also the cases cited generally throughout this section.

7. See the following: **Conn.**—*White v. Portland*, 67 Conn. 272, 34 Atl. 1022. **N. C.**—*McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845; *Burns v. Ashworth*, 72 N. C. 496 (it is surplusage merely); *Rowland v. Gardner*, 69 N. C. 53, immaterial except as it may affect the question of costs. **Ore.**—*Burggraf v. Brocha*, 74 Ore. 381, 145 Pac. 639.

Compare *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 159, 45 S. E. 875; *Lee v. Mutual Reserve Fund L. Assn.*, 97 Va. 160, 33 S. E. 556.

Statutes provide for striking out parties. See *supra*, XI, A, 2. But if the plaintiff does not strike them out, his action may be dismissed. *Lewis v. Eshleman*, 57 Iowa 633, 11 N. W. 617.

8. See 6 STANDARD PROC. 900.

Form of Demurrer.—(Title of court and cause and venue.) The defendant demurs to the plaintiff's complaint on the ground that there is a misjoinder of parties plaintiff (or defendant), (state in what the misjoinder consists).

9. **Cal.**—*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236. **Colo.**—*Springhetti v. Hahnewald*, 54 Colo. 383, 131 Pac. 266. **Mo.**—*Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107. **Ore.**—*Wolf v. Eppen-*

will be waived.¹⁰ If the objection be demurrable, a motion to strike out the misjoined party will not lie.¹¹ But in some jurisdictions, the objection cannot be taken by demurrer,¹² or answer,¹³ but must be taken advantage of by a motion to strike out the name of the plaintiff or defendant improperly joined,¹⁴ or to dismiss the cause of action as to him;¹⁵ and if not so taken, it is waived.¹⁶ Generally, a misjoinder of parties is not a ground of nonsuit,¹⁷ and cannot be raised by motion to dismiss after answer,¹⁸ by objection to the introduction of evidence,¹⁹ by general demurrer to the evidence,²⁰ or by instruction.²¹

stein, 71 Ore. 1, 140 Pac. 751; *In re Young's Estate*, 63 Ore. 120, 126 Pac. 992. See also *Stewart v. Templeton*, 55 Ore. 364, 104 Pac. 978, 106 Pac. 640. But see *State v. Duniway*, 63 Ore. 555, 128 Pac. 853, holding objection must be taken by motion to strike out.

[a] A supplemental answer is the proper remedy where the fact which causes a misjoinder of parties arises pending the action and after answer filed. *Calderwood v. Pyser*, 31 Cal. 333.

[b] Must be specifically pointed out in the answer. *Donahue v. Bragg*, 49 Mo. App. 273; *Mills v. Carthage*, 31 Mo. App. 141 (general denial insufficient); *Clark v. Aldrich*, 4 App. Div. 523, 40 N. Y. Supp. 440, 74 N. Y. St. 873.

10. Cal.—*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Tennant v. Pfister*, 51 Cal. 511. Colo.—*Springhetti v. Hahnwald*, 54 Colo. 383, 131 Pac. 266; *Saul v. Lapidus*, 46 Colo. 538, 105 Pac. 863. Mo.—*Belt v. St. Louis, I. M. & S. R. Co.* (Mo. App.), 190 S. W. 1002; *Central Lumb. & M. Co. v. Reyburn-Laird R. E. B. & C. Co.*, 189 Mo. App. 405, 176 S. W. 509; *Kansas City Masonic Temple Co. v. Young*, 179 Mo. App. 278, 166 S. W. 838; *Donahue v. Bragg*, 49 Mo. App. 273. Mont.—*Meredith v. Bitter Root Valley Irr. Co.*, 49 Mont. 204, 141 Pac. 643. N. Y.—*Petree v. Lansing*, 66 Barb. 357. Ore.—*Wolf v. Eppenstein*, 71 Ore. 1, 140 Pac. 751. See cases in preceding note.

[a] But the court has power (1) to allow the defendant to withdraw his answer and interpose a demurrer (*Meredith v. Bitter Root Valley Irr. Co.*, 49 Mont. 204, 141 Pac. 643), or (2) to amend his answer so as to plead the misjoinder. *Gillam v. Sigmar*, 29 Cal. 637, where the objection was not apparent and was not discovered until trial.

11. Mo.—*Soeding v. Bartlett*, 35 Mo. 90. N. Y.—*Bailey v. Easterly*, 7 How.

Pr. 495. N. C.—*McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845.

[a] If there is evidence connecting the defendant with the action, the motion to strike him from the record will be denied. *Gates v. Nash*, 6 Cal. 192.

12. See 6 STANDARD PROC. 900.

13. *Gagle v. Besser*, 162 Iowa 227, 144 N. W. 3.

14. Ark.—*Fry v. Street*, 37 Ark. 39; *Hot Springs R. Co. v. Tyler*, 36 Ark. 205; *Oliphint v. Mansfield & Co.*, 36 Ark. 191. Compare *Equitable Sur. Co. v. Wilson*, 125 Ark. 597, 187 S. W. 940. Ia.—*Gagle v. Besser*, 162 Iowa 227, 144 N. W. 3; *Citizens' State Bank v. Jess*, 127 Iowa 450, 103 N. W. 471; *Independent School Dist. v. Independent School Dist.*, 50 Iowa 322; *Dist. Tp. of White Oak v. Dist. Tp. of Oskaloosa*, 44 Iowa 512. Ky.—*Yeates v. Walker*, 1 Duv. 84; *Dean v. English*, 18 B. Mon. 132. Mo.—*Lass v. Eisleben*, 50 Mo. 122; *Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107, when the case is in the justice's court. If the case is in the circuit court, the objection must be raised by demurrer or answer. Okla.—*Maddin v. Robertson*, 38 Okla. 526, 133 Pac. 1128, where error is apparent.

15. *Bort v. Yaw*, 46 Iowa 323.

16. *Gagle v. Besser*, 162 Iowa 227, 144 N. W. 3.

[a] A motion to strike the petition from the files is not a proper remedy. *Maddin v. Robertson*, 38 Okla. 526, 133 Pac. 1128.

17. *Burggraf v. Brocha*, 74 Ore. 381, 145 Pac. 639.

18. *Armuchee Pants Mfg. Co. v. Juillard & Co.*, 14 Ga. App. 141, 80 S. E. 525; *Burns v. Ashworth*, 72 N. C. 496.

19. *Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107.

20. *Pettingill v. Jones*, 21 Mo. App. 210.

21. *Lass v. Eisleben*, 50 Mo. 122.

And it is not a ground of collateral attack on a judgment.²²

Determination. — If several persons join in a cause of action when their interests are several, and all the parties are before the court, they may be allowed to file separate petitions on their cause of action, and the defendant ruled to answer without other process.²³ But where there is a misjoinder of parties and of causes of action, unless one of the parties withdraws himself and his cause of action leaving only one plaintiff with a single cause of action or with several causes that may be joined, a demurrer should be sustained.²⁴

6. Cure of Misjoinder. — A misjoinder may be cured by striking out the name of the party improperly joined,²⁵ or by amending the complaint so as to show a right of action in all the parties,²⁶ or by the verdict.²⁷

F. NONJOINER OR DEFECT OF PARTIES.²⁸ — **1. Who May Make Objection.** — One properly sued has a right to object that another ought to have been sued with him.²⁹

2. At Common Law. — a. *Of Plaintiffs.* — (I.) **In Actions Ex Contractu.** — At common law, the nonjoinder of a necessary party plaintiff in actions ex contractu is fatal, whether or not it is pleaded in abatement.³⁰ Objection may be by plea in abatement,³¹ by demurrer,³² or,

22. See 15 STANDARD PROC. 475.

23. *Keary v. Mutual Reserve Fund L. Assn.*, 30 Fed. 359, *Brewer, J.*, disposing of the case alone.

24. *Campbell v. Washington L. & P. Co.*, 166 N. C. 488, 82 S. E. 842.

25. *Berkshire v. Shultz*, 25 Ind. 523. **As to motion to strike out**, see *supra*, XI, A, 2, e, (II).

26. *Debolt v. Carter*, 31 Ind. 355; *Berkshire v. Shultz*, 25 Ind. 523.

27. *Metropolitan St. Ry. Co. v. Adams Express Co.* (Mo. App.), 130 S. W. 101.

Aider by verdict generally, see the titles "Pleading;" "Verdict."

28. **As ground for involuntary nonsuit**, see 7 STANDARD PROC. 670.

As ground for vacating judgments, see 15 STANDARD PROC. 157.

In Admiralty. — See 1 STANDARD PROC. 436.

As to notice of objection, see *infra*, XIV, G.

29. *Brownson v. Gifford*, 8 How. Pr. (N. Y.) 389.

[a] **But he cannot do so unless his rights are in some way affected by the nonjoinder.** *Kern v. Coffin*, 203 Fed. 238, 121 C. C. A. 480.

As to right to demur, see 6 STANDARD PROC. 855.

30. *Hughes-Buie Co. v. Mendoza* (Tex. Civ. App.), 156 S. W. 328.

31. *Ga.* — *Brooks v. Columbus W. Lot*

Co., 7 Ga. 101. **Ill.** — *Snell v. De Land*, 43 Ill. 323. **Ind.** — *Garrison v. Clark*, 11 Ind. 369. **Me.** — *Winslow v. Merrill*, 11 Me. 127, by plea in abatement only. **Pa.** — *Porter v. Cresson*, 10 Serg. & R. 257. **Tex.** — *Hughes-Buie Co. v. Mendoza* (Tex. Civ. App.), 156 S. W. 328; *Brackenridge v. Claridge* (Tex. Civ. App.), 42 S. W. 1005. **W. Va.** — *Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092. **Eng.** *Cabell v. Vaughan*, 1 Saund. 291, 85 Eng. Reprint 389.

But see *Baker v. Jewell*, 6 Mass. 460, 4 Am. Dec. 162.

As to pleas in abatement generally, see the title "Abatement, Pleas of."

[a] **Striking Out Plea.** — Where there is a general issue, a plea of nonjoinder may be stricken from the files. *Lasher v. Colton*, 225 Ill. 234, 80 N. E. 122.

[b] **In Texas** (1) it can be taken advantage of only by plea in abatement, unless the defect appears from the evidence. *Holliman v. Rogers*, 6 Tex. 91. (2) It cannot be made for the first time after judgment (*De Perez v. Everett*, 73 Tex. 431, 11 S. W. 388), or (3) by motion for new trial (*Brackenridge v. Claridge* [Tex. Civ. App.], 42 S. W. 1005), or (4) to dismiss the suit. *McGuire v. Glass*, 4 Wills. Civ. Cas., §§51, 54, 15 S. W. 127.

32. *Garrison v. Clark*, 11 Ind. 369; *Baker v. Jewell*, 6 Mass. 460, 4 Am. Dec. 162. See 6 STANDARD PROC. 897.

on trial, the objection may be urged under the general issue.³³

(II.) In Actions *Ex Delicto*.—A nonjoinder of parties plaintiff must be pleaded in abatement;³⁴ it cannot be taken advantage of on the trial, otherwise than in mitigation of damages.³⁵ The defense cannot be relied on in bar of the action,³⁶ nor raised by demurrer,³⁷ under the general issue,³⁸ or by motion in arrest of judgment.³⁹

If, in tort actions, such as replevin, where the right of action depends on title, the plaintiff alleges title wholly in himself, proof of title in more is a fatal variance.⁴⁰ Although a plea in abatement may be interposed,⁴¹ there is no necessity for it,⁴² as part ownership in another is a good plea in bar.⁴³

(III.) In Real Actions.⁴⁴—It has been held that the nonjoinder of parties plaintiff in real actions must be taken advantage of by plea in abatement.⁴⁵

33. **U. S.**—Cochran *v.* Brannon, 196 Fed. 219. **Ala.**—Long *v.* Kansas City, M. & B. R. Co., 170 Ala. 635, 54 So. 62; Tallapoosa County Bank *v.* Salmon, 12 Ala. App. 589, 68 So. 542. **Ill.**—Lasher *v.* Colton, 225 Ill. 234, 80 N. E. 122; Snell *v.* De Land, 43 Ill. 323; Cline *v.* Buddemeier, 164 Ill. App. 79. **Ind.**—Garrison *v.* Clark, 11 Ind. 369. **Me.**—Holyoke *v.* Loud, 69 Me. 59. **Mass.**—Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162. **N. Y.**—Dob *v.* Halsey, 16 Johns. 34, 40, 8 Am. Dec. 293. **Tex.**—See Holliman *v.* Rogers, 6 Tex. 91, and *supra*, note 75.

See also 7 STANDARD PROC. 72.

34. **Cal.**—Whitney *v.* Stark, 8 Cal. 514, 68 Am. Dec. 360. **Ill.**—Edwards *v.* Hill, 11 Ill. 22, omitting to do so, he thereby consents to a severance of the cause of action. **Mass.**—Thomson *v.* Pentecost, 210 Mass. 223, 96 N. E. 335; May *v.* Western Union Tel. Co., 112 Mass. 90; Bullock *v.* Haywood, 10 Allen 460. **Miss.**—McInnis Lumb. Co. *v.* Rather, 111 Miss. 55, 71 So. 264. **Pa.**—Deal *v.* Bogue, 20 Pa. 228, 57 Am. Dec. 702, although the defect appears on the face of the declaration. **Tex.**—May *v.* Slade, 24 Tex. 205; Hughes-Buie Co. *v.* Mendoza (Tex. Civ. App.), 156 S. W. 328; Texas & N. O. R. Co. *v.* Ochiltree (Tex. Civ. App.), 127 S. W. 584, by plea in abatement or special exception. **Vt.**—Bishop *v.* Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454, Ann. Cas. 1914B, 1163, 36 L. R. A. (N. S.) 1171.

35. **Cal.**—Whitney *v.* Stark, 8 Cal. 514, 68 Am. Dec. 360. **Ill.**—Edwards *v.* Hill, 11 Ill. 22. **Miss.**—McInnis Lumb. Co. *v.* Rather, 111 Miss. 55, 71 So. 264. **Tex.**—May *v.* Slade, 24 Tex.

205; Hughes-Buie Co. *v.* Mendoza (Tex. Civ. App.), 156 S. W. 328; Cummings & Co. *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500.

36. Thomson *v.* Pentecost, 210 Mass. 223, 96 N. E. 335; Bishop *v.* Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454, Ann. Cas. 1914B, 1163, 36 L. R. A. (N. S.) 1171.

37. See 6 STANDARD PROC. 897.

38. **Mass.**—Bullock *v.* Hayward, 10 Allen 460. **N. H.**—True *v.* Congdon, 44 N. H. 48, 59. **Pa.**—Deal *v.* Bogue, 20 Pa. 228, 57 Am. Dec. 702. **Vt.**—Bishop *v.* Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454, Ann. Cas. 1914B, 1163, 36 L. R. A. (N. S.) 1171.

Compare McInnis Lumb. Co. *v.* Rather, 111 Miss. 55, 71 So. 264, nonjoinder of parties plaintiff not apparent on the declaration may be availed of by plea in abatement or by nonsuit. See also 7 STANDARD PROC. 72.

39. True *v.* Congdon, 44 N. H. 48, 59.

40. Converse *v.* Symmes, 10 Mass. 377; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Reinheimer *v.* Hemingway, 35 Pa. 432.

In replevin suits, see generally the title "Replevin."

41. Cox *v.* Morrow, 14 Ark. 603; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

42. Bolton *v.* Cuthbert, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914.

43. Cox *v.* Morrow, 14 Ark. 603; Reinheimer *v.* Hemingway, 35 Pa. 432.

44. See the titles "Real and Mixed Actions;" "Writ of Entry."

45. Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219. But see Webster *v.* Vandeventer, 6 Gray (Mass.) 428,

b. *Of Defendants.*—(I.) In Actions *Ex Contractu*.—The rule at common law is that unless the joint liability appears from the plaintiff's own pleading, nonjoinder of parties defendant in actions on contract, whether on a specialty or not, must be pleaded in abatement,⁴⁶ or the objection is waived.⁴⁷ It cannot be taken advantage of afterwards by any other plea.⁴⁸ But if the objection is apparent on the face of the plaintiff's pleadings,⁴⁹ the defendant should not plead in abatement,⁵⁰ but should demur;⁵¹ or he may move in arrest of

holding rule is not applicable to the statutory action of writ of entry to foreclose a mortgage.

46. *Ark.*—Hamilton *v.* Buxton, 6 *Ark.* 24. *Conn.*—Belden *v.* Curtis, 48 *Conn.* 32, 39. *Ill.*—David Rutter & Co. *v.* McLaughlin, 257 *Ill.* 199, 100 *N. E.* 509; Sinsheimer *v.* Skinner Mfg. Co., 165 *Ill.* 116, 121, 46 *N. E.* 262; Cummings *v.* People, 50 *Ill.* 132. *Ky.*—Waits *v.* McClure, 10 *Bush* 763. *Me.*—Kierstead *v.* Bennett, 93 *Me.* 328, 45 *Atl.* 42; Holyoke *v.* Loud, 69 *Me.* 59. *Md.*—Bowie *v.* Neale, 41 *Md.* 124; Sittig *v.* Birkestack, 38 *Md.* 158. *Mich.*—Beasore *v.* Stevens, 155 *Mich.* 403, 119 *N. W.* 431. *Miss.*—Lillard *v.* Planters' Bank, 3 *How.* 78. *N. H.*—Nealley *v.* Moulton, 12 *N. H.* 485. *N. J.*—Smith *v.* Miller, 49 *N. J. L.* 521, 13 *Atl.* 39. *Pa.*—Collins *v.* Smith, 78 *Pa.* 423; Bellas *v.* Fagely, 19 *Pa.* 273; Miller *v.* Kulesowicz, 41 *Pa.* Super. 39. *Tex.*—Anderson *v.* Chandler, 18 *Tex.* 436; Holliman *v.* Rogers, 6 *Tex.* 91 (the rule as to raising nonjoinder of plaintiffs at trial where it appears from the evidence does not apply to defendants); Carr *v.* Wright (Tex. Civ. App.), 190 *S. W.* 254; Holman *v.* Vickery (Tex. Civ. App.), 106 *S. W.* 430. *Vt.*—Hyde *v.* Lawrence, 49 *Vt.* 361; McGregor *v.* Balch, 17 *Vt.* 562. *Va.*—Wilson & Griffith *v.* McCormick, 86 *Va.* 995, 11 *S. E.* 976. *W. Va.*—McDonald *v.* Cole, 46 *W. Va.* 186, 32 *S. E.* 1033. *Eng.*—Rice *v.* Shute, 5 *Burr.* 2611, 1 *Smith L. Cas.* 556, 98 *Eng.* Reprint 374.

47. *Ill.*—Thompson *v.* Strain, 16 *Ill.* 369. *Ky.*—Waits *v.* McClure, 10 *Bush* 763. *Mich.*—Beasore *v.* Stevens, 155 *Mich.* 403, 119 *N. W.* 431. *Tex.*—Carr *v.* Wright (Tex. Civ. App.), 190 *S. W.* 254. *Va.*—Wilson *v.* McCormick, 86 *Va.* 995, 11 *S. E.* 976. even though it appears that the plaintiff knew of the joint liability. *Eng.*—Rice *v.* Shute, 5 *Burr.* 2611, 1 *Smith L. Cas.* 556, 98 *Eng.* Reprint 374.

See also 11 *STANDARD PROC.* 976, note 80.

48. Anderson *v.* Chandler, 18 *Tex.* 436.

[a] Neither (1) under the general issue (*Ind.*—Bradley *v.* Ward, 6 *Blackf.* 190. *Ky.*—Waits *v.* McClure, 10 *Bush* 763. *N. Y.*—Burgess *v.* Abbott, 6 *Hill* 135. *Vt.*—Hyde *v.* Lawrence, 49 *Vt.* 361. See also 7 *STANDARD PROC.* 72), nor (2) in arrest of judgment. Anderson *v.* Chandler, 18 *Tex.* 436.

Variance where several contract is declared on and joint contract is proved, see 11 *STANDARD PROC.* 1050, note 11.

49. See *infra*, this note.

[a] To open this door for the defendant, (1) the plaintiff must have alleged and thus admitted all that it would have been necessary for the defendant to have alleged in an ordinary plea in abatement. Belden *v.* Curtis, 48 *Conn.* 32, 40. (2) It must appear that the party omitted is still living as well as that he jointly contracted. *Conn.*—Belden *v.* Curtis, 48 *Conn.* 32, 40. *Miss.*—Lillard *v.* Planters' Bank, 3 *How.* 78. *N. J.*—Smith *v.* Miller, 49 *N. J. L.* 521, 13 *Atl.* 39. *Tex.*—Davis *v.* Willis, 47 *Tex.* 154.

Compare Hanley *v.* Donoghue, 59 *Md.* 239, 43 *Am. Rep.* 554 (holding a declaration demurrable which gave no reason for not joining the other parties); and McGregor *v.* Balch, 17 *Vt.* 562, 567, holding that it will be presumed the party is living for at least seven years, unless the contrary appear.

50. Lewis *v.* State, 65 *Miss.* 468, 4 *So.* 429; Davis *v.* Willis, 47 *Tex.* 154.

51. *Ill.*—Sinsheimer *v.* Skinner Mfg. Co., 165 *Ill.* 116, 121, 46 *N. E.* 262; Cummings *v.* People, 50 *Ill.* 132; Gottfried Brew. Co. *v.* McDonald, 146 *Ill.* App. 601. *Md.*—Bowie *v.* Neale, 41 *Md.* 124. *Miss.*—Lewis *v.* State, 65 *Miss.* 468, 4 *So.* 429; Lillard *v.* Planters'

judgment,⁵² for a new trial,⁵³ or bring error.⁵⁴

(II.) **In Actions Ex Delicto.** — In actions for personal torts unconnected with contracts, the nonjoinder of a joint tortfeasor cannot generally be taken advantage of in any way, as the defendants are held to be liable jointly and severally.⁵⁵ The same is true as to nonjoinder in actions, the gist of which is a breach of a duty arising out of a relationship, such as a carrier and passenger and the like.⁵⁶ But in tort actions, the gist of which is a breach of a duty arising out of contract, the rules obtaining in actions of contract apply.⁵⁷ And in tort actions concerning real property, one tenant in common sued in trespass for anything respecting the land held in common may plead the tenancy in common in abatement.⁵⁸

c. *Form of Plea in Abatement.* — In consonance with the general rule, a plea in abatement on account of nonjoinder of parties should give the plaintiff a better writ.⁵⁹

Bank, 3 How. 78. **N. J.**—*Smith v. Miller*, 49 N. J. L. 521, 13 Atl. 39.

See 6 STANDARD PROC. 897.

52. **Conn.**—*Belden v. Curtis*, 48 Conn.

32, 39. **Ill.**—*Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 121, 46 N. E. 262; *Cummings v. People*, 50 Ill. 132. **Tex.** *Anderson v. Chandler*, 18 Tex. 436. But see *Holliman v. Rogers*, 6 Tex. 91. **Vt.**—*McGregor v. Balch*, 17 Vt. 562.

53. *Gottfried Brew. Co. v. McDonald*, 146 Ill. App. 601.

54. *Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 121, 46 N. E. 262; *Cummings v. People*, 50 Ill. 132; *McGregor v. Balch*, 17 Vt. 562.

55. *Tandrup v. Sampsell*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852; *Yeazel v. Alexander*, 58 Ill. 254; *Low v. Mumford*, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469.

56. *Swigert v. Graham*, 7 B. Mon. (Ky.) 661.

57. *Swigert v. Graham*, 7 B. Mon. (Ky.) 661.

As to rules in contract cases, see *supra*, XIV, F, 2, b, (I).

58. **Me.**—*Southard v. Hill*, 44 Me. 92, 69 Am. Dec. 85. **Mass.**—*Converse v. Symmes*, 10 Mass. 377, if he neglects so to plead he waives his right. **N. Y.** *Low v. Mumford*, 14 Johns. 426, 7 Am. Dec. 469.

See also *Tandrup v. Sampsell*, 234 Ill. 526, 530, 85 N. E. 331, 17 L. R. A. (N. S.) 852.

59. See generally 1 STANDARD PROC. 50.

[a] Such a plea must state (1) the name of the parties who should have been joined (*Dwight v. Central Ver-*

mont R. Co., 9 Fed. 785, 20 Blatchf. 200 [so that the plaintiff may traverse the allegation and form a definite issue to be tried or discontinue and bring a new suit joining the proper parties]; *Holliman v. Rogers*, 6 Tex. 91; *Standard L. & P. Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931, (2) and their residences (*Holman v. Vickery* [Tex. Civ. App.], 106 S. W. 430, where plaintiff alleged ignorance as to defendant's partners. See *McLeod v. Citizens' Bank*, 61 Fla. 350, 56 So. 190, the place of residence of the omitted persons must be stated in the affidavit verifying the plea of nonjoinder), (3) and must aver that they are still alive (**Conn.**—*Belden v. Curtis*, 48 Conn. 32, 40. **Fla.**—*McLeod v. Citizens' Bank*, 61 Fla. 350, 56 So. 190. **Ind.**—*Boseker v. Chamberlain*, 160 Ind. 114, 66 N. E. 448; *Wilson v. States*, 6 Blackf. 212), (4) and within the jurisdiction of the court. **Fla.**—*McLeod v. Citizens' Bank*, 61 Fla. 350, 56 So. 190. **Ind.**—*Boseker v. Chamberlain*, 160 Ind. 114, 66 N. E. 448. **W. Va.**—*Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092. (5) In addition thereto, the plea must state facts showing definitely the nature and extent of the interest of the persons who should have been joined. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119. (6) A plea of nonjoinder of partners must show that at the time of the making of the contract sued on, the nonjoined persons were partners with the defendant. *McLeod v. Citizens' Bank*, 61 Fla. 350, 56 So. 190. **Form of plea setting up nonjoinder of parties**, see 9 STANDARD PROC. 913.

3. In Equity.—a. *Who May Raise Objection.*—One whose duty it is to bring necessary parties before the court cannot rely on their absence for reversal.⁶⁰

b. *When Objection Must Be Raised.*—The nonjoinder of merely formal or proper parties is waived if not objected to before the hearing.⁶¹ But the nonjoinder of a necessary or indispensable party may be raised at any stage of the cause unless for cogent reasons, as it goes to the jurisdiction of the court.⁶² But when the objection is delayed until the hearing or later, it receives far less favor from the court, and its allowance depends to some extent upon sound discretion.⁶³

c. *How Objection Is Raised.*—(I.) **By Demurrer.**—In equity, the nonjoinder of necessary or proper parties may be raised by demurrer, if the defect is apparent on the face of the bill.⁶⁴ If the defendant demurs and answers at the same time, and it appears that all the necessary parties are before the court, the court may disregard the objection for want of parties and proceed to final decree.⁶⁵

(II.) **By Plea or Answer.**—(A.) **GENERALLY.**—If the nonjoinder of parties is not apparent on the bill, the objection may be raised by plea or by answer.⁶⁶ And if the bill suggests a reason for not bringing all

60. *Vandever v. Vandever*, 3 Mete. (Ky.) 137.

61. *Ala.*—*Carwile v. Crump*, 165 Ala. 206, 51 So. 744. *D. C.*—*Las Ovas Co. v. Davis*, 35 App. Cas. 372; *Landram v. Jordan*, 25 App. Cas. 291, 301. *Ill.*—*Gerard v. Bates*, 124 Ill. 150, 155, 16 N. E. 258, 7 Am. St. Rep. 350; *Pren-tice v. Kimball*, 19 Ill. 320. *Mass.*—*Schworer v. Boylston Market Assn.*, 99 Mass. 285, 295. *N. J.*—*Voorhees' Exrx. v. Melick*, 25 N. J. Eq. 523; *Cutler v. Tuttle*, 19 N. J. Eq. 549.

[a] **Objection Cannot Be Made at Hearing.**—*Voorhees' Exrx. v. Melick*, 25 N. J. Eq. 523; *Cutler v. Tuttle*, 19 N. J. Eq. 549. See also *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273; *Dias v. Bouchaud*, 10 Paige (N. Y.) 445, 459.

62. *McLaughlin v. Van Kueren*, 21 N. J. Eq. 379; *Hartley v. Langkamp*, 243 Pa. 550, 90 Atl. 402.

[a] **Such objection may be made** (1) at the hearing although the objection was not made either by plea or demurrer (*Ala.*—*Carwile v. Crump*, 165 Ala. 206, 51 So. 744; *Chapman v. Hamilton*, 19 Ala. 121. *Ark.*—*Porter v. Clements*, 3 Ark. 364. *Ill.*—*Gerard v. Bates*, 124 Ill. 150, 155, 16 N. E. 258, 7 Am. St. Rep. 350; *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273. *Me.*—*Hussey v. Dole*, 24 Me. 20. *N. J.*—*Sweet v. Parker*, 22 N. J. Eq. 453; *Melick v.*

Melick, 17 N. J. Eq. 156. *Pa.*—*Hartley v. Langkamp*, 243 Pa. 550, 90 Atl. 402. *W. Va.*—*Burlew v. Quarrier*, 16 W. Va. 108), or (2) it may be made on appeal (*Ala.*—*Carwile v. Crump*, 165 Ala. 206, 51 So. 744. *Ill.*—*Gerard v. Bates*, 124 Ill. 150, 155, 16 N. E. 258, 7 Am. St. Rep. 350; *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273, 282. *Ky.*—*Johnson v. Rankin*, 2 Bibb 184. *Pa.*—*Hartley v. Langkamp*, 243 Pa. 550, 90 Atl. 402. *Tex.*—*Hess v. Webb*, 103 Tex. 46, 123 S. W. 111), or (3) by motion to set aside a default judgment. *Miller v. Klasner*, 19 N. M. 21, 140 Pac. 1107; *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77. Defect of parties as ground for setting aside judgments generally, see 15 STANDARD PROC. 157.

63. *Ill.*—*Chicago, M. & N. R. R. Co. v. National Elevator & D. Co.*, 153 Ill. 70, 38 N. E. 915. *Mass.*—*Schworer v. Boylston Market Assn.*, 99 Mass. 285, 295. *Mich.*—*Holecomb v. Mosher*, 50 Mich. 252, 15 N. W. 129.

64. See 6 STANDARD PROC. 898.

Form of demurrer in equity for want of parties, see 9 STANDARD PROC. 915.

65. *Chapman v. Hamilton*, 19 Ala. 121.

66. *U. S.*—*Snelling v. Richard*, 166 Fed. 635; *Howth v. Owens*, 29 Fed. 722. *Ala.*—*Carwile v. Crump*, 165 Ala. 206, 51 So. 744; *Toulmin v. Hamilton*, 7 Ala. 362. *Ill.*—*Gerard v. Bates*, 124

interested parties before the court, the defendant may controvert the excuse suggested by specially pleading matter showing its falsity.⁶⁷

(B.) FORM OF PLEA AND ANSWER. — As at law,⁶⁸ a plea or answer setting up a nonjoinder of parties should designate the omitted party,⁶⁹ and set forth facts by which they are made necessary or proper parties.⁷⁰

(III.) By Motion of Party. — The want of proper parties when apparent on the face of the bill may be taken advantage of by motion to dismiss as well as by demurrer.⁷¹

(IV.) On Court's Own Motion. — Proper parties will not be ordered brought in by the court on its own motion.⁷² But if at any time it appears that a person not made a party is a necessary or indispensable party, the trial court will of its own motion arrest the proceedings that he may be brought in;⁷³ or if the cause is pending on appeal, the appellate court will reverse the decree and remand the cause in order that the omitted parties may be brought in,⁷⁴ unless the objection was

Ill. 150, 155, 16 N. E. 258, 7 Am. St. Rep. 350; Craig v. Smith, 94 Ill. 469. Mass.—Schwoerer v. Boylston Market Assn., 99 Mass. 285. Miss.—Rodd v. Durbridge, 53 Miss. 694. N. J.—Plum v. Smith, 56 N. J. Eq. 468, 39 Atl. 1070; Voorhees' Exrs. v. Melick, 25 N. J. Eq. 523. N. Y.—Dias v. Bouchaud, 10 Paige 445. Ohio.—Lahman v. Cincinnati Gas Light & Coke Co., 11 Ohio Dec. 215. Va.—Armentrout's Exrs. v. Gibbons, 25 Gratt. (66 Va.) 371. Eng. Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

As to pleas generally, see the title "Pleas in Equity."

As to answers generally, see the title "Answers."

[a] In Abatement or Bar.—A plea of want of proper parties is a plea in bar. Howth v. Owens, 29 Fed. 722; Hammond v. Hunt, 11 Fed. Cas. No. 6,003.

[b] Proceedings on Plea or Answer. Rodd v. Durbridge, 53 Miss. 694.

[c] Whether the plea is sufficient depends on the bill and plea taken together. Cockburn v. Thompson, 16 Ves. Jr. 321, 325, 33 Eng. Reprint 1005.

67. Alger v. Anderson, 78 Fed. 729, 734.

68. See *supra*, XIV, F, 2, c.

69. Dwight v. Central Vermont R. Co., 9 Fed. 785, 20 Blatchf. 200; Case v. Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536.

Form of plea in equity for want of parties, see 9 STANDARD PROC. 915.

70. Schwoerer v. Boylston Market Assn., 99 Mass. 285, 295.

71. Thornton's Admr. v. Neal, 49 Ala. 590 (motion must indicate names

of those omitted); Prentice v. Kimball, 19 Ill. 320. But see Wood v. Wood, 56 Fla. 882, 47 So. 560; Noyes v. Bragg, 220 Mass. 106, 110, 107 N. E. 669.

72. Mains v. Henkle, 2 Ohio Dec. (Reprint) 530. See also cases cited *infra*, this section.

73. U. S.—Minnesota v. Northern Sec. Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. ed. 499; Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762. Ala.—Carwile v. Crump, 165 Ala. 206, 51 So. 744; Russell v. Bell, 160 Ala. 480, 49 So. 314; Wilkinson v. May, 69 Ala. 33. Ill.—Gerard v. Bates, 124 Ill. 150, 155, 16 N. E. 258, 7 Am. St. Rep. 350; Prentice v. Kimball, 19 Ill. 320. Mass. Schwoerer v. Boylston Market Assn., 99 Mass. 285, 295. N. J.—Waker v. Booraem, 68 N. J. Eq. 345, 59 Atl. 451; Van Keuren v. McLaughlin, 21 N. J. Eq. 163. N. M.—Miller v. Klasner, 19 N. M. 21, 140 Pac. 1107. Ohio.—Mains v. Henkle, 2 Ohio Dec. (Reprint) 530. Tex.—Black v. Black, 95 Tex. 627, 69 S. W. 65. Va.—Armentrout's Exrs. v. Gibbons, 25 Gratt. (66 Va.) 371; Jameson's Admx. v. Deshields, 3 Gratt. (44 Va.) 4. W. Va.—Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360.

Form of order without motion to bring in necessary parties, see 9 STANDARD PROC. 916.

74. Fla.—Florida Land Rock Phos. Co. v. Anderson, 50 Fla. 501, 513, 39 So. 392; Indian River Mfg. Co. v. Wooten, 48 Fla. 271, 277, 37 So. 731.

Ill.—Emmerson v. Merritt, 249 Ill. 538, 544, 94 N. E. 955; McLennan v. Johnston, 60 Ill. 306. Neb.—Smith v. Shaffer, 29 Neb. 656, 45 N. W. 936. N. J.

expressly relinquished in the court below.⁷⁵

d. *Determination of Objection and Dismissal*.—As a general rule, if the equity of the bill is with the plaintiff,⁷⁶ the court will not dismiss his bill on a successful objection for want of parties, however and whenever raised.⁷⁷ But the court will direct the cause to stand over so that the plaintiff may bring them in by proper amendment,⁷⁸ and will dismiss the bill if the plaintiff fails to make the necessary amendments.⁷⁹ A dismissal will be directed in other cases also.⁸⁰

Kempton v. Bartine, 59 N. J. Eq. 149, 44 Atl. 461. **Ore.**—Wheeler v. Lack, 37 Ore. 238, 247, 61 Pac. 849. **Pa.** Hartley v. Langkamp, 243 Pa. 550, 90 Atl. 402. **Va.**—Jameson's Admx. v. Deshields, 3 Gratt. (44 Va.) 4. **W. Va.** Gall v. Gall, 50 W. Va. 523, 40 S. E. 380; Kellam v. Sayre, 30 W. Va. 198, 3 S. E. 589.

[a] Unless it affirmatively appears that certain omitted persons are necessary parties, the decree will not be reversed for want of parties. Moran v. Pellifant, 28 Ill. App. 278, 284.

75. Armentrout's Exrs. v. Gibbons, 25 Gratt. (66 Va.) 371.

76. Lucas v. Bank of Darien, 2 Stew. (Ala.) 280, 326. See Westcott v. Minnesota Min. Co., 23 Mich. 145, 163.

77. **U. S.**—Fourth Nat. Bank v. Carrollton Railroad, 11 Wall. 624, 20 L. ed. 82; Hammond v. Hunt, 11 Fed. Cas. No. 6,003. **Ala.**—Toulmin v. Hamilton, 7 Ala. 362; Lucas v. Bank of Darien, 2 Stew. 280, 326. **Conn.**—New London Bank v. Lee, 11 Conn. 112, 27 Am. Dec. 713. **Ill.**—Emmerson v. Merritt, 249 Ill. 538, 94 N. E. 955. **N. J.**—Ball v. Ward, 73 N. J. Eq. 440, 68 Atl. 343; Kempton v. Bartine, 59 N. J. Eq. 149, 44 Atl. 461. **Ore.**—Wheeler v. Lack, 37 Ore. 238, 246, 61 Pac. 849. **Va.** Jameson's Admx. v. Deshields, 3 Gratt. (44 Va.) 4.

Compare Hussey v. Dole, 24 Me. 20, if an order that the cause stand over is not made the bill will be dismissed.

[a] Whether raised (1) by demurrer (Ala.—Chapman v. Hamilton, 19 Ala. 121. Tenn.—Gray v. Hays, 7 Humph. 588. Tex.—Mott v. Ruenbuhl, 1 White & W. Civ. Cas., §599), or (2) answer (Van Epps v. Van Deusen, 4 Paige [N. Y.] 64, 25 Am. Dec. 516, if objection is made by answer or if the complainant neglects to amend, the chancellor in his discretion may permit the cause to stand over or dismiss it), or (3) made for the first time at the hearing (Van Epps v. Van

Deusen, 4 Paige [N. Y.] 64, 25 Am. Dec. 516; Monroe v. Buchanan, 27 Tex. 241, 247), or (4) whether the objection is made by the court on its own motion. **U. S.**—Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762. **Ala.**—Wilkinson v. May, 69 Ala. 33. **Mass.**—Schwoerer v. Boylston Market Assn., 99 Mass. 285, 295.

78. As to amendments in equity, see *supra*, XI, A, 1, b.

79. **U. S.**—Minnesota v. Northern Sec. Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. ed. 499; Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762. **Ala.**—Carwile v. Crump, 165 Ala. 206, 51 So. 744; Wilkinson v. May, 69 Ala. 33. **Ky.** Huston v. McClarty's Heirs, 3 Litt. 274. **Minn.**—Johnson v. Robinson, 20 Minn. 170; Cover v. Baytown, 12 Minn. 124. **Pa.**—Hartley v. Langkamp, 243 Pa. 550, 90 Atl. 402.

But see Van Epps v. Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516, holding that it is a matter of course to dismiss the bill upon the allowance of a plea or demurrer unless the complainant takes issue on the plea or obtains leave to amend.

80. See *infra*, this note.

[a] Thus, (1) if the parties were omitted in bad faith (Wheeler v. Lack, 37 Ore. 238, 61 Pac. 849), or (2) if the plaintiff is chargeable with laches (Schwoerer v. Boylston Market Assn., 99 Mass. 285, 295). And (3) if it is impossible to supply the necessary parties and a decree cannot be made without prejudice to those not parties (Kendig v. Dean, 97 U. S. 423, 24 L. ed. 1061; Fourth Nat. Bank v. Carrollton Railroad, 11 Wall. [U. S.] 624, 20 L. ed. 82; Barney v. Baltimore, 6 Wall. [U. S.] 280, 18 L. ed. 825), or (4) if the bill would be dismissed even though the omitted parties were before the court (Oneida v. Allen, 137 Mich. 224, 100 N. W. 441; Wheeler v. Lack, 37 Ore. 238, 246, 61 Pac. 849), the bill will be dismissed.

Dismissal Without Prejudice. — A dismissal for want of parties must be made without prejudice.⁸¹

e. *Cure of Defect.* — Any defect in omitting to make a person a party is cured by his coming in and consenting to be treated as a party to the decree and to be bound by it.⁸²

4. Under the Code. — a. *Generally.* — Under the code, an objection on the ground of nonjoinder or defect of parties plaintiff or defendant must be raised by demurrer, if apparent on the face of the pleading;⁸³ and if it is not so apparent, then by answer;⁸⁴ otherwise the objection is waived,⁸⁵ unless the party omitted is an indispensable party, as

81. U. S.—Kendig *v.* Dean, 97 U. S. 423, 24 L. ed. 1061; Barney *v.* Baltimore, 6 Wall. 280, 18 L. ed. 825; Dandridge *v.* Washington's Exrs., 2 Pet. 370, 378, 7 L. ed. 454. **Ky.**—Barry *v.* Rogers, 2 Bibb 314. **N. Y.**—Van Epps *v.* Van Deussen, 4 Paige 64, 25 Am. Dec. 516.

82. Hannas *v.* Hannas, 110 Ill. 53.

83. See 6 STANDARD PROC. 897.

[a] **Form of Demurrer.**—(Title of court and cause and venue.) The defendant demurs to the plaintiff's complaint on the ground that there is a defect of parties plaintiff (or defendant), (state in what the defect consists).

84. Ariz.—Gleeson *v.* Costello (Ariz.), 138 Pac. 544. **Cal.**—Hayt *v.* Bentel, 164 Cal. 680, 130 Pac. 432; O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236. **Colo.**—Great West Min. Co. *v.* Woodmas, 12 Colo. 46, 64, 20 Pac. 771, 13 Am. St. Rep. 204. **Ind.**—Sharpe *v.* Baker, 51 Ind. App. 547, 96 N. E. 627, 99 N. E. 44, by plea in abatement. **Ky.**—Carpenter *v.* Miles, 17 B. Mon. 598. **Minn.**—Randall Prtg. Co. *v.* Sanitas Min. Water Co., 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706; Holden & Wheeling Mut. F. Ins. Co. *v.* Chicago G. W. R. Co., 120 Minn. 230, 139 N. W. 157. **Nev.**—Deegan *v.* Deegan, 22 Nev. 185, 198, 37 Pac. 360, 58 Am. St. Rep. 742. **N. M.**—Miller *v.* Klasner, 19 N. M. 21, 140 Pac. 1107. **N. Y.**—Brown *v.* Cherry, 56 Barb. 635, 38 How. Pr. 352; Chelsea Exch. Bank *v.* Travelers' Ins. Co., 173 App. Div. 829, 160 N. Y. Supp. 225; Munson *v.* New York Cent. & H. R. R. Co., 32 Misc. 282, 65 N. Y. Supp. 848. **N. C.** Ball-Thrash & Co. *v.* McCormick, 162 N. C. 471, 78 S. E. 303; Koehs Co. *v.* Jackson, 156 N. C. 326, 72 S. E. 382. **Okl.**—Harrah State Bank *v.* School Dist. No. 70, 47 Okla. 593, 149 Pac. 1190. **Wis.**—Franke *v.* H. P. Nelson

Co., 157 Wis. 241, 147 N. W. 13; Radant *v.* Werheim Mfg. Co., 106 Wis. 600, 82 N. W. 562; Robbins *v.* Deverill, 20 Wis. 142, 159.

[a] **Unless the complaint shows the nonjoined plaintiff was living when the suit was commenced, the objection must be taken by answer.** Deegan *v.* Deegan, 22 Nev. 185, 198, 37 Pac. 360, 58 Am. St. Rep. 742; Scofield *v.* Van Syckle, 23 How. Pr. (N. Y.) 97; Brainard *v.* Jones, 11 How. Pr. (N. Y.) 569.

85. Cal.—Hayt *v.* Bentel, 164 Cal. 680, 130 Pac. 432; O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236; Stevens *v.* Los Angeles Dock & Terminal Co., 20 Cal. App. 743, 130 Pac. 197. **Colo.**—Peck *v.* Peck, 33 Colo. 421, 80 Pac. 1063; Great West Min. Co. *v.* Woodmas, 12 Colo. 46, 64, 20 Pac. 771, 13 Am. St. Rep. 204; Bloom *v.* McPhee & McGinnity Co., 26 Colo. App. 256, 143 Pac. 825. **Ind.**—Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 448. **Ia.** Kirkwood *v.* Perry Town Lot & I. Co., 159 N. W. 774. **Minn.**—Kanne *v.* Kanne, 119 Minn. 265, 138 N. W. 25. **Mo.** Johnson *v.* United Rys. Co., 247 Mo. 326, 152 S. W. 362, 374. **N. M.**—Miller *v.* Klasner, 19 N. M. 21, 140 Pac. 1107. **N. Y.**—Lawrence *v.* Congregational Church, 164 N. Y. 115, 58 N. E. 24; Brown *v.* Cherry, 56 Barb. 635, 38 How. Pr. 352; Parker *v.* Paine, 37 Misc. 768, 76 N. Y. Supp. 942. **Ore.**—Burggraf *v.* Brocha, 74 Ore. 381, 145 Pac. 639; Portland *v.* Coffey, 67 Ore. 507, 135 Pac. 358; Cooper *v.* Thomason, 30 Ore. 161, 176, 45 Pac. 296. **Wis.**—Radant *v.* Werheim Mfg. Co., 106 Wis. 600, 82 N. W. 562; Robbins *v.* Deverill, 20 Wis. 142, 159. **Wyo.**—Becker *v.* Hopper, 22 Wyo. 237, 138 Pac. 179, Ann. Cas. 1916D, 1041.

[a] **Absence of parties does not go to the court's jurisdiction over the subject matter of a suit or the parties properly before it; and if the court**

where a complete determination of the controversy cannot be had without his presence.⁸⁶ A defect of parties cannot be taken advantage of by a nonsuit,⁸⁷ by an objection to the introduction of any evidence,⁸⁸ or by motion for judgment on the pleadings;⁸⁹ it cannot be raised for the first time on appeal.⁹⁰

The court in its discretion may permit the amendment of an answer so as to set up a defect of parties.⁹¹

b. *Form of Answer.*—The defense that there is a nonjoinder of parties cannot be relied on under a general denial.⁹² It must be separately stated;⁹³ and must be alleged clearly and distinctly without leaving it to doubt or inference whether it is relied on.⁹⁴ In setting up this defense, the defendant must point out the person claimed to be a necessary party,⁹⁵ and show that he is living,⁹⁶ and subject to the process of the court.⁹⁷

proceeds to judgment as it may do, the judgment is valid as between the parties. *Stewart v. Hall*, 150 Iowa 744, 130 N. W. 993.

[b] If, on the overruling of a demurrer setting up nonjoinder, the defendant answers to the merits, he waives defects of parties plaintiff. *State v. Mallinckrodt Chemical Wks.*, 249 Mo. 702, 156 S. W. 967; *California v. Kiesling* (Mo. App.), 180 S. W. 559; *Territory ex rel. Baca v. Baca*, 18 N. M. 63, 134 Pac. 212. See 6 STANDARD PROC. 1005.

86. Ark.—*Arkadelphia Lumb. Co. v. Mann*, 78 Ark. 414, 94 S. W. 46. Cal.—*O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423. Colo.—*McLean v. Farmers' High Line C. & R. Co.*, 44 Colo. 184, 98 Pac. 16; *Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166; *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063. Nev.—*Robinson v. Kind*, 23 Nev. 330, 338, 47 Pac. 1, 997. N. M.—*Miller v. Klasner*, 19 N. M. 21, 140 Pac. 1107. Ohio.—*Reformed Presby. Church v. Nelson*, 35 Ohio St. 638. Wis.—*Robbins v. Deverill*, 20 Wis. 142, 159.

Bringing in parties on court's motion, see *supra*, XI, A, 1, e, (VII).

[a] After judgment by default, the defendant, by motion to set it aside, may raise the objection that a necessary party is omitted. *Miller v. Klasner*, 19 N. M. 21, 140 Pac. 1107. Defect of parties as a ground for setting aside judgments generally, see 15 STANDARD PROC. 157.

87. *Pavisich v. Bean*, 48 Cal. 364; *Whitney v. Stark*, 8 Cal. 514, 68 Am. Dec. 360; *Ball-Thrash & Co. v. McCormick*, 162 N. C. 471, 78 S. E. 303.

88. *Holden & Wheeling Mut. F. Ins. Co. v. Chicago G. W. R. Co.*, 120 Minn. 230, 139 N. W. 157.

89. See 14 STANDARD PROC. 936.

90. Ia.—*Stewart v. Hall*, 150 Iowa 744, 130 N. W. 993. Mo.—*Toovey v. Baxter*, 59 Mo. App. 470. N. Y.—*Oslander v. Weber*, 114 N. Y. 95, 103, 21 N. E. 112; *Bauman v. Kuhn*, 103 N. Y. Supp. 773. Okla.—*Harrah State Bank v. School Dist. No. 70*, 47 Okla. 593, 149 Pac. 1190.

91. *Burr v. United Railroads*, 163 Cal. 663, 873, 126 Pac. 873.

[a] Where the pleadings are oral so that the objection cannot be raised by demurrer. *Moppar v. Wiltchik*, 56 Misc. 676, 107 N. Y. Supp. 594.

92. *Baxter v. St. Louis Transit Co.*, 193 Mo. 1, 95 S. W. 856.

93. *Munson v. New York C. & H. R. R. Co.*, 32 Misc. 282, 65 N. Y. Supp. 848.

94. *Bevier v. Dillingham*, 18 Wis. 529, 534.

[a] If not taken in a clear and distinct manner, the objection of nonjoinder is deemed waived. *Bevier v. Dillingham*, 18 Wis. 529, 534.

Form of answer of nonjoinder, see 9 STANDARD PROC. 914.

95. *Holden & Wheeling Mut. F. Ins. Co. v. Chicago G. W. R. Co.*, 120 Minn. 230, 139 N. W. 157; *Fowler v. Kennedy*, 2 Abb. Pr. (N. Y.) 347.

96. Ind.—*Levi v. Haverstick*, 51 Ind. 236; *Alexander v. Collins*, 2 Ind. App. 176, 28 N. E. 190. Nev.—*Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742. N. Y.—*Palmer v. Field*, 76 Hun 229, 27 N. Y. Supp. 736, 59 N. Y. St. 123.

97. *Carico v. Moore*, 4 Ind. App. 20,

c. *Hearing and Determination.*—The issue presented by a defense of nonjoinder of parties is to be tried like any other defense.⁹³ When the lack of parties appears, the action is not dismissed, but is allowed to stand over that they may come in or be brought in,⁹⁹ although, if after timely objection the plaintiff does not bring them in, his action will be dismissed without prejudice to a new action, in the discretion of the court.¹

d. *Cure of Defect.*—A defect of parties is cured where the proper parties come in and answer,² and by a verdict.³

G. NOTICE OF OBJECTION.—Statutes sometimes provide that a defendant cannot object to a misjoinder or nonjoinder of parties at the trial, unless he first gives notice of the objection.⁴

29 N. E. 928; *Alexander v. Collins*, 2 Ind. App. 176, 28 N. E. 190; *Lefferts v. Silsby*, 54 How. Pr. (N. Y.) 193; *Palmer v. Field*, 76 Hun 229, 27 N. Y. Supp. 736, 59 N. Y. St. 123.

98. *Munson v. New York C. & H. R. R. Co.*, 32 Misc. 282, 65 N. Y. Supp. 848.

99. **Ky.**—*Carpenter v. Miles*, 17 B. Mon. 598. See *Van Buskirk v. Levy*, 3 Mete. 133, applying this rule to a case where the defendant set up an assignment of the note for benefit of creditors. **N. Y.**—*Sherman v. Parish*, 53 N. Y. 483, 490. **N. C.**—*Ball-Thrash & Co. v. McCormick*, 162 N. C. 471, 78 S. E. 303. **N. D.**—*Willbur v. Johnson*, 32 N. D. 314, 155 N. W. 671.

1. *Carpenter v. Miles*, 17 B. Mon. (Ky.) 598; *Sherman v. Parish*, 53 N. Y. 483, 490, unqualified judgment of dismissal erroneous. See also 7 STANDARD PROC. 671.

[a] **Effect of Dismissal.**—*Munson v. New York C. & H. R. R. Co.*, 32 Misc. 282, 65 N. Y. Supp. 848.

2. *Brunswick v. Finney*, 54 Ga. 317.
3. *Metropolitan St. Ry. Co. v. Adams Express Co.* (Mo. App.), 130 S. W. 101.

4. See the statutes, and *McInnis Lumb. Co. v. Rather*, 111 Miss. 55, 71 So. 264; *Walker v. Hall*, 66 Miss. 390,

6 So. 318; *Stauffer v. Garrison*, 61 Miss. 67; *Murray v. Pfeiffer*, 70 N. J. L. 768, 59 Atl. 147; *Peterson v. Christianson*, 68 N. J. L. 392, 56 Atl. 288; *Bank of Toronto v. Manufacturers' & M. F. Assn.*, 63 N. J. L. 5, 42 Atl. 761; *Elliott v. Bodine*, 59 N. J. L. 567, 36 Atl. 1038; *King v. Holbrook*, 58 N. J. L. 369, 33 Atl. 965.

[a] **Failing to give the notice**, the defendant is precluded from making the objection at the trial. *McInnis Lumb. Co. v. Rather*, 111 Miss. 55, 71 So. 264; *Stone v. West Jersey Ice Mfg. Co.*, 65 N. J. L. 20, 46 Atl. 696; *Brown v. Fitch*, 33 N. J. L. 418; *Fleming v. Freese*, 26 N. J. L. 263.

[b] **The plaintiff will not be non-suited** if such notice is not given. *Fairchild v. Llewellyn Realty Co.*, 82 N. J. L. 423, 82 Atl. 924.

[c] **But this preclusion extends no further** than to prevent his defeating the action solely on the ground of nonjoinder or misjoinder of parties. It does not deprive the defendant of his substantial rights. *Brown v. Fitch*, 33 N. J. L. 418.

[d] **As affecting defenses available**, see *Stone v. West Jersey Ice Mfg. Co.*, 65 N. J. L. 20, 46 Atl. 696; *King v. Holbrook*, 58 N. J. L. 369, 33 Atl. 965; *Brown v. Fitch*, 33 N. J. L. 418.

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CROSS-REFERENCES:

Decedents' Estates; Homesteads and Exemptions;
Judicial Sales.

For forms, see 9 STANDARD PROC. 916, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND NATURE OF PROCEEDING.—Partition is the act or proceeding by which co-owners of property cause it to be either divided into as many shares as there are owners, according to their interests therein, or if that cannot be equitably done, to be sold for the best obtainable price and the proceeds distributed.¹ This article treats only of such proceedings at law or in equity; it excludes partition by act of the parties.

Nature of Proceeding.—At the common law, partition was both a legal and an equitable remedy.² But there is no substantial reason for designating the action under the code as exclusively either a legal or equitable proceeding.³ It is a "civil action" within the meaning of code provisions declaring that there shall be but one form of action to be called a civil action.⁴ But it does not necessarily follow that it is purely equitable in character.⁵ But under some statutes, the action for partition shall be by equitable proceedings.⁶

1. See *Noecker v. Wallingford*, 133 Iowa 605, 111 N. W. 37; *Hudgins v. Sansom*, 72 Tex. 229, 10 S. W. 104.

[a] "The object of the action of partition is to effect a division of real property among several joint owners, so that each may hold his respective share in severalty." *Clark v. Richardson*, 32 Iowa 399. See also *Longley v. Longley*, 92 Me. 395, 42 Atl. 798.

[b] "Partition implies an interest in different persons in the property to be divided." *Brady v. McCosker*, 1 N. Y. 214, 222, 3 Denio 610, 4 How. Pr. 291.

[c] **Distribution and Partition Distinguished.**—See *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415; also *Parkinson v. Parkinson*, 139 Mich. 530, 102 N. W. 1002.

[d] **For other definitions, see** *Mo. Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1, 131 Am. St. Rep. 595. **Tenn.** *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. 757. **Va.**—*Martin v. Martin*, 112 Va. 731, 72 S. E. 680. See also *Pomeroy v. Pomeroy*, 55 N. J. Eq. 568, 37 Atl. 754.

2. *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997, that is to say, it might be afforded by either a court of law or equity. See also *Klever v. Seawall*, 65 Fed. 393, 12 C. C. A. 661.

[a] **Partition at Law and in Equity Are Different Things.**—*Whaley v. Dawson*, 2 Sch. & Lef. (Eng.) 367, followed in *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. ed. 256.

[b] **Under the equitable practice prevailing in the courts of the United States, a proceeding in partition is an**

equitable proceeding, administered under the rules applicable to a bill in equity for partition. *Gilbert v. Hopkins*, 204 Fed. 196, 122 C. C. A. 432. See also *Klever v. Seawall*, 65 Fed. 393, 12 C. C. A. 661, notwithstanding proceeding would be on law side if in state court.

[c] **Under the statutes of North Carolina**, the proceeding for a partition of lands is a proceeding at law. See *Gilbert v. Hopkins*, 204 Fed. 196, 122 C. C. A. 432.

As to jurisdiction of partition suits, see *infra*, III.

3. *Field v. Leiter*, 16 Wyo. 1, 41, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

4. *McRoberts v. Lockwood*, 49 Ohio St. 374, 34 N. E. 734; *Perry v. Richardson*, 27 Ohio St. 110; *Field v. Leiter*, 16 Wyo. 1, 40, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

5. *Field v. Leiter*, 16 Wyo. 1, 41, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997. Compare *Deery v. McClintock*, 31 Wis. 195.

[a] "It may be or it may not, depending upon the nature of the titles asserted and the relief sought. The distinction between actions at law and suits in equity are abolished by the code, but not the distinction between legal and equitable rights or legal and equitable relief." *Field v. Leiter*, 16 Wyo. 1, 41, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

6. See the statutes, and *Metcalf v. Hoopingardner*, 45 Iowa 510; *Wright v. Marsh*, 2 G. Gr. (Iowa) 94. *Contra*, *Hopkins v. Medley*, 97 Ill. 402.

It has been held that a suit in partition is a proceeding in rem.⁷

II. TIME FOR COMMENCING PROCEEDING.⁸—Statutes sometimes prohibit the institution of a proceeding for partition before the expiration of the time within which the estate of a decedent should be settled.⁹ Even without such provisions, a proceeding before an estate has been settled, as to debts against it and legacies payable, or the time allowed for that purpose has expired, has been held premature.¹⁰ But in some jurisdictions, it is not reversible error that

7. *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9, cited in *Sandiford v. Hempstead*, 97 App. Div. 163, 90 N. Y. Supp. 76. See also *Schick v. Whitecomb*, 68 Neb. 784, 94 N. W. 1023 (holding that proceeding under Nebraska statute is essentially one in rem); *Smith v. Pratt*, 13 Ohio 548; *Pillsbury's Lessee v. Dugan's Admr.*, 9 Ohio 117, 34 Am. Dec. 427; *Goudy's Lessee v. Shank*, 8 Ohio 415; *Glover's Lessee v. Ruffin*, 6 Ohio 255, all holding that proceedings under Ohio statute are analogous to proceedings in rem. Compare *Meyer v. Kuhn*, 65 Fed. 705, 13 C. C. A. 298, holding that proceedings in partition are not strictly proceedings in rem, since they are not taken directly against property; but that they are regarded, so far as they affect property, as proceedings in rem sub modo.

See generally the title "Proceedings in Rem."

8. Where taken in connection with distribution of estate, see *infra*, XV, B.

9. See the statutes, and *Beecher v. Beecher*, 43 Conn. 556; also *Hall v. Gabbert*, 213 Ill. 208, 218, 72 N. E. 806; *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401, and the cases cited *infra*, this note.

[a] The Missouri statute (1) requires the court to be satisfied that the estate has been finally settled and all claims against it fully discharged, or that the property not already partitioned, is more than sufficient to pay all claims and demands against the estate. See *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924; *Robertson v. Brown*, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485. (2) It does not provide that no partition can be had until the time limited for contesting the will has expired. *Robertson v. Brown*, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485. See also *Spratt v. Lawson*, 176 Mo. 175, 75 S. W. 642. (3) Nor does it operate to prevent a par-

tition until after the administration upon the estate of one who has been absent for a great number of years and whose whereabouts is unknown, where it does not appear that there are any debts against such person or his estate. *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924.

[b] In Nebraska, proceedings may be filed at any time after the expiration of the time for filing claims against the estate, although the estate has not been settled, and there has been no decree of distribution, provided the personal assets in the hands of the executor are sufficient to discharge the debts of the estate and the other statutory charges. *Schick v. Whitecomb*, 68 Neb. 784, 94 N. W. 1023.

[c] The Ohio statute permits the petition to be filed at any time, but the decree cannot be entered within one year from the date of death of a decedent. *Schneider v. Cordesman*, 10 Ohio Dec. 571, 8 Ohio N. P. 99; *Fryman v. Fryman*, 6 Ohio Cir. Dec. 377, 9 Ohio Cir. Ct. 91. Compare *Smith v. Montag*, 1 Ohio Dec. 224, 32 Wkly. L. Bul. 153.

[d] For rule in Wisconsin, see *Hinman v. Hinman*, 126 Wis. 191, 105 N. W. 788.

10. See Ia.—*Thomas v. Thomas*, 73 Iowa 657, 35 N. W. 693, until debts of the estate have been ascertained. N. J.—*Serena v. Moore*, 69 N. J. Eq. 687, 60 Atl. 953, proceedings should be suspended until the amount required by the executors to pay legacies, etc., is ascertained. Compare *Simpson v. Straughen* (N. J. Eq.), 19 Atl. 667, holding partition at suit of creditor permissible. S. C.—*Ex parte Worley*, 49 S. C. 41, 26 S. E. 949, until expiration of one year from death.

See also *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401, discussing holdings. But see *Reifsnnyder's Estate*, 214 Pa. 637, 63 Atl. 1075, holding that petition will not be dismissed merely because

such proceedings are had and a decree entered before the expiration of the time allowed by law for final settlement of the estate,¹¹ though the practice is not approved.¹²

III. JURISDICTION AND VENUE.¹³ — A. **JURISDICTION OF COURTS GENERALLY.** — Partition in the early history of English jurisprudence was within the jurisdiction of the law courts,¹⁴ though equity courts at a very early date assumed concurrent jurisdiction over partition in cases of real estate.¹⁵ And when the writ of partition was abolished by statute in England,¹⁶ courts of equity were vested with exclusive jurisdiction.¹⁷

In this country the remedy of partition has generally been regulated more or less by statute,¹⁸ and the jurisdiction under statute has been in some states vested in courts of law,¹⁹ and in others in courts of equity,²⁰ and in still others the remedy may be pursued in either

it was filed within one year of date of death of decedent, and explaining Keim's Estate, 201 Pa. 609, 51 Atl. 337, holding to contrary.

[a] A homestead, which is not liable for the debts of a deceased owner, may be partitioned prior to a settlement of his estate. *Hild v. Hild*, 129 Iowa 649, 106 N. W. 159, 113 Am. St. Rep. 500.

[b] A presumption that the estate has been settled exists when the suit for partition is begun after the time allowed by law for the settlement of the estate. *Minear v. Hogg*, 94 Iowa 641, 63 N. W. 444, *distinguishing* *Thomas v. Thomas*, 73 Iowa 657, 35 N. W. 693. See also *Chapman v. Kullman*, 191 Mo. 237, 245, 89 S. W. 924.

[c] Objection that the partition was premature can only be made by creditors of the estate. *White v. Jones*, 67 Tex. 638, 4 S. W. 161.

11. **Ill.**—*Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806, *followed in* *Watke v. Stine*, 214 Ill. 563, 73 N. E. 793, and *distinguishing* *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401. **Ia.**—*Smith v. Smith*, 132 Iowa 700, 109 N. W. 194, 119 Am. St. Rep. 581, "no authority is cited to the effect that action of partition will not lie until the estate of the ancestor is fully settled." **Mich.**—*Owings v. Owings*, 150 Mich. 609, 114 N. W. 393.

12. *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806. See also *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401.

13. See generally the titles "Jurisdiction;" "Venue."

14. See the following: **Ind.**—*Coquillard v. Coquillard*, 62 Ind. App. 426, 113 N. E. 474. **Ia.**—*Wright v. Marsh*, 2 G. Gr. 94. **Eng.**—*Agar v. Fairfax*, 17 Ves. Jr. 533, 34 Eng. Reprint 206;

Turner v. Morgan, 8 Ves. Jr. 143, 32 Eng. Reprint 307; *Calmady v. Calmady*, 2 Ves. Jr. 568, 30 Eng. Reprint 780; *Mundy v. Mundy*, 2 Ves. Jr. 122, 30 Eng. Reprint 554.

15. *Story's Eq. Jur.* (13th ed.) §646. See also **Ga.**—*Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655. **Ill.**—*Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222, equity jurisdiction of ancient origin. **Ind.**—*Coquillard v. Coquillard*, 62 Ind. App. 426, 113 N. E. 474. **Ia.**—*Wright v. Marsh*, 2 G. Gr. 94. **N. C.**—*Donnell v. Mateer*, 42 N. C. 94. **Wyo.**—*Field v. Leiter*, 16 Wyo. 1, 35, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997. **Eng.**—*Baring v. Nash*, 1 Ves. & B. 551, 35 Eng. Reprint 214.

16. St. 3 & 4 Wm. IV, ch. 27, §36.

17. St. 36 & 37 Vict., ch. 66, §34; *Mayfair Property Co. v. Johnston* (1894), 1 Ch. 508, 63 L. J. Ch. 399, 70 L. T. N. S. 485, 8 Rep. 781. See also *Coquillard v. Coquillard*, 62 Ind. App. 426, 113 N. E. 474; *In re Knowles*, 24 U. C. Q. B. 311.

18. See the statutes, and **Ga.**—*Roberson v. Bennett* (Ga. App.), 93 S. E. 297, only the superior court has jurisdiction in matters of partition; action in city court a nullity. **Ind.**—*Coquillard v. Coquillard*, 62 Ind. App. 426, 113 N. E. 474. **Wyo.**—*Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

19. *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

20. See the statutes, and **Ala.**—*Fitts v. Craddock*, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53; *McQueen v. Turner*, 91 Ala. 273, 8 So. 863, jurisdiction concurrent with probate court. **Md.**

a court of law or equity;²¹ and, generally, the statutory creation or regulation of the remedy has not been considered as excluding equity jurisdiction over partition in proper cases.²² Under the reform procedure combining legal and equitable remedies in the same court, jurisdiction in partition is assumed regardless of whether the remedy is regarded as legal or equitable.²³ In the absence of a contrary statute, jurisdiction of partition suits is in courts possessing general equity or chancery powers,²⁴ though in some jurisdictions, if the

Davis v. Helbig, 27 Md. 452, 92 Am. Dec. 646, upholding statute as constitutional. **Wyo.**—Field v. Leiter, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

[a] In Massachusetts, the statute excludes partition from the jurisdiction of courts of equity. Husband v. Aldrich, 135 Mass. 317; Whiting v. Whiting, 15 Gray (Mass.) 503; Adam v. Briggs Iron Co., 7 Cush. (Mass.) 361.

[b] The Pennsylvania statute confers on the court of common pleas all the powers of a court of equity in such cases. Kennedy v. Condram, 244 Pa. 264, 90 Atl. 620. But see Lee v. Lee, 12 Pa. Dist. 450.

21. Field v. Leiter, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

22. See the following: **Ark.**—Patton v. Wagner, 19 Ark. 233. **Ky.**—Beeler's Heirs v. Bullitt's Heirs, 3 A. K. Marsh. 280, 13 Am. Dec. 161. **N. Y.**—Cardwell v. Clark, 94 Misc. 433, 158 N. Y. Supp. 300. **N. C.**—Weeks v. Weeks, 40 N. C. 111, 47 Am. Dec. 358; Ramsay v. Bell, 38 N. C. 209, 42 Am. Dec. 163. **Tex.**—Grassmeyer v. Beeson, 18 Tex. 753, 70 Am. Dec. 309. **Wyo.**—Field v. Leiter, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

But see Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655.

23. Rout v. King, 103 Ind. 555, 3 N. E. 249; Coquillard v. Coquillard, 62 Ind. App. 426, 113 N. E. 474; Flynn v. McNeely (Mo.), 178 S. W. 69.

24. See the following: **U. S.**—Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644. **Ala.**—Bozone v. Daniel, 39 So. 774; McQueen v. Turner, 91 Ala. 273, 8 So. 863. **Ark.**—Dunbar v. Bourland, 88 Ark. 153, 114 S. W. 467; Patton v. Wagner, 19 Ark. 233. **Cal.**—Ryer v. Fletcher Ryer Co., 126 Cal. 482, 58 Pac. 908; Richardson v. Loupe, 80 Cal. 490, 22 Pac. 227. **Conn.**—Isham v. Gilbert, 3 Conn. 166. **Del.**—Bradford v. Robinson, 7 Houst. 29, 30 Atl. 670. **Ga.**—Johnson v. Hop-

kins, 145 Ga. 817, 59 S. E. 60; Tate v. Goff, 89 Ga. 184, 15 S. E. 30. **Ill.**—Wolkau v. Wolkau, 264 Ill. 510, 106 N. E. 461; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115; Poulter v. Poulter, 193 Ill. 641, 61 N. E. 1056. But see Hopkins v. Medley, 97 Ill. 402; Greenup v. Sewell, 18 Ill. 53. **Ia.**—Conover v. Earl, 26 Iowa 167; Wright v. Marsh, 2 G. Gr. 94. **Kan.**—Raynsford v. Holman, 68 Kan. 813, 74 Pac. 1128; Ott v. Sprague, 27 Kan. 620; Blauw v. Love, 9 Kan. App. 55, 57 Pac. 258. **Ky.**—Hopkins v. Crouch, 86 Ky. 281, 5 S. W. 557; Haggin v. Haggin, 2 B. Mon. 317. **La.**—Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 So. 434. **Me.**—Bailey v. Knapp, 79 Me. 205, 9 Atl. 356; Nash v. Simpson, 78 Me. 142, 3 Atl. 53. **Md.**—Lawes v. Lumpkin, 18 Md. 334; Phelps v. Stewart, 17 Md. 231. **Mich.**—Godfrey v. White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537. **Minn.**—Bonham v. Weymouth, 39 Minn. 92, 38 N. W. 805; Swain v. Knapp, 32 Minn. 429, 21 N. W. 414. **Miss.**—Paddock v. Shields, 57 Miss. 340. **Mo.**—Flynn v. McNeely, 178 S. W. 69; Grogan v. Grogan, 177 S. W. 649; Barnard v. Keathley, 230 Mo. 209, 130 S. W. 306. **N. H.**—Hale v. Jaques, 69 N. H. 411, 43 Atl. 121; Crowell v. Woodbury, 52 N. H. 613. **N. J.**—Bryan v. Bryan, 61 N. J. Eq. 45, 48 Atl. 341; Hay v. Estell, 18 N. J. Eq. 251; Low v. Holmes, 17 N. J. Eq. 148. **N. Y.**—Howell v. Mills, 56 N. Y. 226; Blakely v. Calder, 15 N. Y. 617; Cardwell v. Clark, 94 Misc. 433, 158 N. Y. Supp. 300. **N. C.**—Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9; Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86. **Ohio.**—McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734; Doane v. Fleming, Wright 168. **Pa.**—Armstrong v. Walker, 150 Pa. 585, 25 Atl. 53; Stewart v. Alleghany Nat. Bank, 101 Pa. 342. **R. I.**—Calland v. Conway, 14 R. I. 9; Bailey v. Sisson, 1 R. I. 233. **S. C.**

remedy at law is full and complete, the party must resort to that forum.²⁵

Partition of Personal Property.²⁶ — Ordinarily equity has exclusive jurisdiction of suits for the partition of personal property.²⁷

Federal Courts. — United States courts having general equity powers have jurisdiction over actions in partition.²⁸

B. JURISDICTION OF PROBATE COURTS.²⁹ — Courts having jurisdiction of the settlement and distribution of estates have been given jurisdiction of partition suits.³⁰ Such jurisdiction is as a rule con-

Latham *v.* Harby, 50 S. C. 428, 27 S. E. 862. **Tenn.**—Queener *v.* Trew, 6 Heisk. 59; Dean *v.* Snelling, 2 Heisk. 484. **Tex.**—Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Oliver *v.* Oliver (Tex. Civ. App.), 181 S. W. 705; James *v.* James (Tex. Civ. App.), 164 S. W. 47. **Vt.**—Spaulding *v.* Warner, 59 Vt. 646, 11 Atl. 186; Gourley *v.* Woodbury, 43 Vt. 89. **Va.**—Davis *v.* Tebbs, 81 Va. 600. **W. Va.**—Le Sage *v.* Le Sage, 52 W. Va. 323, 43 S. E. 137. **Wyo.**—Field *v.* Leiter, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

See also Julian *v.* Yeoman, 25 Okla. 448, 106 Pac. 956, 138 Am. St. Rep. 929, 27 L. R. A. (N. S.) 618; Fields *v.* Lamb, 2 Ore. 340.

[a] When a proceeding for partition is removed to the federal court, it is properly transferred to the equity calendar. Highland Park Mfg. Co. *v.* Steele, 232 Fed. 10, 146 C. C. A. 202, affirming 212 Fed. 972, decree modified, 235 Fed. 465, 149 C. C. A. 11. As to removal of causes generally, see the title "Removal of Causes."

25. Tate *v.* Goff, 89 Ga. 184, 15 S. E. 30; Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562; Lowe *v.* Burke, 79 Ga. 164, 3 S. E. 449.

26. Admiralty jurisdiction of lictation, see 1 STANDARD PROC. 401.

27. See the following: **Ala.**—Marshall *v.* Crow's Admr., 29 Ala. 278; Smith *v.* Dunn, 27 Ala. 315. **Ind.**—Robinson *v.* Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417. **Ia.**—Conover *v.* Earl, 26 Iowa 167. **Md.**—Van Dyck *v.* Bloede, 128 Md. 330, 97 Atl. 630; Crapster *v.* Griffith, 2 Bland 5. **Mich.**—Godfrey *v.* White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537. **Minn.**—Swain *v.* Knapp, 32 Minn. 429, 21 N. W. 414. **N. J.**—Low *v.* Holmes, 17 N. J. Eq. 148. **N. Y.**—Tinney *v.* Stebbins, 28 Barb. 290; Fobes *v.* Shattuck, 22 Barb. 568. **N. C.**—Weeks *v.*

Weeks, 40 N. C. 111, 47 Am. Dec. 358; Edwards *v.* Bennett, 32 N. C. 361; Irwin *v.* King, 28 N. C. 219. **Okla.**—Julian *v.* Yeoman, 25 Okla. 448, 106 Pac. 956, 138 Am. St. Rep. 929, 27 L. R. A. (N. S.) 618. **Vt.**—Spaulding *v.* Warner, 59 Vt. 646, 11 Atl. 186. **Va.**—Smith *v.* Smith, 4 Rand. (25 Va.) 95.

28. See the following: Gilbert *v.* Hopkins, 204 Fed. 196, 122 C. C. A. 432; Klever *v.* Seawall, 65 Fed. 393, 12 C. C. A. 661; Woods *v.* Woods, 184 Fed. 159; Daniels *v.* Benedict, 50 Fed. 347; Aspen Min. & S. Co. *v.* Rucker, 28 Fed. 220; *Ex parte* Biddle, 2 Mason 472, 3 Fed. Cas. No. 1,391.

Jurisdiction of federal courts, see generally the title "United States Courts."

29. As to probate courts generally, see the title "Probate Courts."

30. See the statutes, and **U. S.**—Robinson *v.* Fair, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415. **Ala.**—Cross *v.* Watson, 197 Ala. 171, 72 So. 394; Caperton *v.* Hall, 118 Ala. 265, 24 So. 122. See also Layton *v.* Campbell, 155 Ala. 220, 46 So. 775. Compare Finch *v.* Smith, 146 Ala. 644, 41 So. 819. **Cal.**—Buckley *v.* Superior Court, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135. **Conn.**—Gates *v.* Treat, 17 Conn. 388. **Ill.**—Ames *v.* Ames, 143 Ill. 321, 36 N. E. 110. **Ind.**—Shull *v.* Kennon, 12 Ind. 34; Bennet *v.* East, 7 Ind. 174; Coquillard *v.* Coquillard, 62 Ind. App. 426, 113 N. E. 474; Romy *v.* State, 32 Ind. App. 146, 67 N. E. 998. **Ia.**—Hooke *v.* Hooke, 6 La. 420. **Me.**—Earl *v.* Rowe, 35 Me. 414, 58 Am. Dec. 714. **Md.**—Phelps *v.* Stewart, 17 Md. 231. **Mass.**—Sigourney *v.* Sibley, 22 Pick. 507, 33 Am. Dec. 762; Sigourney *v.* Sibley, 21 Pick. 101, 32 Am. Dec. 248; Wainwright *v.* Dorr, 13 Pick. 333. **Mich.**—Prince *v.* Clark, 81 Mich. 167, 45 N. W. 663. **Minn.**—Hurley *v.* Hamilton, 37 Minn. 160, 33 N. W. 912. **Miss.**

current rather than exclusive.³¹

C. RETENTION OF JURISDICTION BY COURT FIRST ASSUMING SAME. When more than one court in a state has concurrent jurisdiction of the action, the one which first assumes jurisdiction acquires exclusive jurisdiction of the action.³² So also, when a court of chancery has possession of a case on some ground of equity jurisdiction wholly distinct from partition, the cause will be retained for that purpose.³³

D. TERRITORIAL JURISDICTION AND VENUE.—Generally speaking, courts of one state have no jurisdiction to partition lands lying in another state.³⁴

The venue in which the action must be brought is usually prescribed by statute.³⁵ The jurisdiction is usually restricted to lands within the county.³⁶ If the property is situated in different counties, the suit

Lum v. Reed, 53 Miss. 73; Currie v. Stewart, 26 Miss. 646, 649, 61 Am. Dec. 500. **N. H.**—Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780. **N. J.** Richman v. Baldwin, 21 N. J. L. 395; Curtis v. Jenkins, 20 N. J. L. 679. **Pa.** Waln's Appeal, 4 Pa. 502; Selfridge's Appeal, 9 Watts & S. 55; Bishop's Appeal, 7 Watts & S. 251. **S. C.**—Davenport v. Caldwell, 10 S. C. 317; Faust v. Bailey, 5 Rich. L. 107; Gates v. Iriek, 2 Rich. L. 593. **Tenn.**—Wilcox v. Cannon, 1 Coldw. 369. **Tex.**—Hutchens v. Dresser (Tex. Civ. App.), 196 S. W. 969. **Vt.**—Grice v. Randall, 23 Vt. 239.

But see Hanner v. Silver, 2 Ore. 336.

Partition as part of distribution of estate, see *infra*, XV.

31. **Ark.**—Dunbar v. Bourland, 88 Ark. 153, 114 S. W. 467. **Ind.**—Coquillard v. Coquillard, 62 Ind. App. 426, 113 N. E. 474. **Kan.**—Gordon v. Munn, 81 Kan. 537, 106 Pac. 286, 25 L. R. A. (N. S.) 917; Shorten v. Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587. **Mo.**—Chrisman v. Divinia, 141 Mo. 122, 41 S. W. 920.

See also Coltrane v. Laughlin, 157 N. C. 282, 72 S. E. 961.

[a] In Texas (1) until the administration of an estate is closed, the county court has exclusive jurisdiction to decree a partition of lands (Branch v. Hanrick, 70 Tex. 731, 8 S. W. 539. See Wilkinson v. McCart, 53 Tex. Civ. App. 507, 116 S. W. 400), (2) but otherwise the district court has power to partition under its general jurisdiction. Oliver v. Oliver (Tex. Civ. App.), 181 S. W. 705; Williamson v. McElroy (Tex. Civ. App.), 155 S. W. 998.

32. See Dunbar v. Bourland, 88 Ark.

153, 114 S. W. 467; Wagstaff v. Marey, 25 Misc. 121, 54 N. Y. Supp. 1021; Honsinger v. Stewart, 34 N. D. 513, 159 N. W. 12; also the title "**Jurisdiction.**"

33. Maupin v. Gains, 125 Ark. 181, 188 S. W. 552.

34. See the following: **Ky.**—Page v. McKee, 3 Bush 135, 96 Am. Dec. 201. **Neb.**—Reams v. Sinclair, 88 Neb. 738, 130 N. W. 562, Ann. Cas. 1912B, 989; Schick v. Whiteomb, 68 Neb. 784, 94 N. W. 1023. **Tenn.**—Johnson v. Kimbro, 3 Head 557, 75 Am. Dec. 781. **Tex.**—Holt v. Guerguin, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136. **Va.**—Pillow v. Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Wimer v. Wimer, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126.

See also the title "**Proceedings in Rem.**"

[a] When all the parties are before the court, and there are no minors, the equities growing out of the judgment may be enforced, though the judgment itself be not enforceable. Page v. McKee, 3 Bush (Ky.) 135, 96 Am. Dec. 201.

35. See the statutes, and Johnson v. Detrick, 152 Mo. 243, 53 S. W. 891.

[a] An action by devisees must be brought in the county where the personal representative qualified. Boreing v. Melcon, 159 Ky. 14, 166 S. W. 612, decree modified, 159 Ky. 623, 167 S. W. 870.

36. **Ala.**—Turnipseed v. Fitzpatrick, 75 Ala. 297. **Ind.**—Romy v. State, 32 Ind. App. 146, 67 N. E. 998. **Ky.** Boon v. Nelson's Heirs, 2 Dana 391. **Mass.**—Mitchell v. Starbuck, 10 Mass. 5; *In re Bonner*, 4 Mass. 122. **Miss.**

may generally be brought in either.³⁷

E. OBJECTIONS TO JURISDICTION AND WAIVER THEREOF.—If the court will not acquire jurisdiction of the subject matter, failure to object will not confer jurisdiction.³⁸ When such jurisdiction has been acquired, all other jurisdictional objections are waived unless properly made.³⁹

IV. PARTIES.⁴⁰—**A. WHO MAY MAINTAIN SUIT OR ACTION.** The writ of partition lay at common law only between parceners.⁴¹ By statutes 31 and 32, Henry VIII, the remedy was extended to joint tenants and tenants in common whether of estates of inheritance or for life or years.⁴² And now, any cotenant or joint tenant may, generally speaking, maintain proceedings for partition.⁴³ In some

Nugent v. Powell, 63 Miss. 99. **S. C.** *Brown v. McMullen*, 1 Nott & McC. 252. **Tex.**—*Coryell v. Linthecum*, 11 S. W. 1092; *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. 534; *Grant v. Reavis* (Tex. Civ. App.), 34 S. W. 132.

[a] In Maine the suit may be brought in any county; but if an issue of fact is joined the cause is remitted for trial to the county where the land lies. *Sewall v. Ridlon*, 5 Greenl. (Me.) 458.

37. **U. S.**—*Nelson v. Moon*, 3 McLean 319, 17 Fed. Cas. No. 10,111. **Ala.**—*Bozone v. Daniel*, 39 So. 774. **Ark.**—*Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913. **Cal.**—*Middlecoff v. Cronise*, 155 Cal. 185, 100 Pac. 232; *Murphy v. Los Angeles County Superior Court*, 138 Cal. 69, 70 Pac. 1070. **Ga.**—*Royston v. Royston*, 21 Ga. 161. **Ind.**—*Shull v. Kennon*, 12 Ind. 34. **Ky.** *Perkins v. McCarley*, 97 Ky. 43, 29 S. W. 867. **Md.**—*Roessner v. Mitchell*, 122 Md. 460, 89 Atl. 722. **Mo.**—*Yount v. Yount*, 15 Mo. 383. **N. C.**—*In re Skinner's Heirs*, 22 N. C. 63. **Pa.** *White's Estate*, 3 Pa. Dist. 697, 14 Pa. Co. Ct. 249. **Tex.**—*Osborn v. Osborn*, 62 Tex. 495.

[a] When a majority of the interested parties reside in a county where a part of the property is situated, suit must be brought in that county; but if all are nonresidents or a majority do not reside in any county, the suit must be brought where an equal or greater part of the property is situate. *Johnson v. Detrick*, 152 Mo. 243, 53 S. W. 891.

38. *Bompart v. Roderman*, 24 Mo. 385. See generally the title "Jurisdiction."

39. **U. S.**—*Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251. **Me.**—*Sewall*

v. Ridlon, 5 Greenl. 458. **N. H.**—*Ela v. McConihe*, 35 N. H. 279. **Tenn.** *Johnson v. Murray*, 12 Lea 109.

See also *In re Swan*, 238 Pa. 430, 86 Atl. 275.

40. See generally the title "Parties."

41. **Miss.**—*Paddock v. Shields*, 57 Miss. 340. **Vt.**—*Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498. **Wyo.** *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

[a] The alienee of a parcener could not, at common law, have a writ of partition against the other parcener, though the other parcener could have such writ against him. *Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498.

42. See *Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498; *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

[a] The alienee of a parcener (1) could bring the writ, as they became tenants in common under the statute. *Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498. See *Paddock v. Shields*, 57 Miss. 340. (2) But he could not join with another parcener in bringing such writ against a third parcener, inasmuch as the writ was given to one at common law, and to the other by statute. *Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498.

43. **Ala.**—*O'Neal v. Cooper*, 191 Ala. 182, 67 So. 689. **Ark.**—*Lester v. Kirtley*, 83 Ark. 554, 104 S. W. 213. **Conn.** *Candee v. Candee*, 87 Conn. 85, 86 Atl. 758. **Fla.**—*Christopher v. Mungen*, 61 Fla. 513, 55 So. 273; *Dallam v. Sanchez*, 56 Fla. 779, 47 So. 871. **Ill.** *Barr v. Barr*, 273 Ill. 621, 113 N. E. 36; *Brown v. Sunderland*, 251 Ill. 523, 96 N. E. 345. **Ia.**—*Noecker v. Walling-*

jurisdictions, life tenants or a tenant for years holding land jointly may maintain partition;⁴⁴ and by statute, the right has been conferred on reversioners or remaindermen, though the preceding particular estate has not terminated.⁴⁵ A trustee holding the legal title

ford, 133 Iowa 605, 111 N. W. 37. **Kan.**—Kinkadee v. Maxwell, 75 Kan. 50, 88 Pac. 523. **La.**—Beemel's Succession, 117 La. 744, 42 So. 256. **Mass.**—Haven v. Haven, 181 Mass. 573, 64 N. E. 410. **Minn.**—Hunt v. Meeker County Abstract, etc. Co., 128 Minn. 207, 150 N. W. 798, Ann. Cas. 1916D, 925. See Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293. **Mo.**—Halferty v. Karr, 188 Mo. App. 241, 175 S. W. 146. **N. Y.**—Obecnay v. Goetz, 116 App. Div. 807, 102 N. Y. Supp. 232; Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. Supp. 76; New York Home Missionary Soc. v. Baptist, etc. Church, 73 Misc. 128, 130 N. Y. Supp. 879. **N. C.**—Taylor v. Carrow, 156 N. C. 6, 72 S. E. 76. **R. I.**—Updike v. Adams, 22 R. I. 432, 48 Atl. 384. **Tenn.**—Davis v. Solari, 132 Tenn. 225, 177 S. W. 939. **Tex.**—Huth v. Huth (Tex. Civ. App.), 187 S. W. 523. **Va.**—Arendall v. Arendall, 119 Va. 1, 89 S. E. 87. **W. Va.**—Le Sage v. Le Sage, 52 W. Va. 323, 43 S. E. 137. **Eng.**—Bradshaw v. Fane, 3 Drew. 534, 2 Jur. N. S. 247, 25 L. J. Ch. 413, 4 Wkly. Rep. 422, 61 Eng. Reprint 1006. **Can.**—Archibald v. Handley, 32 Nova Scotia 1.

See also: **D. C.**—Prall v. Prall, 39 App. Cas. 100. **Okl.**—Julian v. Yeoman, 25 Okla. 448, 106 Pac. 956, 138 Am. St. Rep. 929, 27 L. R. A. (N. S.) 618. **P. I.**—Segui v. Segui, 14 Phil. Isl. 102. **Wash.**—Eckert v. Schmitt, 60 Wash. 23, 110 Pac. 635.

[a] **An alien co-tenant** may maintain the action. Hall v. Hall, 13 Hun (N. Y.) 306 (affirmed, 81 N. Y. 130); Nolan v. Command, 11 Civ. Proc. (N. Y.) 295.

[b] **A committee of a lunatic** may maintain an action of partition. Klohs v. Reifsnnyder, 61 Pa. 240. See generally the title "Insane Persons."

[c] **Husband and Wife.**—Equity has entertained suits between husband and wife for partition. See 11 STANDARD PROC. 712. But see Marston v. Ward, 35 Tex. 797; Howe v. Blandon, 21 Vt. 315.

[d] **Two or more joint tenants (1)** may unite as parties plaintiff (Me. Upham v. Bradley, 17 Me. 423. **Mo.**

Chouteau v. Paul, 3 Mo. 260. **N. H.**—Ladd v. Perley, 18 N. H. 395), (2) though it is not at all certain that all the co-tenants may join as plaintiffs. Swett v. Bussey, 7 Mass. 503. (3) In an early Missouri case this view was also maintained (Bompart v. Roderman, 24 Mo. 385), (4) but it was subsequently overruled. Larned v. Renshaw, 37 Mo. 458; Waugh v. Blumenthal, 28 Mo. 462.

[e] **An administrator** has no authority to institute or maintain proceedings in equity for the partition of land in which his intestate was interested. Terrell v. Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94.

[f] **In Massachusetts** a proceeding in equity for partition of land between tenants in common cannot be maintained. Moseley v. Bolster, 201 Mass. 135, 87 N. E. 606; Husband v. Aldrich, 135 Mass. 317.

44. **Ind.**—Hawkins v. McDougal, 125 Ind. 597, 25 N. E. 807. See also Shaw v. Beers, 84 Ind. 528. **Ky.**—Eversole v. Combs, 130 Ky. 82, 112 S. W. 1132. **N. Y.**—Jenkins v. Fahey, 73 N. Y. 355; Aekley v. Dygert, 33 Barb. 176. **Eng.**—Gaskell v. Gaskell, 6 Sim. 643, 58 Eng. Reprint 735; Hobson v. Sherwood, 4 Beav. 184, 49 Eng. Reprint 309.

[a] **Tenants by the curtesy** are included in this classification. **N. J.**—Weise v. Welsh, 30 N. J. Eq. 431. **N. Y.**—Tilton v. Vail, 42 Hun 638, 4 N. Y. St. 500; Bender v. Van Allen, 28 Misc. 304, 59 N. Y. Supp. 885. **Va.**—Otley v. McAlpine's Heirs, 2 Gratt. (43 Va.) 340. Compare Reed v. Reed, 107 N. Y. 545, 14 N. E. 442.

45. See the statutes, and **Ala.**—Fitts v. Craddock, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53; McQueen v. Turner, 91 Ala. 273, 8 So. 863. **Ind.**—Shaw v. Beers, 84 Ind. 528. **Mass.**—Johnson v. Johnson, 7 Allen 196, 83 Am. Dec. 676; Hodgkinson's Petition, 12 Pick. 374. **Mich.**—Metcalfe v. Miller, 96 Mich. 459, 56 N. W. 16, 35 Am. St. Rep. 617. **Miss.**—Belew v. Jones, 56 Miss. 342. **Mo.**—Simmons v. McAdaras, 6 Mo. App. 297. **N. H.**—Brown v. Brown, 8 N. H. 93. **N. Y.**—Jenkins v. Fahey, 73 N. Y. 355; Sullivan v. Sul-

of lands held in common with others may maintain the action.⁴⁶ So may the mortgagor, while holding the legal title of land held in common.⁴⁷

An infant cannot maintain an action in partition either alone,⁴⁸ or jointly with an adult,⁴⁹ unless authorized by statute,⁵⁰ though upon this proposition there are authorities to the contrary.⁵¹

B. PARTIES DEFENDANT.—1. **Generally.**—Every person having any interest in the property should be made a party to a partition

livan, 66 N. Y. 37. **N. C.**—Osborne v. Mull, 91 N. C. 203; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639. **Ore.** Savage v. Savage, 19 Ore. 112, 23 Pac. 890, 20 Am. St. Rep. 795. **W. Va.** Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 56; Bice v. Nixon, 34 W. Va. 107, 11 S. E. 1004.

But see *McConnell v. Bell*, 121 Tenn. 198, 114 S. W. 203, 130 Am. St. Rep. 770; *Holt v. Hamlin*, 120 Tenn. 496, 111 S. W. 241.

46. **N. J.**—*Smith v. Gaines*, 38 N. J. Eq. 65, reversed on other grounds, 39 N. J. Eq. 545. **N. Y.**—*Gallie v. Eagle*, 65 Barb. 583, 1 Thomp. & C. 124; *Andrews v. Kirk*, 160 N. Y. Supp. 434. **Wis.**—*Munson v. Bringe*, 146 Wis. 393, 131 N. W. 904, Ann. Cas. 1912C, 325.

[a] **A cestui que trust** (1) cannot maintain partition proceedings. *Harris v. Larkins*, 22 Hun (N. Y.) 488 (2) Nor need he be joined. *Smith v. Gaines*, 38 N. J. Eq. 65, reversed on other grounds, 39 N. J. Eq. 545.

47. **La.**—*Bienvenu v. Factors*, etc. Ins. Co., 33 La. Ann. 209. **Me.**—*Up- ham v. Bradley*, 17 Me. 423; *Call v. Barker*, 12 Me. 320. **Mass.**—*Colton v. Smith*, 11 Pick. 311, 22 Am. Dec. 375. See *Bradley v. Fuller*, 23 Pick. 1. **N. Y.** *Reid v. Gardner*, 65 N. Y. 578; *Wotten v. Copeland*, 7 Johns. Ch. 140. **R. I.** *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466.

[a] But he cannot do so after the mortgagee has entered for condition broken. *Blodgett v. Hildreth*, 8 Allen (Mass.) 186. See *Bradley v. Fuller*, 23 Pick. (Mass.) 1; *Gibbs v. Haydon*, 47 L. T. N. S. 184, 30 Wkly. Rep. 726.

[b] Where he does not hold the legal title, the mortgagor cannot maintain the action. **Mass.**—*Blodgett v. Hildreth*, 8 Allen 186. **N. J.**—*Yglesias v. Dewey*, 60 N. J. Eq. 62, 47 Atl. 59. **Can.**—*In re McCully*, 23 Ont. L. R. 156, 2 Ont. W. N. 407, 662, 18 Ont. W. R. 236.

48. *Dineen v. Hall*, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392.

Necessity for appointment of guardian ad litem, see 10 STANDARD PROC. 715.

49. *Dineen v. Hall*, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392.

[a] **Infant may be a party defendant** but not plaintiff. *Brown v. Brown*, 9 Ont. Pr. (Can.) 245. See *infra*, IV, B, 2, d.

[b] **In England** when infants are interested parties, the decree should provide for the appointment of a trustee. *Bowra v. Wright*, 4 DeG. & Sm. 265, 20 L. J. Ch. 216, 15 Jur. 981, 64 Eng. Reprint 825; *Shepherd v. Church- ill*, 25 Beav. 21, 53 Eng. Reprint 543; *Orger v. Sparke*, 9 Wkly. Rep. 180.

[c] **This was the early rule (1) in New York** (*Postley v. Kain*, 4 Sandf. Ch. 508; *Gallatian v. Cunningham*, 8 Cow. 361), (2) but at present the surrogate may in a proper case grant authority. *Thompson v. Hart*, 169 N. Y. 571, 61 N. E. 1135; *Clark v. Clark*, 14 Abb. Pr. (N. Y.) 299.

50. *Jackson v. Edwards*, 7 Paige (N. Y.) 386. See also: **U. S.**—*Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415. **Ala.**—*Coker v. Pitts*, 37 Ala. 692. **Ill.**—*Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115. **Ind.**—*Schee v. McQuilken*, 59 Ind. 269.

51. **Ind.**—*Shull v. Kennon*, 12 Ind. 34. **La.**—*Hooke v. Hooke*, 6 La. 472. **Miss.**—*Cocks v. Simmons*, 57 Miss. 183; *Wilson v. Duncan*, 44 Miss. 642. **Mo.** *Robertson v. Brown*, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485; *Chris- man v. Divinia*, 141 Mo. 122, 41 S. W. 920. **Ohio.**—*Goudy v. Shank*, 8 Ohio 415. **Tenn.**—*Burks v. Burks*, 7 Baxt. 353; *Freeman v. Freeman*, 9 Heisk. 301. *Compare Davidson v. Bowden*, 5 Sneed 129. **Va.**—*Lucey v. Kelly*, 117 Va. 318, 84 S. E. 661; *Zirkle v. McCue*, 26 Gratt. (67 Va.) 517. **W. Va.**—*Thomp- son v. Buffalo Land & Coal Co.*, 77 W. Va. 782, 83 S. E. 1040. **Eng.**—*Davis*

suit or action,⁵² the judgment having no effect on parties or the title possessed by a party omitted from the action.⁵³ On the other hand,

v. Ingram (1897), 1 Ch. 477, 66 L. J. Ch. 386, 45 Wkly. Rep. 459.

See also *Culley v. Elford*, 187 Ala. 165, 65 So. 381; *Hartmann v. Hartmann*, 59 Ill. 103.

52. See the following: **Ala.**—*Culley v. Elford*, 187 Ala. 165, 65 So. 381; *Crampton v. Rutledge*, 157 Ala. 141, 47 So. 214; *Ferris v. Montgomery Land & Imp. Co.*, 94 Ala. 557, 10 So. 607, 33 Am. St. Rep. 146. **Cal.**—*De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81. **Del.**—*Candy v. Stradley*, 1 Del. Ch. 113. **Fla.**—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77. **Ga.**—*Vason v. Clanton*, 102 Ga. 540, 29 S. E. 456; *Jones v. Napier*, 93 Ga. 582, 20 S. E. 41. **Ill.**—*Barr v. Barr*, 273 Ill. 621, 113 N. E. 36; *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401. **Ind.**—*Schissel v. Dickson*, 129 Ind. 139, 28 N. E. 540; *Milligan v. Poole*, 35 Ind. 64. **Ia.**—*Granger v. Granger*, 172 Iowa 159, 152 N. W. 503, 154 N. W. 305. **Ky.**—*Kendrick v. Kendrick*, 4 J. J. Marsh. 241; *Batterton v. Chiles*, 12 B. Mon. 348, 54 Am. Dec. 539. **La.**—*Smith v. Smith*, 131 La. 970, 60 So. 634; *Gibbs v. Jackson's Exr.*, 47 La. Ann. 766, 17 So. 291; *Ware v. Vignes*, 35 La. Ann. 288. **Me.**—*Richardson v. Watts*, 94 Me. 476, 48 Atl. 180; *Tilton v. Palmer*, 31 Me. 486. **Mich.**—*Benedict v. Beurmann*, 90 Mich. 396, 51 N. W. 461. **Miss.**—*Moore v. Summerville*, 80 Miss. 323, 31 So. 793, 32 So. 294; *Vick v. Vicksburg*, 1 How. 379, 31 Am. Dec. 167. **Mo.**—*Grogan v. Grogan*, 177 S. W. 649; *Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643; *Hiles v. Rule*, 121 Mo. 248, 25 S. W. 959; *Estes v. Nell*, 108 Mo. 172, 18 S. W. 1006. **N. Y.**—*Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811 (*affirming* 66 Hun 381, 21 N. Y. Supp. 493, 49 N. Y. St. 357); *Skillin v. Central Trust Co.*, 80 App. Div. 206, 80 N. Y. Supp. 188; *Booth v. Fordham*, 73 App. Div. 109, 76 N. Y. Supp. 664. But see *Van Meter v. Kelly*, 115 N. Y. Supp. 943. **Ohio.**—*Barr v. Chapman*, 5 Ohio Cir. Ct. 69, 3 Ohio Cir. Dec. 36. **Pa.**—*Stickles v. Oviatt*, 212 Pa. 219, 61 Atl. 908; *Kimmel's Estate*, 20 Pa. Dist. 137. **P. I.**—*Albano v. Aguiran*, 22 Phil. Isl. 345; *Gregorio v. Osio*, 21 Phil. Isl. 619. **Tex.**—*Black v. Black*, 95 Tex. 627, 69 S. W. 65; *McKinney v. Moore*, 73 Tex. 470, 11

S. W. 493; *McDade v. Vogel* (Tex. Civ. App.), 173 S. W. 506. **W. Va.**—*Oneal v. Stimson*, 61 W. Va. 551, 56 S. E. 889. **Wis.**—*Morse v. Stockman*, 65 Wis. 36, 26 N. W. 176.

See also *infra*, IV, B, 2: and generally the title "Parties."

[a] **Another Statement.**—All persons interested in the suit and whose rights will be directly affected by the decree must be made parties, unless they are too numerous, or some of them are beyond the reach of process. *Culley v. Elford*, 187 Ala. 165, 65 So. 381.

[b] **An alien** may be made a party defendant though he has not declared his intention to become a citizen. *Nolan v. Command*, 11 Civ. Proc. (N. Y.) 295.

[c] **A defendant having an interest in more than one capacity** must be made a defendant in every capacity in which he has an interest in the property. *Numsen v. Lyon*, 87 Md. 31, 39 Atl. 533. But see *Dienl v. Lambart*, 9 Civ. Proc. (N. Y.) 267, holding that it is sufficient if the various interests of a party appear from the averments of the complaint.

[d] **Failure to take objection to want of parties** in the lower court does not prevent the question being raised on appeal. *Holloway v. McIlhenry Co.*, 77 Tex. 657, 14 S. W. 240. See generally the title "Parties."

53. See the following: **U. S.**—*Glover v. Bradley*, 233 Fed. 721, 147 C. C. A. 487, Ann. Cas. 1917A, 921. **Ala.**—*Tribble v. Wood*, 193 Ala. 192, 68 So. 986; *Caperton v. Hall*, 118 Ala. 265, 24 So. 122. **Ill.**—*Clark v. Zaleski*, 268 Ill. 427, 109 N. E. 321. **Ia.**—*Parkhill v. Doggett*, 135 Iowa 113, 112 N. W. 189; *Furene's v. Severtson*, 102 Iowa 322, 71 N. W. 196. **N. Y.**—*Harrison v. Higgins*, 218 N. Y. 553, 113 N. E. 551; *Moore v. Appleby*, 108 N. Y. 237, 15 N. E. 377, *affirming* 36 Hun 368. **N. C.**—*Hall v. Want*, 61 N. C. 502. **Pa.**—*Perrine v. Kohr*, 205 Pa. 602, 55 Atl. 790. **P. I.**—*Sanidad v. Cabotaje*, 5 Phil. Isl. 204. **Tenn.**—*Glasscock v. Tate*, 107 Tenn. 486, 64 S. W. 715. **Tex.**—*Black v. Black*, 95 Tex. 627, 69 S. W. 65. **W. Va.**—*High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536. **Eng.**—*Atkinson v.*

persons having no interest in the property should not be made parties.⁵⁴ In the case of strict partition, it is sufficient to make the present owner, or, in some cases the tenant for life of each share, a party.⁵⁵

2. Necessary and Proper Parties.—a. *Generally.*—Persons who claim under the same title are the only necessary parties.⁵⁶ Under some statutes all persons interested in the reversion or remainder are necessary parties in an action by life tenants;⁵⁷ but in some jurisdictions, reversioners or remaindermen are proper,⁵⁸ but not necessary parties.⁵⁹ A mortgagee is a necessary party,⁶⁰ as are also purchasers under executory contracts of sale of separate parcels,⁶¹ though there is authority to the effect that a lienholder need not be made a party;⁶²

Holtby, 10 H. L. Cas. 313, 11 Eng. Re-print 1047.

Effect of judgment on partition generally, see *infra*, XIV.

54. Perkins v. Perkins (Tex. Civ. App.), 166 S. W. 915.

55. McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. ed. 1015, followed in Culley v. Elford, 187 Ala. 165, 65 So. 381. See Monarque v. Monarque, 80 N. Y. 320.

56. McIntire v. McIntire's Exr., 82 Ky. 502. See also Flournoy v. Kirkman, 270 Mo. 1, 192 S. W. 462.

57. Ala.—Culley v. Elford, 187 Ala. 165, 65 So. 381; Fitts v. Craddock, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53; McQueen v. Turner, 91 Ala. 273, 8 So. 863. **Ind.**—Tower v. Tower, 141 Ind. 223, 40 N. E. 747; Shaw v. Beers, 84 Ind. 528. **N. Y.**—Jenkins v. Fahey, 73 N. Y. 355; O'Toole v. O'Toole, 39 App. Div. 302, 56 N. Y. Supp. 963; Levy v. Levy, 79 Hun 290, 29 N. Y. Supp. 384. **N. C.**—Bell v. Adams, 81 N. C. 118. **Eng.**—Kelly v. Shelton, 1 Jones Exch. 555, 2 Jones Exch. 351.

[a] **Even Though Such Interests Be Contingent.**—Paget v. Melcher, 42 App. Div. 76, 58 N. Y. Supp. 913.

[b] **The decree will not bind remaindermen in existence,** unless they are joined as parties. Culley v. Elford, 187 Ala. 165, 65 So. 381. **Effect of judgment or decree generally,** see *infra*, XIV.

58. Piano Mfg. Co. v. Kindschi, 131 Wis. 590, 111 N. W. 680.

59. Mo.—Collins v. Crawford, 103 S. W. 537; Robertson v. Brown, 187 Mo. 452, 86 S. W. 187, 106 Am. St. Rep. 485. **Pa.**—Smith's Estate, 2 Del. Co. Ct. 423. **S. C.**—Thomas v. Poole, 19 S. C. 323. **Wis.**—Piano Mfg. Co. Kindschi, 131 Wis. 590, 111 N. W. 680.

60. Cal.—Rich v. Smith, 26 Cal. App. 775, 148 Pac. 545. **Ill.**—Barr v. Barr,

273 Ill. 621, 113 N. E. 36; McGregor v. Malarkey, 96 Ill. App. 421. **Ia.** Rider v. Clark, 54 Iowa 292, 6 N. W. 271; Metcalf v. Hoopingardner, 45 Iowa 510. **Mass.**—Bradley v. Fuller, 23 Pick. 1; Munroe v. Luke, 19 Pick. 39; Colton v. Whitton, 38 N. H. 127, 75 Am. Dec. 375. **Mich.**—Eberts v. Fisher, 44 Mich. 551, 7 N. W. 211. **N. H.**—Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163. **Can.**—McDougall v. McDougall, 14 Grant Ch. (U. C.) 267.

[a] **Method of Raising Objection.** Where the bill shows on its face that the persons holding the incumbances are not made parties, the proper practice is to take advantage of it by demurrer. Barr v. Barr, 273 Ill. 621, 113 N. E. 36. See generally the titles "**Demurrer**;" "**Parties**."

61. Rich v. Smith, 26 Cal. App. 775, 148 Pac. 545.

62. U. S.—East Coast Cedar Co. v. People's Bank, 111 Fed. 446, 49 C. C. A. 422. **Ala.**—Inman v. Prout, 90 Ala. 362, 7 So. 842; Fennell v. Tucker, 49 Ala. 453. **Ind.**—Green v. Brown, 146 Ind. 1, 44 N. E. 805. **Ky.**—Barry v. Baker, 29 Ky. L. Rep. 573, 93 S. W. 1061; Talbott v. Campbell, 23 Ky. L. Rep. 2198, 67 S. W. 53. **Md.**—Thruston v. Minke, 32 Md. 571. **Mich.**—Eberts v. Fisher, 44 Mich. 551, 7 N. W. 211. **N. J.**—Greiss v. Noisky, 82 N. J. Eq. 1, 87 Atl. 155; Becker v. Carev, 36 Atl. 770; Pomeroy v. Pomeroy, 55 N. J. Eq. 568, 37 Atl. 754. **N. Y.** Sebring v. Mersereau, 9 Cow. 344 (*affirming* 1 Hopk. Ch. 501); Harwood v. Kirby, 1 Paige 469; Wotten v. Cope-land, 7 Johns. Ch. 140; Flamm v. Perry, 78 App. Div. 603, 80 N. Y. Supp. 125. **N. C.**—Holley v. White, 172 N. C. 77, 89 S. E. 1061. **Pa.**—Stewart v. Allegheny Nat. Bank, 101 Pa. 342; Wright v. Viekers, 81 Pa. 122; Long's Appeal, 77 Pa. 151. **R. I.**—Udpike v.

but such persons are at least proper parties, though they may not be considered necessary parties.⁶³ One who is in possession and holds under a claim of adverse possession is not a proper party to a suit for partition.⁶⁴ However, in jurisdictions where the court in an action for partition may settle disputed rights or interests of the parties to the action, all persons claiming an interest whether adverse or not are proper parties.⁶⁵ A tenant, who has no interest in the fund sought to be partitioned, is neither a necessary,⁶⁶ nor a proper⁶⁷ party. Trustees and beneficiaries are proper parties.⁶⁸

When the state is a necessary party, and declines to consent to be made a party, partition cannot be had.⁶⁹

Persons unknown may be made parties to the action and be bound by the judgment.⁷⁰

Adams, 22 R. I. 432, 48 Atl. 384. **S. C.** Marion County Lumb. Co. v. Tilghman Lumb. Co., 84 S. C. 505, 66 S. E. 124, 877. **Va.**—Martin v. Martin, 95 Va. 26, 27 S. E. 810. Compare Conrad's Admr. v. Fuller, 98 Va. 16, 34 S. E. 893. **W. Va.**—Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Childers v. Loudin, 51 W. Va. 559, 42 S. E. 637. **Eng.**—Swan v. Swan, 8 Price 518, 22 Rev. Rep. 770; Baring v. Nash, 1 Ves. & B. 551, 35 Eng. Reprint 214.

[a] **A holder of an easement** or right of way over the property should not ordinarily be made a party to the partition suit. **Mass.**—Weston v. Foster, 7 Metc. 297. **Mich.**—Hooper v. McAllister, 115 Mich. 174, 73 N. W. 133. **N. J.**—Bouvier v. Baltimore, etc. R. Co., 65 N. J. L. 313, 47 Atl. 772.

63. **Mich.**—Wettlaufer v. Ames, 133 Mich. 201, 94 N. W. 950, 103 Am. St. Rep. 449; O'Connor v. Keenan, 132 Mich. 646, 94 N. W. 186. **Mo.**—Burnes' Est. v. Porter, 82 Mo. App. 66. **N. Y.** Gardner v. Luke, 12 Wend. 269; Smith v. Siblich, 12 N. Y. Supp. 905, 35 N. Y. St. 682. **N. C.**—Holley v. White, 172 N. C. 77, 89 S. E. 1061.

Compare Thruston v. Minke, 32 Md. 571.

[a] **The holder of a contract lien** upon the property is a proper party, though he may not be a necessary party. Grogan v. Grogan (Mo.), 177 S. W. 649.

64. **Ala.**—Cross v. Watson, 197 Ala. 171, 72 So. 394. **Ill.**—Clark v. Zaleski, 268 Ill. 427, 109 N. E. 321. **Me.**—Tilton v. Palmer, 31 Me. 486. **Mich.** McCamman v. Davis, 162 Mich. 435, 127 N. W. 329. **Miss.**—Nugent v. Powell, 63 Miss. 99. **N. J.**—McCullough

v. Ward, 76 N. J. Eq. 454, 79 Atl. 438. **N. C.**—Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

[a] **Interest in Land Necessary.** Reynolds v. Love, 191 Ala. 218, 68 So. 27.

65. **Cal.**—Morenhout v. Higuera, 32 Cal. 289. **Ky.**—McIntire v. McIntire's Exr., 82 Ky. 502. **N. Y.**—Satterlee v. Kobbe, 173 N. Y. 91, 65 N. E. 952; Townsend v. Bogert, 126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835; Lawrence v. Norton, 116 App. Div. 896, 102 N. Y. Supp. 431.

66. Gailey v. Ricketts, 123 Ark. 18, 184 S. W. 422.

67. Gailey v. Ricketts, 123 Ark. 18, 184 S. W. 422.

68. **Ga.**—Welch v. Agar, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380. **Md.**—Numsen v. Lyon, 87 Md. 31, 39 Atl. 533. **Mo.**—Reinhardt v. Wendeck, 40 Mo. 577. **N. J.**—Mackey v. Mackey, 71 N. J. Eq. 686, 63 Atl. 984. **N. Y.** Evans v. Ogsbury, 2 App. Div. 556, 37 N. Y. Supp. 1104, 74 N. Y. St. 399. **Pa.**—Kenyon v. Davis, 219 Pa. 585, 69 Atl. 62; Reid v. Clendenning, 193 Pa. 406, 44 Atl. 500.

69. Ferris v. Montgomery Land & Imp. Co., 94 Ala. 557, 10 So. 607, 33 Am. St. Rep. 146.

State as party generally, see the title "States and Territories."

70. **Ind.**—Waltz v. Borroway, 25 Ind. 380. **Ky.**—Hynes v. Oldham, 3 Mon. 266. **Me.**—Brackett v. Persons Unknown, 53 Me. 238, 87 Am. Dec. 548; Foxcroft v. Barnes, 29 Me. 128. **Mass.** Foster v. Abbot, 8 Metc. 596; Cook v. Allen, 2 Mass. 462. **N. J.**—Cona v. Hudson Co., 86 N. J. L. 154, 90 Atl. 1031, Ann. Cas. 1916E, 999. **N. M.** Rodriguez v. La Cueva Ranch Co., 17

Persons not in esse are not properly made parties to the suit.⁷¹

Disseizors should not be made parties to the action.⁷²

b. **Grantees of Co-tenant.**—If a conveyance made by a co-tenant divests him of all interest in the property, his grantee should be made a party.⁷³ The authorities are in conflict as to whether the grantee of a specific parcel by a co-tenant should be made a party.⁷⁴ Both grantor and grantee are necessary parties when there has been a conveyance in severalty of a part of lands, in the absence of a ratification by the other co-tenants or if the conveyance is not otherwise binding on them.⁷⁵

N. M. 246, 134 Pac. 228. **N. Y.**—*Denning v. Corwin*, 11 Wend. 647; *Cole v. Hall*, 2 Hill 625. See *McQuillan v. McQuillan*, 134 N. Y. Supp. 893. *Compare Johnson v. Aleshire*, 130 App. Div. 178, 114 N. Y. Supp. 398. **Ohio.**—*Rogers v. Tucker*, 7 Ohio St. 417. **Wis.**—*Kane v. Rock River Canal Co.*, 15 Wis. 179; *Marvin v. Titsworth*, 10 Wis. 320; *Nash v. Church*, 10 Wis. 303, 78 Am. Dec. 678.

See also *Tell v. Senac*, 122 La. 1040, 48 So. 448.

71. **Ala.**—*Culley v. Elford*, 187 Ala. 165, 65 So. 381. **Ga.**—*Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562. **Ind.**—*Coquillard v. Coquillard*, 62 Ind. App. 426, 113 N. E. 474. **Mo.**—*Sparks v. Clay*, 185 Mo. 393, 84 S. W. 40; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802. **N. Y.**—*Brevoort v. Brevoort*, 70 N. Y. 136; *Clemens v. Clemens*, 37 N. Y. 59; *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455, *affirming* 5 Abb. Pr. 92. **Tenn.**—*Freeman v. Freeman*, 9 Heisk. 301. **Va.**—*Carneal v. Lynch*, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819; *Faulkner v. Davis*, 18 Gratt. (59 Va.) 651, 98 Am. Dec. 698; *Baylor's Lessee v. Dejarnette*, 13 Gratt. (54 Va.) 152. **Eng.**—*Giffard v. Hort*, 1 Sch. & Lef. 386, 407; *Leonard v. Sussex*, 2 Vern. Ch. 526, 23 Eng. Reprint 940.

[a] **The living children** represent those who may be born later. *Betz v. Farling*, 274 Ill. 107, 113 N. E. 40.

[b] **The court may appoint a trustee** to protect the contingent interests of after born children. *Shields v. Aitken*, 236 Pa. 6, 84 Atl. 662.

72. *Tilton v. Palmer*, 31 Me. 486. But see *Weston v. Stoddard*, 137 N. Y. 119, 33 N. E. 62, 33 Am. St. Rep. 697, 20 L. R. A. 624.

73. **N. Y.**—*Jackson ex dem. Antell v. Brown*, 3 Johns. 459. See *Maloney v. Cronin*, 44 Hun 270, 7 N. Y. St.

700. **Pa.**—*Pitzer's Estate*, 24 Pa. Co. Ct. 359. **S. C.**—*Jeter v. Knight*, 81 S. C. 265, 62 S. E. 259, 128 Am. St. Rep. 908; *McNish v. Guerard*, 4 Strobb. Eq. 66.

Compare Bryan v. Bryan, 61 N. J. Eq. 45, 48 Atl. 341.

[a] **A grantee of an easement** from one co-tenant need not be made a party when the co-tenant was without authority to make such grant. *Pfeiffer v. Regents of University*, 74 Cal. 156, 15 Pac. 622.

74. See *infra*, this note.

[a] **That it should be done**, see: **Cal.**—*Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139. **N. Y.**—*Howard v. Morrissey*, 71 Misc. 267, 130 N. Y. Supp. 322. **Eng.**—*Story v. Johnson*, 2 Y. & C. Exch. 586.

[b] **That it is not required**, for the reason that such a conveyance may be treated as void by the other co-tenants, see *Barnes v. Lynch*, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 470; *Blossom v. Brightman*, 21 Pick. (Mass.) 283; *Broughton v. Howe*, 6 Vt. 266.

[c] **If all of the co-tenants join in the deed to a parcel**, such grantee is not a proper party to a suit to partition the residue of the property. *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227.

[d] **If the other co-tenants ratify the conveyance** made by one co-tenant, the grantee is not a proper party. *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; *New York & T. Land Co. v. Hyland*, 3 Tex. Civ. App. 601, 28 S. W. 206.

75. **La.**—*Blair v. Dwyer*, 110 La. 332, 34 So. 644. **Miss.**—See *Parker v. Harrison*, 63 Miss. 225. **N. H.**—*Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163. **N. Y.**—*Harris v. Harris*, 75 App. Div. 216, 77 N. Y. Supp. 985.

Compare Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; *Sutter v. San Fran-*

c. *Heirs of a co-tenant*, who is living, should not be made parties;⁷⁶ but after his death, they become co-tenants in his place and should be.⁷⁷

d. *Infants*.—An infant may be made a party defendant to a partition suit; and is as a rule a necessary party.⁷⁸ If the minor has a testamentary guardian, such guardian must be made a party.⁷⁹

e. *Insane Persons*.—A co-tenant, who is insane, must nevertheless be made a party to the action.⁸⁰

f. *Husband and Wife*.—Unless otherwise provided by statute, a husband is a necessary party to an action for partition, when the

cisco, 36 Cal. 112; *Harlan v. Langham*, 69 Pa. 235.

76. *Scripps Corp. v. Parkinson*, 186 Mich. 663, 153 N. W. 29; *Hughey v. Mosby*, 31 Tex. Civ. App. 76, 71 S. W. 395.

77. Fla.—*Nelson v. Haisley*, 39 Fla. 145, 22 So. 265. La.—*Chalon v. Walker*, 7 La. Ann. 477. See *Tell v. Senae*, 122 La. 1040, 48 So. 448. N. Y.—*Van Williams v. Elias*, 106 App. Div. 288, 94 N. Y. Supp. 611; *Vanderwerker v. Vanderwerker*, 7 Barb. 221. S. C. *Huckabee v. Newton*, 23 S. C. 291.

See also *Burchett v. Clark*, 162 Ky. 586, 172 S. W. 1048; *Irlanda v. Pitargue*, 22 Phil. Isl. 383.

[a] Upon the death of a co-tenant pendente lite (1), his heirs must be made parties, and the action abates until they are brought in. Cal.—*Ewald v. Corbett*, 32 Cal. 493. Fla.—*Nelson v. Haisley*, 39 Fla. 145, 22 So. 265. N. Y.—*Requa v. Holmes*, 16 N. Y. 193. See generally the title “Survival.”

(2) Making personal representative a party is not sufficient. See *Ewald v. Corbett*, 32 Cal. 493.

[b] A posthumous heir must be made a party to the action. *Weiland v. Muntz*, 25 Ohio Cir. Ct. 185.

[c] An absent heir (1) should be made a party though he be unheard of for a considerable time. *Johnson v. Johnson*, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748. (2) But the failure to do so will not necessarily render a sale of the property null and void. *Tobin v. United States Safe Deposit, etc. Bank*, 115 La. 366, 39 So. 33; *Martinez v. Wall*, 107 La. 737, 31 So. 1023. See also *Welch's Appeal*, 126 Pa. 297, 17 Atl. 623.

78. Ala.—*Coker v. Pitts*, 37 Ala. 692. Ill.—*Campbell v. Campbell*, 63 Ill. 462; *Hickenbotham v. Blackledge*, 54 Ill. 316. Ky.—*Blue v. Waters*, 114 Ky. 659, 71 S. W. 889; *Bacon v. Bills*, 12 Ky. Op. 691. But see *Scott v.*

Pond Creek Coal Co., 152 Ky. 67, 153 S. W. 23. La.—*Carrollton Land & Imp. Co. v. Eureka Homestead Soc.*, 119 La. 692, 44 So. 434; *Sallier's Succession*, 115 La. 97, 38 So. 929. Miss.—*Cocks v. Simmons*, 57 Miss. 183; *Albright v. Flowers*, 52 Miss. 246. Mo.—*Shaw v. Gregoire*, 41 Mo. 407. N. Y.—*O'Donoghue v. Smith*, 85 App. Div. 324, 85 N. Y. Supp. 398, affirmed, 184 N. Y. 365, 77 N. E. 621. N. C.—*Credle v. Baugham*, 152 N. C. 18, 67 S. E. 46, 136 Am. St. Rep. 787. Ore.—*Fiske v. Kellogg*, 3 Ore. 503. Tenn.—*Winchester v. Winchester*, 1 Head 460. Can. *Tryon v. Peer*, 13 Grant Ch. (U. C.) 311.

[a] Infants may be made parties by cross petition. *Blue v. Waters*, 114 Ky. 659, 71 S. W. 889.

[b] Absent minor heirs cannot be made defendants, but the court will appoint a guardian for the protection of their interests. *McCullough v. Minor*, 2 La. Ann. 466; *Penny v. Christmas*, 7 Rob. (La.) 481; *Coombs v. Persons Unknown*, 82 Me. 326, 19 Atl. 826.

Necessity for appointment of guardian ad litem, see 10 STANDARD PROC. 715.

79. *Budde v. Rebenack*, 137 Mo. 179, 38 S. W. 910.

[a] But it is not sufficient to make the guardian alone a party; the minor must also be made a party. *Lowe v. Maurer*, 4 Ohio Dec. (Reprint) 243, 1 Cleve. L. Rep. 157.

80. Ala.—*Tribble v. Wood*, 193 Ala. 192, 68 So. 986; *Bryant's Heirs v. Stearns*, 16 Ala. 302. N. Y.—*Gorham v. Gorham*, 3 Barb. Ch. 24. Eng.—*Hollingworth v. Sidebottom*, 7 L. J. Ch. 2, 8 Simm. 620, 59 Eng. Reprint 246.

See generally 13 STANDARD PROC. 597.

[a] The committee of a lunatic will be ordered to convey according to the partition. In *Matter of Bloomar*, 2

wife claims an interest in the property.⁸¹ But there is authority to the effect that the husband is not a necessary party to a suit against the wife for partition.⁸² If upon the death of the wife, the husband acquires her interest, he necessarily should be made a party.⁸³ One who is actually a tenant by the curtesy, or who claims to be such, is a proper party to the action.⁸⁴ If the dower interest of the wife of a co-tenant be inchoate, she need not be made a party.⁸⁵ Nor is she a necessary party after the husband's death and before dower is assigned to her.⁸⁶ If a married woman claims a homestead right in the property sought to be partitioned, she must be made a party.⁸⁷ Of course, if the widow of a deceased co-tenant has an interest in the property apart from her dower interest, she must be made a party defendant.⁸⁸

g. Executors and Administrators.—By reason of the common law rule that real estate descends directly to the heir or devisee, an executor and administrator is neither a necessary nor a proper party

De G. & J. 88, 27 L. J. Ch. 173, 4 Jur. N. S. 546, 6 Wkly. Rep. 178, 44 Eng. Reprint 921.

81. *Spring v. Sanford*, 7 Paige (N. Y.) 550; *Tannehill v. Tannehill* (Tex. Civ. App.), 171 S. W. 1050. See generally 11 STANDARD PROC. 763.

82. *Estes v. Nell*, 140 Mo. 639, 41 S. W. 940; *Cochran v. Thomas*, 131 Mo. 253, 33 S. W. 6; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Barnes v. Blake*, 59 Hun 371, 13 N. Y. Supp. 77.

[a] Especially Where His Only Interest Is a Contingent One.—*Frahm v. Seaman* (Iowa), 159 N. W. 206.

[b] Though a Proper One.—*Hill v. Alexander*, 77 Mo. 296.

83. *Ballard v. Johns*, 80 Ala. 32; *Bogert v. Bogert*, 1 Silv. Sup. 436, 53 Hun 629, 5 N. Y. Supp. 893, 2 Silv. Sup. 22, 53 Hun 636, 6 N. Y. Supp. 299.

84. *U. S.*—*Walton v. Willis*, 1 Dall. 351, 1 L. ed. 171. *N. J.*—*Weise v. Welsh*, 30 N. J. Eq. 431. *N. Y.*—*Bender v. Terwilliger*, 48 App. Div. 371, 63 N. Y. Supp. 269 (*affirmed*, 166 N. Y. 590, 59 N. E. 1118); *Best v. Zeh*, 82 Hun 232, *affirmed*, 146 N. Y. 363, 41 N. E. 88, 31 N. Y. Supp. 230. *Ohio* *Pillsbury's Lessee v. Dugan's Admr.*, 9 Ohio 117, 34 Am. Dec. 427; *Poster's Lessee v. Dugan's Exrs.*, 8 Ohio 87, 31 Am. Dec. 432; *Richards v. Richards*, 15 Ohio Cir. Ct. (N. S.) 287.

85. *Ill.*—*Davis v. Lang*, 153 Ill. 175, 38 N. E. 635. *Ind.*—*Haggerty v. Wagner*, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384. *N. Y.*—*Moses v. Moses*, 170 App. Div. 211, 155 N. Y. Supp.

1066; *Matthews v. Matthews*, 1 Edw. Ch. 565. *Pa.*—*Carl v. Jauss*, 22 Pa. Dist. 407.

But see *In re Hewish*, 17 Ont. (Can.) 454.

86. *Ala.*—*Francis v. Sandlin*, 150 Ala. 583, 43 So. 829. *Me.*—*Leonard v. Motley*, 75 Me. 418. *Mass.*—*Motley v. Blake*, 12 Mass. 280. *Miss.*—*Wood v. Bryant*, 68 Miss. 198, 8 So. 518. *N. H.*—*Miller v. Dennett*, 6 N. H. 109. *N. Y.*—*Tanner v. Niles*, 1 Barb. 560. See also *Green v. Putnam*, 1 Barb. 500; *Ripple v. Gilborn*, 8 How. Pr. 456. But see *Coles v. Coles*, 15 Johns. 319; *Wilkinson v. Parish*, 3 Paige 653. *Pa.* *Fink's Appeal*, 130 Pa. 256, 18 Atl. 621; *Power v. Power*, 7 Watts 205. *R. I.*—*Hoxsie v. Ellis*, 4 R. I. 123. *Va.*—*McClintic v. Manns*, 4 Munf. (18 Va.) 328. *Compare* *Custis v. Snead*, 12 Gratt. (53 Va.) 260.

But see *Reed v. Reed*, 25 Ky. L. Rep. 2324, 80 S. W. 520, under statute.

[a] But if a sale of the property is necessary she is at least a proper party defendant. *In re Siperly*, 44 Barb. (N. Y.) 370; *Tanner v. Niles*, 1 Barb. (N. Y.) 560; *Gordon v. Sterling*, 13 How. Pr. (N. Y.) 405.

87. *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81; *Wheelock v. Overshiner*, 110 Mo. 100, 19 S. W. 640. *Contra*, *Hill v. Jackson* (Tex. Civ. App.), 51 S. W. 357.

88. *Mont.*—*Hurley v. O'Neill*, 31 Mont. 595, 79 Pac. 242. *N. Y.*—*Letson v. Evans*, 33 Misc. 437, 68 N. Y. Supp. 421. *Tex.*—*Franklin v. Moss* (Tex. Civ. App.), 64 S. W. 786; *Ellis v. Stewart* (Tex. Civ. App.), 24 S. W. 585.

to a partition suit;⁸⁹ but by reason of statute or the necessities of the case it is sometimes essential that he be made a party.⁹⁰

h. *Creditors*.—A creditor of the ancestor should not be made a party to an action of partition between the widow and heirs.⁹¹ A judgment creditor of one of tenants in common is not a necessary party, where the partition sale does not free the land from pre-existing liens.⁹²

i. *Lessees* are not, as a rule, necessary parties;⁹³ but when one tenant in common has demised his undivided share for a long term, the lessee should be made a party.⁹⁴

89. *Ala.*—Tindal v. Drake, 51 Ala. 574. *Ill.*—Dicus v. Scherer, 277 Ill. 168, 115 N. E. 161; Manternach v. Studdt, 240 Ill. 464, 88 N. E. 1000. *La.*—Hewes v. Baxter, 46 La. Ann. 1281, 16 So. 196. *Miss.*—Foster v. Newton, 46 Miss. 661. *Mo.*—Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843; Harbison v. Sanford, 90 Mo. 477, 3 S. W. 20. *N. J.*—Wittel v. Wittel, 82 N. J. Eq. 229, 91 Atl. 722 (personal representatives are not necessary parties); Speer v. Speer, 14 N. J. Eq. 240. *N. Y.*—Barton v. Reynolds, 81 Misc. 15, 142 N. Y. Supp. 895. See Snyder v. Parezo, 151 App. Div. 110, 135 N. Y. Supp. 960. *N. C.*—Garrison v. Cox, 99 N. C. 478, 6 S. E. 124. *S. C.*—McCreary v. Burns, 17 S. C. 45. *Tex.*—Doll v. Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

See also Stout v. Stout, 82 Ohio St. 358, 92 N. E. 465.

[a] "Particularly is this true where it does not appear that the personal property of the deceased is insufficient to pay the debts of the deceased." Dicus v. Scherer, 277 Ill. 168, 115 N. E. 161.

[b] When the ancestor left no debts or where it does not appear that the estate was administered, a bill for partition is not defective for failure to make the administrator a party. Mertens v. Cook, 135 Mich. 35, 97 N. W. 47.

[c] It is only under a very exceptional state of facts that the administrator can be made a party. Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245.

[d] An administrator pendente lite cannot complain that he was not made a party when he made no application to be made a party. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

[e] If an error is made in substituting the personal representative for a deceased party, instead of the

heirs, it will be cured by an amendment bringing in the heirs. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

90. See the statutes, and *Ala.*—Davis v. Bingham, 111 Ala. 292, 18 So. 660; McQueen v. Turner, 91 Ala. 273, 8 So. 863. *Ill.*—Claussen v. Claussen, 279 Ill. 99, 116 N. E. 693. *Ky.*—Kendrick v. Kendrick, 4 J. J. Marsh. 241. *Miss.*—Bennett v. Bennett, 84 Miss. 493, 36 So. 452. *Mo.*—Budde v. Rebenack, 137 Mo. 179, 38 S. W. 910; Perkins v. Goddin, 111 Mo. App. 429, 85 S. W. 936. *N. Y.*—Bender v. Terwilliger, 48 App. Div. 371, 63 N. Y. Supp. 269 (*affirmed*, 166 N. Y. 590, 59 N. E. 1118); Underhill v. Underhill, 6 App. Div. 78, 39 N. Y. Supp. 468. *S. C.*—*Ex parte* Worley, 49 S. C. 41, 26 S. E. 949.

[a] Executor of a co-tenant is not a proper party, unless he is by the will invested with and authorized to represent the title to the property involved in the partition proceeding. Nelson v. Haisley, 39 Fla. 145, 22 So. 265.

[b] If one who is properly a party in his individual capacity answers in his representative capacity, he thereby becomes a party in the latter capacity. Parks v. Van Dergriff (Tenn.), 57 S. W. 177.

91. *Ind.*—Gregory v. High, 29 Ind. 527. *Kan.*—Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245. *N. J.*—Speer v. Speer, 14 N. J. Eq. 240.

92. Jordan v. Faulkner, 168 N. C. 466, 84 S. E. 764.

93. *Ark.*—Gailey v. Rickett, 123 Ark. 18, 184 S. W. 422. *Ky.*—Pleak v. Chambers, 7 B. Mon. 565. *Md.*—Brendel v. Klopp, 69 Mo. 1, 13 Atl. 589. *Wis.*—Peterman v. Kingsley, 140 Wis. 666, 123 N. W. 137, 133 Am. St. Rep. 1107. *Eng.*—O'Reilly v. Vincent, 2 Molloy 330.

94. *Md.*—Thruston v. Minke, 32 Md. 571. *Eng.*—Cornish v. Gest, 2 Cox Ch. 27, 30 Eng. Reprint 13. *Can.*—Fitz-

j. *Purchasers or Encumbrancers Pendente Lite*.—A purchaser of an interest in the property at a judicial sale, held pending the partition proceedings, may under some statutes become a party to the partition suit;⁹⁵ but apart from statute, the weight of authority is that they need not be made parties.⁹⁶

V. PROCESS AND APPEARANCE.⁹⁷ — **A. NECESSITY FOR.** — In the absence of a contrary statute, a defendant in a partition suit may enter a voluntary appearance.⁹⁸ Unless the parties in interest voluntarily enter an appearance in the partition suit, however,⁹⁹ there can be no valid sale or division of the property, or any part of it, until they have had legal notice thereof by the issuance and service of such process as is necessary for that purpose.¹ And because of statute it has been held that a voluntary appearance in the absence of process is not sufficient.² Statutes sometimes provide for a written notice of intention to apply for a writ of partition.³

Notice to "unknown owners" is indispensable.⁴

patrick v. Wilson, 12 Grant Ch. (U. C.) 440.

[a] Lessee for a term of years with right of renewal is a necessary party. Glaser v. Burns, 154 N. Y. Supp. 21, 170 App. Div. 321, 155 N. Y. Supp. 936.

95. See the statutes, and O'Connor v. Keenan, 132 Mich. 646, 94 N. W. 186; Wipff v. Heder (Tex. Civ. App.), 41 S. W. 164.

96. Ala.—Stein v. McGrath, 128 Ala. 175, 30 So. 792. Del.—*In re* Miller's Est., 77 Atl. 773. Ill.—Stollard v. Nyceum, 240 Ill. 472, 83 N. E. 1003; Witte v. Hinze, 171 Ill. App. 428; McGregor v. Malarkey, 96 Ill. App. 421. Ind.—Edwards v. Dykeman, 95 Ind. 905; Arnold v. Butterbaugh, 92 Ind. 403. Me.—Partridge v. Luce, 56 Me. 16. Mo.—Becker v. Strocher, 167 Mo. 306, 66 S. W. 1083. N. Y.—Sears v. Hyer, 1 Paige 483; Wagstaff v. Marey, 25 Misc. 121, 54 N. Y. Supp. 1021. N. C.—Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; Coble v. Clapp, 54 N. C. 173. Pa.—Baird v. Corwin, 17 Pa. 462; Welty v. Ruffner, 9 Pa. 224.

97. See generally the title "Process."

98. Ill.—Dunning v. Dunning, 37 Ill. 306. Pa.—Reid v. Clendenning, 193 Pa. 406, 44 Atl. 500. Wis.—Tallman v. McCarty, 11 Wis. 401.

[a] The committee of a lunatic may enter an appearance in a partition suit without service upon it or the lunatic. Finzer v. Nevin, 13 Ky. L. Rep. 773, 18 S. W. 367; Rogers v. McLean, 11 Abb. Pr. (N. Y.) 440, *affirmed*, 34 N. Y. 536, 31 How. Pr. 279.

As to what constitutes an appearance, see 2 STANDARD PROC. 491, et seq.

99. Ill.—Dunning v. Dunning, 37 Ill. 306. Miss.—Tindall v. Tindall, 3 So. 581. Pa.—Reid v. Clendenning, 193 Pa. 406, 44 Atl. 500. Wis.—Tallman v. McCarty, 11 Wis. 401.

1. See the following: Ky.—Railey v. Railey, 5 B. Mon. 110; Craig v. Barker, 4 Dana 600; Palmer v. Palmer, 2 Dana 390. Miss.—Tindall v. Tindall, 3 So. 581. S. C.—Sligh v. Sligh, 1 Brev. 176. Wash.—Ponti v. Hoffman, 87 Wash. 137, 151 Pac. 249, statute provides that notice shall be given to all persons interested in the partition, their guardians, or agents.

See the titles "Jurisdiction;" "Process."

[a] If the suit is in equity, the complainant must take out and serve a subpoena as in ordinary suits. Larkin v. Mann, 2 Paige (N. Y.) 27. See generally the title "Subpoena."

[b] A guardian for minors, when all claim in one right, may institute proceedings for partition without process. Goudy's Lessee v. Shank, 8 Ohio 415.

2. Candy v. Stradley, 1 Del. Ch. 113.

3. See the statutes, and Cocks v. Callaway, 141 Ga. 774, 82 S. E. 286; Lochrane v. Equitable Loan, etc. Co., 122 Ga. 433, 50 S. E. 372, under Georgia statute providing for twenty days' notice, in which event, no formal process is required, all the parties being brought into court by service of the notice.

4. Ill.—Thornton v. Houtze, 91 Ill.

B. FORM AND SUFFICIENCY.—The form and contents of the process is usually prescribed by statute.⁵

C. SERVICE OF PROCESS⁶ in a partition suit may be made by any person authorized to serve process in a civil action.⁷ And unless otherwise prescribed by statute, it must be served in the same manner as process in civil actions generally.⁸ Service of process on a non-resident defendant out of the state may be made, when authorized by statute, in lieu of publication.⁹ But jurisdiction may be obtained by publication of process.¹⁰ Indeed, notice to unknown owners is usually given by publication.¹¹ The facts requiring publication

199, required by statute. **Me.**—*Savage v. Gray*, 96 Me. 557, 53 Atl. 61. **N. Y.** *Sanford v. White*, 1 Thomp. & C. 647, 46 How. Pr. 205, *affirmed*, 47 How. Pr. 96, 56 N. Y. 359. **Wis.**—*Mecklem v. Blake*, 19 Wis. 397; *Kane v. Rock River Canal Co.*, 15 Wis. 179.

5. See the statutes.

[a] **To Whom Addressed.**—*Cock v. Callaway*, 141 Ga. 774, 82 S. E. 286; *Martin v. Parker*, 14 Minn. 13, 100 Am. Dec. 188.

[b] **Necessary to state that the suit is for partition**, though a voluntary appearance waives this defect. *Keil v. West*, 21 Fla. 508. Necessity for process where voluntary appearance, see *supra*, V, A.

[c] **Need Not Contain a Description of the Premises.**—*Keil v. West*, 21 Fla. 508.

[d] **Amendments of process in partition proceedings** is no different than in other cases. See the title "**Process**," and *Dewar v. Spence*, 2 Whart. (Pa.) 211, 30 Am. Dec. 241.

6. See generally the title "**Service of Process and Papers**."

7. *Kyle v. Kyle*, 55 Ind. 387.

8. *Wilcox v. Monday*, 83 Ind. 335. See generally the title "**Service of Process and Papers**."

[a] **Under a Pennsylvania statute** relating to the manner of serving notice of inquisition in partition proceedings, service upon one of the co-tenants as members of a partnership composed of some, but not all of the co-tenants, is insufficient to bind the partners not personally served, the act requiring personal service upon all the resident co-tenants. *Morrow v. Morrow*, 152 Pa. 516, 25 Atl. 1107.

[b] **An irregularity in the mode of service** is waived (1) by appearance (*Upson v. Horn*, 3 Strobb. [S. C.] 108, 49 Am. Dec. 633), or (2) by failure to make timely objections. *Upson*

v. Horn, 3 Strobb. (S. C.) 108, 49 Am. Dec. 633. See generally the title "**Service of Process and Papers**."

9. *O'Donoghue v. Smith*, 184 N. Y. 365, 77 N. E. 621, *affirming* 85 App. Div. 324, 83 N. Y. Supp. 398. See also *Tell v. Senac*, 122 La. 1040, 48 So. 448; *Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249; and generally the title "**Service of Process and Papers**."

10. See the following: **Fla.**—*Keil v. West*, 21 Fla. 508. **Ga.**—*Hamby Mt. Gold Mines v. Calhoun Land, etc. Co.*, 83 Ga. 311, 9 S. E. 831; *Patton v. Childs*, 78 Ga. 352. **Ill.**—*Schaefer v. Kienzel*, 123 Ill. 430, 15 N. E. 164. **Ia.**—*Williams v. Westcott*, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287; *Mason v. Messenger*, 17 Iowa 261. **Mich.**—*Platt v. Stewart*, 10 Mich. 260. **Neb.**—*McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602. **N. J.**—*Cona v. Henry Hudson Co.*, 86 N. J. L. 154, 90 Atl. 1031, Ann. Cas. 1916E, 999. **N. Y.**—*Volz v. Steiner*, 67 App. Div. 504, 73 N. Y. Supp. 1006. **Ohio.**—*Rogers v. Tucker*, 7 Ohio St. 417; *Tabler v. Wiseman*, 1 Ohio Dec. (Reprint) 497, 10 West. L. J. 207. **Pa.**—*Sankey's Appeal*, 55 Pa. 491; *Kantner's Appeal* 24 Pa. Co. Ct. 310, 16 Montg. Co. Rep. 215. **Tenn.**—*Robertson v. Robertson*, 2 Swan 197. **Tex.**—*Taliaferro v. Butler*, 77 Tex. 578, 14 S. W. 191. **Wis.**—*Tucker v. Whittlesey*, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; *Foster v. Hammond*, 37 Wis. 185.

[a] **Georgia.**—If any of the parties reside out of the limits of the state, the notice provided for in this state must be published for such time as the court may fix. *Lochrane v. Equitable Loan, etc. Co.*, 122 Ga. 433, 50 S. E. 372.

11. **Mass.**—*Ashley v. Brightman*, 21 Pick. 285. **N. Y.**—*Denning v. Corwin*, 11 Wend. 647; *Allen v. Allen*, 11 How.

are usually required to be stated by affidavit.¹² As in other actions in which service by publication is authorized, the statute must be strictly followed.¹³

Service Upon Minors or Incompetents.¹⁴ — There is authority to the effect that minors interested in land involved in a partition proceeding must be served personally with process,¹⁵ service on their guardians alone being insufficient.¹⁶ Service upon the guardian in addition to service upon the minor is sometimes required.¹⁷ The general guardian, where the minor has one, is the proper person to receive service, under some authorities.¹⁸ Indeed, such service has been held sufficient, without service upon the infant.¹⁹ And under some statutes, a general guardian may enter the appearance of his ward without service of process either on the ward or himself.²⁰ It is otherwise with a guardian ad litem.²¹

VI. PLEADINGS. — A. GENERALLY. — Pleadings are essential to a partition suit; no decree can be entered without them.²² Under

Pr. 277. **Tex.**—Foote *v.* Sewall, 81 Tex. 659, 17 S. W. 373.

12. See statutes, and **Ill.**—Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164. **Mich.**—Platt *v.* Stewart, 10 Mich. 260. **N. Y.**—Denning *v.* Corwin, 11 Wend. 647, if unknown owners, affidavit must allege ignorance of the names, rights and title of such owners.

13. **Ind.**—Cox *v.* Matthews, 17 Ind. 367. **Ky.**—Newby *v.* Perkins, 1 Dana 440, 25 Am. Dec. 160. **Mid.**—Savary *v.* Da Camara, 60 Md. 139. **Mass.**—Ashley *v.* Brightman, 21 Pick. 285. **Mich.**—Platt *v.* Stewart, 10 Mich. 260. **N. Y.**—Denning *v.* Corwin, 11 Wend. 647; Gallatien *v.* Cunningham, 8 Cow. 370; Bowler *v.* Ennis, 46 App. Div. 309, 61 N. Y. Supp. 686. **Wis.**—Mecklem *v.* Blake, 19 Wis. 397; Kane *v.* Rock River Canal Co., 15 Wis. 179. **Can.**—*In re* Loney, 10 U. C. Q. B. 305.

See generally the title “**Service of Process and Papers.**”

[a] **Description of Premises.**—When the statute authorizing publication of notice requires that a description of the premises sought to be partitioned must be published, the court fails to obtain jurisdiction in the event of failure to publish such description. **Sanford v. White**, 1 Thomp. & C. (N. Y.) 647, 46 How. Pr. 205, *affirmed*, 56 N. Y. 359, 47 How. Pr. 96.

14. See generally 12 **STANDARD PROC.** 737, et seq.; 13 **STANDARD PROC.** 600, et seq.; and the title “**Service of Process and Papers.**”

15. See the following: **Fla.**—Terrell *v.* Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94. **Ill.**—Nichols *v.*

Mitchell, 70 Ill. 258. **Ky.**—Girty *v.* Logan, 6 Bush 8, under old code provision. **Mo.**—McMurtry *v.* Fairley, 194 Mo. 502, 91 S. W. 902; Smith *v.* Davis, 27 Mo. 298, under early statute. **S. C.**—Tederall *v.* Bouknight, 25 S. C. 275. **Tex.**—Taylor *v.* Whitfield, 33 Tex. 181.

16. Nichols *v.* Mitchell, 70 Ill. 258.

[a] A distinction is sometimes made between a proceeding in equity and one under the statute, it being sufficient in the latter case by virtue of express provision of statute to serve the guardian. Nichols *v.* Mitchell, 70 Ill. 258.

17. See the statutes, and Korn's Estate, 6 Pa. Dist. 435. But see Smith *v.* Davis, 27 Mo. 298.

18. Gayle *v.* Johnston, 80 Ala. 395.

19. Dampier *v.* McCall, 78 Ga. 607, 3 S. E. 563; Havens *v.* Drake, 43 Kan. 484, 23 Pac. 621.

[a] **Service upon the testamentary guardian** is sufficient. Richards *v.* Richards, 17 Ind. 636, because of statute authorizing him to agree to partition under direction of court.

20. Payne *v.* Masek, 114 Mo. 631, 21 S. W. 751; Hite *v.* Thompson, 18 Mo. 461.

21. See the following: **Ill.**—Chambers *v.* Jones, 72 Ill. 275. **Mo.**—McMurtry *v.* Fairley, 194 Mo. 502, 91 S. W. 902; Wright *v.* Hink, 193 Mo. 130, 91 S. W. 933; Shaw *v.* Gregoire, 41 Mo. 407. **S. C.**—Tederall *v.* Bouknight, 25 S. C. 275.

22. Larkin *v.* Mann, 2 Paige (N. Y.) 27; O'Leary *v.* Durant, 70 Tex. 409, 11 S. W. 116.

Necessity for pleadings generally, see the title “Pleading.”

the present forms of procedure prevailing in most jurisdictions, pleadings in such suits are governed by the rules applicable generally to other actions.²³

B. BILL, PETITION OR COMPLAINT. — 1. Generally. — Ordinarily the rules as to what must be contained in plaintiff's pleading, whether it be termed a bill or complaint, are the same.²⁴ Statutory requirements as to what must be contained in the bill or complaint are mandatory.²⁵ Allegations of evidentiary facts may as a rule be disregarded.²⁶

Pleading Conditions Precedent. — Demand for partition prior to commencement of the action is unnecessary, and the making of a demand need not be alleged.²⁷ A co-tenant who has occupied the lands need not offer to pay for such use and occupation, although he asks for an allowance for improvements made by him.²⁸

2. Particular Averments. — a. As to Parties. — (I.) Generally. The bill or complaint in partition must name all the parties in interest;²⁹ and it must appear that those named as the parties to the action are all the necessary parties to a complete adjudication.³⁰

23. *McArthur v. Clark*, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333; *Myers v. Rasback*, 4 How. Pr. (N. Y.) 83, 2 Code Rep. 13; *Backus v. Stilwell*, 3 How. Pr. (N. Y.) 318, 1 Code Rep. 70. But see *Traver v. Traver*, 3 How. Pr. (N. Y.) 351, 1 Code Rep. 112, holding that a partition proceeding may be begun by petition.

24. *Larkin v. Mann*, 2 Paige (N. Y.) 27.

[a] There is no need for greater particularity of averment in a bill in equity for partition than in a petition therefor in the probate courts. *Foster v. Ballentine*, 126 Ala. 393, 28 So. 529.

[b] When the property sought to be partitioned is personal property, the petition must state facts showing sufficient reason for equitable interference. *Beardsley v. Kansas Nat. Gas Co.*, 78 Kan. 571, 96 Pac. 859.

25. *Darr v. Darr*, 102 Iowa 453, 71 N. W. 419.

[a] When the statute requires an estimate of the value of the property to be alleged in a complaint for statutory partition, failure to do so renders the complaint insufficient, notwithstanding such allegation is not necessary in a bill in equity. *Guthridge v. Guthridge* (Tex. Civ. App.), 161 S. W. 892. As to description of property in bill or complaint, see *infra*, VI, B, 2, b.

26. *Ind.*—*Sauer v. Schenek*, 159 Ind. 373, 64 N. E. 84. *Kan.*—*Sample* v.

Sample, 34 Kan. 73, 8 Pac. 248. *N. C.*—*McGill v. Buie*, 106 N. C. 242, 11 S. E. 284.

27. *Ind.*—*Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417. *Md.*—*Wilson v. Green*, 63 Md. 547. But see *Chaney v. Tipton*, 11 Gill & J. 253, as to prior rule. *N. Y.*—*McGowan v. Morrow*, 3 Code Rep. 9.

28. *Wilkinson v. Stuart*, 74 Ala. 198; *Hunnicut v. Rogers*, 135 Ga. 595, 69 S. E. 913.

29. *Ala.*—*Foster v. Ballentine*, 126 Ala. 393, 28 So. 529. *Ky.*—*Rice v. Rice*, 10 B. Mon. 420. *Pa.*—*Reid v. Clendenning*, 193 Pa. 406, 44 Atl. 500; *Mushrush's Estate*, 23 Pa. Co. Ct. 629. See also *Lowe v. Franks*, 1 Molloy (Irish) 137.

30. *Ill.*—*Thornton v. Houtze*, 91 Ill. 199. *Md.*—*Hughes' Case*, 1 Bland 46. *Mo.*—*Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643. *Pa.*—*Finks' Appeal*, 130 Pa. 256, 18 Atl. 621; *Dawson v. Lancaster*, 12 Pa. Dist. Ct. 501.

[a] Failure of the complaint to make such a showing renders it defective. *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20.

[b] But the complaint is not subject to demurrer when it did not appear on the face thereof that there is a defect of parties defendant. *Sullivan & Lumsden*, 118 Cal. 664, 50 Pac. 777.

[c] Complaint alleging that the number of certain co-tenants was unknown, etc., is insufficient and subject

In some jurisdictions, it is necessary to state the address and place of residence of the parties.³¹

(II.) Interest and Moieties of the Parties.—Facts must be alleged from which it appears either directly or by inference that the parties at the time of the commencement of the action owned, or had a partitionable interest, in the property.³² The moieties and interests of the respective parties plaintiff and defendant must be alleged;³³ and at all events,

to demurrer. *Salzer v. Elkhorn Land Imp. Co.*, 25 Ky. L. Rep. 1210, 77 S. W. 370.

[d] Where the Petition Shows That a Co-tenant Is Dead.—*Ballard v. Johns*, 80 Ala. 32.

As to necessary parties to suit for partition, see *supra*, IV, B, 2.

31. Ala.—*Foster v. Ballentine*, 126 Ala. 393, 28 So. 529. But see *Griell v. Randolph*, 108 Ala. 601, 18 So. 609, holding that petitioner's residence need not be stated. Fla.—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77. Pa.—*Mushrush's Estate*, 23 Pa. Co. Ct. 629.

32. Cal.—*Bradley v. Harkness*, 26 Cal. 69. See *Middlecoff v. Cronise*, 155 Cal. 185, 100 Pac. 232. Ga.—*Adams v. Butler*, 135 Ga. 405, 69 S. E. 559. Ind.—*Brown v. Brown*, 133 Ind. 476, 32 N. E. 1128, 33 N. E. 615; *Gowdy v. Gordon*, 122 Ind. 533, 24 N. E. 226. Ky.—*Chaney v. Bevins*, 29 Ky. L. Rep. 1219, 96 S. W. 1129. Mo.—*Reed v. Robertson*, 45 Mo. 580. N. Y.—*Doane v. Mercantile Trust Co.*, 24 Misc. 502, 53 N. Y. Supp. 902, *affirmed*, 39 App. Div. 639, 57 N. Y. Supp. 1137, 160 N. Y. 494, 55 N. E. 296. Pa.—*Carey v. Schaller*, 16 Pa. Super. 350; *Hart's Estate*, 41 Pa. Co. Ct. 36. S. C.—*Mitchum v. Shaw*, 98 S. C. 175, 82 S. E. 401; *Harvey v. Hackney*, 35 S. C. 361, 14 S. E. 822. Tenn.—*Smith v. Quarles*, 46 S. W. 1035. Tex.—*Bartell v. Kelsey*, 59 S. W. 631. Va.—*Dillard v. Jefferies*, 118 Va. 81, 86 S. E. 844; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742. W. Va.—*Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736.

[a] Complaint must aver (1) that the co-tenants hold or are in possession of the property as joint tenants in common, and that one or more of them have an estate of inheritance therein, or for life or for years. *Bradley v. Harkness*, 26 Cal. 69. (2) See also *Davis Colliery Co. v. Westfall*, 78 W. Va. 735, 90 S. E. 328, holding that a bill for partition of land which fails to

allege that plaintiff and defendant are co-tenants, or in some way to show that they are jointly interested in the land, is properly dismissed on demurrer.

33. U. S.—*Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644. Ala.—*Martin v. Cannon*, 196 Ala. 151, 71 So. 996; *Foster v. Ballentine*, 126 Ala. 393, 28 So. 529. Cal.—*Spader v. McNeill*, 130 Cal. 500, 62 Pac. 828; *Miller v. Sharp*, 48 Cal. 394. See *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777. Compare *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81, holding that the failure to properly set forth the title or interest of the parties is not a fatal defect. Conn.—*Champion v. Spencer*, 1 Root 147. Fla.—*Milton v. Milton*, 62 Fla. 564, 56 So. 947; *Keil v. West*, 21 Fla. 508. Ga.—*Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655. Ill.—*Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401; *Schwartz v. Ritter*, 186 Ill. 209, 57 N. E. 887; *Wilson v. Dresser*, 152 Ill. 387, 38 N. E. 888. Ind.—*Pipes v. Hobbs*, 83 Ind. 43; *Dye v. Davis*, 65 Ind. 474; *Lowe v. Wiseman*, 46 Ind. App. 405, 91 N. E. 364, 92 N. E. 344; *Shetterly v. Axt*, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865. Ky.—*Salzer v. Elkhorn Land Imp. Co.*, 25 Ky. L. Rep. 1210, 77 S. W. 370. Me.—*Jewett v. Persons Unknown*, 61 Me. 408. Mich.—*Page v. Webster*, 8 Mich. 263, 77 Am. Dec. 446; *Thayer v. Lane*, Walk. Ch. 200. Mo.—*Rogers v. Miller*, 48 Mo. 378; *Reed v. Robertson*, 45 Mo. 480. N. Y.—*Van Cortlandt v. Beekman*, 6 Paige 492; *Bradshaw v. Callaghan*, 8 Johns. 558. N. C.—*Ramsay v. Bell*, 38 N. C. 209, 42 Am. Dec. 165. Ore.—*Hanner v. Silver*, 2 Ore. 336. Pa.—*Johnson v. Kite*, 9 Pa. Dist. 584. Tex.—*Buffalo Bayou Ship Channel Co. v. Bruly*, 45 Tex. 6. Wash.—*Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. W. Va.—*Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67. Wis.—*Sprague v. Maxey*, 122 Wis. 502, 100 N. W. 832; *Spensley v. Janesville*

plaintiff must set out the moiety or interest which he has.³⁴ But a complaint alleging that plaintiff is ignorant of the names, rights, or title of the other persons interested as tenants in common, is sufficient at least in jurisdictions where unknown persons may be made parties.³⁵

It is sufficient to state the ultimate facts respecting the titles of the respective parties, it not being necessary to set forth the rights and titles of the several tenants at large, nor to allege the seizin of the ancestor or the person from whom the parties derive title;³⁶ the complaint need not set out any deraignment of title,³⁷ but if it does set out how plaintiff acquired title, it must state all the facts necessary to vest the title in the plaintiff.³⁸

Adverse Claims.—An allegation that certain named defendants “have or claim to have, some interest in the land, the character and

Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574.

[a] A petition stating plaintiff's interest to be one-fifth, and that the defendants own three-fifths, and making no reference to the remaining fifth or to the fact that the owner was unknown, is demurrable. *Rogers v. Miller*, 48 Mo. 378.

[b] Though a bill for partition does not in terms allege specifically the quantity and proportionate share held by each person interested in the lands sought to be partitioned, it will nevertheless be held sufficient on demurrer, if the allegations are sufficiently clear to enable the court to adjudicate fully the rights and interests of the parties and the quantity and proportionate share held by each in the land. *Szabo v. Speckman* (Fla.), 74 So. 411, L. R. A. 1917D, 357.

34. Ala.—See *Martin v. Cannon*, 196 Ala. 151, 71 So. 996. Conn.—*Champion v. Spencer*, 1 Root 147. Ill.—*Moroney v. Haas*, 277 Ill. 467, 115 N. E. 648; *Tibbs v. Allen*, 27 Ill. 119. Ind.—*Lease v. Carr*, 5 Blackf. 393.

[a] A complaint which fails to show that plaintiff is possessed of some definite and undivided share of the land is demurrable. *Wintermute v. Reese*, 84 Ind. 308.

[b] Though it is immaterial to set out the defendant's proportions among themselves. *Champion v. Spencer*, 1 Root (Conn.) 147.

35. Ia.—*Wright v. Marsh*, 2 G. Gr. 94. N. Y.—*Cole v. Hall*, 2 Hill 625. Wis.—*Kane v. Rock River Canal Co.*, 15 Wis. 179; *Nash v. Church*, 10 Wis. 303, 78 Am. Dec. 678.

Unknown persons as parties, see *supra*, IV, B, 2, a.

36. See the following: Ala.—*Richardson v. N. N. & T. J. Powell*, 74 So. 364; *Foster v. Ballentine*, 126 Ala. 393, 28 So. 529; *McQueen v. Turner*, 91 Ala. 273, 8 So. 863. Fla.—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77. Mo.—*Tupper v. Hertung*, 46 Mo. 135. N. Y.—*Bradshaw v. Callaghan*, 8 Johns. 558. S. C.—*Garrett v. Weinberg*, 50 S. C. 310, 27 S. E. 770. Tenn.—*Smith v. Quarles*, 46 S. W. 1035. Va.—*Martin v. Martin*, 95 Va. 26, 27 S. E. 810. Wis.—*Spensley v. Janesville Cotton Mfg. Co.*, 62 Wis. 549, 22 N. W. 574.

[a] When the facts set forth in the bill disclose the nature of an express trust under a will, the complaint is not insufficient because the effect of the trust is misconceived, and the effect of the devise or bequest is not correctly stated. *Gale v. Harby*, 20 Fla. 171.

37. Ga.—*Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655. Mo.—*Reed v. Robertson*, 45 Mo. 580. N. Y.—*Bradshaw v. Callaghan*, 8 Johns. 558. Wash.—*Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. W. Va.—*Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67.

[a] Rule in Kentucky, see *Toler's Heirs v. Toler*, 33 Ky. L. Rep. 594, 110 S. W. 388; *Salzer v. Elkhorn Land Imp. Co.*, 25 Ky. L. Rep. 1210, 77 S. W. 370.

38. Bell v. Dangerfield, 26 Minn. 307, 3 N. W. 698. But see *Abrams v. Moseley*, 7 S. C. 150.

[a] Insufficient Averment.—*Hunter v. Willard*, 176 App. Div. 204, 162 N. Y. Supp. 364.

[b] If the allegations as to title be contradictory, the complaint is insuffi-

extent of which is unknown to plaintiff," is a sufficient averment of the existence of an adverse claim to require a defendant who is named to present his claim.³⁹

b. *Description of Property*.—The property sought to be partitioned must be described.⁴⁰ But such a general description only is required as will lead to the identification of the property upon which the decree is intended to operate.⁴¹

c. *Possession*.—While if the complaint alleges ownership in fee, the further allegation of possession has been held unnecessary,⁴² in some jurisdictions, it is essential to allege possession of the property to be divided in common with the defendants.⁴³ In some jurisdic-

cient. *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219.

39. *Cal.*—*Morenhout v. Higuera*, 32 Cal. 289. *Mo.*—*Thompson v. Holden*, 117 Mo. 118, 22 S. W. 905. *N. Y.* *Delcambre v. Delcambre*, 210 N. Y. 460, 104 N. E. 950; *Townsend v. Bogert*, 126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835.

[a] If the exact nature of the adverse claim is known, it must be stated, however, *Gage v. Reid*, 104 Ill. 509; *Satterlee v. Kobbe*, 39 App. Div. 420, 57 N. Y. Supp. 341.

40. See the following: *U. S.*—*Grider v. Wood*, 178 Fed. 908, 102 C. C. A. 109. *Md.*—*Hughes' Case*, 1 Bland 46. *Mo.*—*Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643, by express provision of statute. *Nev.*—*Dondero v. Van Sickle*, 11 Nev. 389. *N. Y.*—*Sandiford v. Hempstead*, 97 App. Div. 163, 90 N. Y. Supp. 76, *affirmed*, 186 N. Y. 554, 79 N. E. 1115. *Ore.*—*Hanner v. Silver*, 2 Ore. 336.

[a] But failure to allege that the land is situated in the chancery district in which the bill is filed does not render the bill subject to a general demurrer. *Trucks v. Sessions*, 189 Ala. 149, 66 So. 79. See *Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448.

41. *Thruston v. Minke*, 32 Md. 571; *Baloloy v. Edu*, 20 Phil. Isl. 360.

[a] It is not sufficient to say "a certain law library * * * consisting of about fifteen hundred volumes of text books and reports." *Strange v. Gunn*, 56 Ala. 611.

[b] Describing the property by reference to deeds filed with the petition is sufficient under statute. *Nickels v. Mineral Dev. Co.*, 152 Ky. 198, 153 S. W. 235.

[c] Excuse for Want of More Particular Description.—*Bennett v. Ben-*

nett, 169 Ala. 618, 53 So. 986, L. R. A. 1916C, 693.

42. *Ind.*—*Shetterly v. Axt*, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865. *Mo.*—*Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161. *N. Y.*—*Wainman v. Hampton*, 110 N. Y. 429, 18 N. E. 234. *N. C.*—*Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; *Epley v. Epley*, 111 N. C. 505, 16 S. E. 321; *McGill v. Buie*, 106 N. C. 242, 11 S. E. 284. *S. C.*—*Garrett v. Weinberg*, 50 S. C. 310, 27 S. E. 770.

See also *Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90.

43. *U. S.*—*Sanders v. Devereux*, 60 Fed. 311, 8 C. C. A. 629. *Ky.*—*McDowell v. Kent*, 175 Ky. 445, 194 S. W. 374. *Mo.*—*Gravier v. Ivory*, 34 Mo. 522. *N. Y.*—*Howarth v. Howarth*, 67 App. Div. 354, 73 N. Y. Supp. 785; *Holder v. Holder*, 40 App. Div. 255, 59 N. Y. Supp. 204, general rule. *N. C.* *Maxwell v. Maxwell*, 43 N. C. 25. See *Ramsay v. Bell*, 38 N. C. 209, 42 Am. Dec. 163. *Ore.*—*Sterling v. Sterling*, 43 Ore. 200, 72 Pac. 741, unless the suit is brought by one or more tenants in common of a vested remainder or reversion.

But see *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Ott v. Sprague*, 27 Kan. 620.

[a] Seizin or possession of the person through whom plaintiff claims title at the time plaintiff's title was acquired is essential. *Martin v. Palmer*, 156 App. Div. 327, 141 N. Y. Supp. 396.

[b] Failure to allege possession cannot be raised for the first time on appeal. *Epley v. Epley*, 111 N. C. 505, 16 S. E. 321.

[c] It has been held sufficient to allege (1) that the plaintiff and the defendants "hold" the property (*Biddle v. Starr*, 9 Pa. 461), or (2) are seized in common (*Keil v. West*, 21 Fla. 508).

tions, if it appears from the petition that the parties to the suit are the owners of the land, and nothing appears to the contrary, possession will be presumed.⁴⁴ If because of statute one not in possession may sue for partition, the special circumstances must be alleged.⁴⁵

d. *Particular Mode of Partition.*—While it is proper and perhaps advisable to ask for a particular mode of partition, there being more than one provided by statute,⁴⁶ and to that end to allege the facts upon which the plaintiff relies for the particular mode which he seeks,⁴⁷ yet this is not indispensable, and a complaint which is silent upon the subject is good.⁴⁸ A general allegation that the property cannot be divided by metes and bounds without prejudice is sufficient, without alleging the facts upon which plaintiff relies to obtain a particular mode of partition.⁴⁹ But where the statutes authorize a partition sale only when it is for the interest and advantage of the parties that the land should be sold, it must be so alleged in the bill or petition.⁵⁰

e. *Allegations for Incidental Relief.*—No allowance of incidental relief can be had unless claim therefor is made in the pleadings;⁵¹

But see *Doane v. Mercantile Trust Co.*, 24 Misc. 502, 53 N. Y. Supp. 902, *affirmed*, 39 App. Div. 639, 57 N. Y. Supp. 1137, 160 N. Y. 494, 55 N. E. 296), or (3) are seized and possessed (N. Y.—*Balen v. Jacquelin*, 67 Hun 311, 22 N. Y. Supp. 193; *Hunt v. Crowell*, 2 Edm. Sel. Cas. 385. R. I.—*Cal-land v. Conway*, 14 R. I. 9. W. Va.—*Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90) thereof.

[d] An allegation that plaintiff and defendants are tenants in common of the property does not plead that plaintiff is in possession. *Sterling v. Sterling*, 43 Ore. 200, 72 Pac. 741.

44. *Haw.*—*Waiwaiole v. Kulaea*, 22 Hawaii 651. *Mo.*—*Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161. *N. Y.*—*Wainman v. Hampton*, 110 N. Y. 429, 18 N. E. 234; *Manley v. Manley*, 61 Misc. 183, 112 N. Y. Supp. 771. *N. C.*—*Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; *Epley v. Epley*, 111 N. C. 505, 16 S. E. 321. *Okla.*—*Chouteau v. Chouteau*, 152 Pac. 373. *S. C.*—*Garrett v. Weinberg*, 50 S. C. 310, 27 S. E. 770. *W. Va.*—*Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90.

[a] It is sufficient if the tenancy in common of complainant with defendants appears from the allegations of the bill. *Dillard v. Jefferies*, 118 Va. 81, 86 S. E. 844.

45. *Holder v. Holder*, 40 App. Div. 255, 59 N. Y. Supp. 204.

46. *Prayer for relief*, see *infra*, VI, B, 3.

47. *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

48. *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81. See also *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. ed. 644; *Wheat v. Wheat*, 190 Ala. 461, 67 So. 417.

[a] Failure to allege that the property was not susceptible of partition does not render the pleading defective. *Flynn v. McNeely* (Mo.), 178 S. W. 69.

49. *Cal.*—*De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81. *Md.*—*Wickes v. Wickes*, 98 Md. 307, 56 Atl. 1017. *Mo.*—*Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161. *N. C.*—*Allen v. Chappell*, 78 N. C. 238. *W. Va.*—*Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482.

50. *Tomlinson v. McKaig*, 5 Gill (Md.) 256; *Mewshaw v. Mewshaw*, 2 Md. Ch. 12. See also *Finch v. Smith*, 146 Ala. 644, 41 So. 819; *Rice v. Rice*, 158 Iowa 128, 138 N. W. 1111. But see *Cal.*—*Bartlett v. Mackey*, 130 Cal. 181, 62 Pac. 482. *La.*—*Segur v. Sorel*, 11 La. 439. *Wash.*—*Hill v. Young*, 7 Wash. 33, 34 Pac. 144. *Wyo.*—*Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

51. *Ia.*—*Moy v. Moy*, 111 Iowa 161, 82 N. W. 481. *Miss.*—*Cox v. Kyle*, 75 Miss. 667, 23 So. 518. *N. Y.*—*Cardwell v. Clark*, 94 Misc. 433, 158 N. Y. Supp. 300. *S. C.*—*Garlington v. Copeland*, 32 S. C. 57, 10 S. E. 616. *W. Va.*—*Bice v. Nixon*, 34 W. Va. 107, 11 S. E. 1004.

and a pleading is not multifarious because such claim is joined in a bill seeking partition.⁵²

3. **Prayer for Relief.**⁵³—The complaint or declaration must contain a prayer for partition,⁵⁴ and ask for partition and sale if the former cannot be made.⁵⁵

4. **Signing and Verification.**—Failure to sign a complaint or petition for partition, by the parties or their attorneys, though required by statute, is not a matter of substance, and will not avoid the judgment.⁵⁶ So an erroneous signing of the petition in a representative capacity is not a material defect.⁵⁷

Verification.—A complaint in partition need not be verified,⁵⁸ unless expressly required by statute.⁵⁹ It is obviated by statute in some jurisdictions.⁶⁰

5. **Exhibits.**⁶¹—The filing of exhibits as part of plaintiff's pleading is as a rule unnecessary.⁶² But the filing of plaintiff's evidence

See also *Long v. Long*, 195 Ala. 560, 70 So. 733. But see *Allen-West Com. Co. v. Harshaw*, 123 Ark. 55, 184 S. W. 436; *Macmunn v. Haverkamp*, 8 Pa. Dist. 680, 23 Pa. Co. Ct. 309.

[a] The plaintiff cannot ask for relief with reference to a separate and distinct subject-matter. *Belt v. Bowie*, 65 Md. 350, 4 Atl. 295.

[b] No relief can be claimed that is directed against but one of the defendants. *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493. But see *Ellerson v. Westcott*, 88 Hun 389, 34 N. Y. Supp. 813, 2 N. Y. Ann. Cas. 118, reversed on other grounds, 148 N. Y. 149, 42 N. E. 540.

As to granting incidental relief in partition suit, see *infra*, X.

52. Ala.—*Marshall v. Marshall*, 86 Ala. 383, 5 So. 475. N. J.—*Obert v. Obert*, 10 N. J. Eq. 98, affirmed, 12 N. J. Eq. 423. S. C.—*Buchanan v. Buchanan*, 38 S. C. 410, 17 S. E. 218.

See generally the title "Multifariousness."

53. See generally the title "Prayer."

54. *Hawley v. Castle*, Kirby (Conn.) 218, omission not cured by verdict.

[a] But partition may be decreed in the absence of a prayer therefor under a prayer for general relief, if warranted by the allegations of the complaint. *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918; *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 511.

55. Pa.—*Kerner's Estate*, 29 Pa. Co. Ct. 271. R. I.—*Dyer v. Vinton*, 10 R. I. 517. Eng.—*Holland v. Holland*, L. R. 13 Eq. 406, 41 L. J. Ch. 220, 26 L. T. N. S. 17, 20 Wkly. Rep. 290;

Teall v. Watts, L. R. 11 Eq. 213, 40 L. J. Ch. 176, 23 L. T. N. S. 884, 19 Wkly. Rep. 317.

[a] But a complaint is not insufficient where a sale only is prayed for when it appears therefrom that an actual partition is impracticable. *Lorenz v. Jacobs*, 59 Cal. 262.

56. *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6.

[a] A married woman was required under the old practice to sign the pleading, whether it be a bill or answer, or by special power of attorney filed in the suit, to authorize the proceeding. *Graydon v. Graydon*, McMull. Eq. (S. C.) 63.

57. *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415.

58. *Hall v. Snipes*, 10 Ky. L. Rep. 435, 9 S. W. 388; *Martin v. Porter*, 4 Heisk. (Tenn.) 407. See generally the title "Verification."

59. See the statutes.

[a] Failure to object to the absence of a verification, when it is required, and allowing the cause to go to judgment is a waiver. *Dunning v. Dunning*, 37 Ill. 306.

[b] The affidavit of verification may be made by the attorney, in the absence of a contrary statute. *Wright v. Marsh*, 2 G. Gr. (Iowa) 94.

60. See the statutes, and *Williams v. Capital Mining, etc. Co.*, 153 Ky. 772, 156 S. W. 409.

61. See generally the title "Exhibits."

62. *Jewett v. Perrette*, 127 Ind. 97, 26 N. E. 685.

[a] And they are not considered in determining the sufficiency of the com-

of title by exhibit is sometimes rendered essential because of statute.⁶³

6. Joinder of Causes of Action.—In some jurisdictions, a cause of action for the recovery of the realty may be joined with one asking for partition.⁶⁴ But some statutes prohibit the joinder of an action to recover personal property with an action to partition real estate.⁶⁵

C. PLEA OR ANSWER.—1. Generally.—In proceedings for partition, as in other actions, the defendant may plead anything which will abate the action or bar the partitioner's right to a judgment,⁶⁶ with this limitation that where the proceeding for partition is by an action at law, defendant cannot plead defenses purely equitable in their nature.⁶⁷ He may incorporate all matters of defense in his answer and is not required to plead same specially.⁶⁸ He may plead any fact showing plaintiff's want of title or interest in the land.⁶⁹ But a plea which does not negative or dispute plaintiff's claim⁷⁰ is in-

plaint. *Smith v. King*, 81 Ind. 217. See also 8 STANDARD PROC. 806.

63. See the statutes, and *Williams v. Capital Min., etc. Co.*, 153 Ky. 772, 156 S. W. 409; *Toler's Heirs v. Toler*, 33 Ky. L. Rep. 594, 110 S. W. 388; *Salzer v. Elkhorn Land Imp. Co.*, 25 Ky. L. Rep. 1210, 77 S. W. 370.

64. *Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168; *Denton v. Fyfe*, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272. But see *Belt v. Bowie*, 65 Md. 350, 4 Atl. 295.

[a] In an action by a joint tenant out of possession against his co-tenant who holds adversely to him, a cause of action for possession of the land must be joined with the demand for partition. *Chouteau v. Chouteau* (Okla.), 152 Pac. 373.

65. *Granger v. Granger*, 172 Iowa 159, 152 N. W. 503, 154 N. W. 305; *Watson v. Richardson*, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331.

66. *Reed v. Child*, 4 How. Pr. (N. Y.) 125, 2 Code Rep. 69.

[a] A plea that the premises are not partitionable is not a sufficient defense when the petition asks for a sale in such event. *Baldwin v. Aldrich*, 34 Vt. 526, 80 Am. Dec. 695. But see *Brown v. Turner*, 1 Aik. (Vt.) 350, 15 Am. Dec. 696, when petition only seeks partition.

As to pleas in abatement, see *infra*, VI, C, 2.

67. Me.—*Bailey v. Knapp*, 79 Me. 205, 9 Atl. 356. **N. J.**—*Polhemus v. Hodson*, 19 N. J. Eq. 63. **Va.**—*Wiseley v. Findlay*, 3 Rand. (24 Va.) 361, 15 Am. Dec. 712.

68. *Mylin v. King*, 139 Ala. 319, 35

So. 998; *Stein v. McGrath*, 128 Ala. 175, 30 So. 792.

[a] If defendant pleads a defense based upon an agreement required by the statute of frauds to be in writing, the answer must show that it is in writing. *Jacob v. Fischer*, 7 Ohio Dec. 423, 5 Ohio N. P. 419. See generally the title "Frauds, Statute of."

69. *Reed v. Child*, 4 How. Pr. (N. Y.) 125, 2 Code Rep. 69; *Wallace v. International Paper Co.*, 53 App. Div. 41, 65 N. Y. Supp. 543.

[a] Want of title in plaintiff must be set up in the answer. *Taylor's Estate*, 16 Pa. Dist. 951, 34 Pa. Co. Ct. 647.

[b] A plea denying (1) plaintiff's title must set up the facts with particularity (*Knight v. Knight*, 10 Del. Ch. 304, 89 Atl. 595. See *Gracy v. Fielding*, 71 Fla. 1, 70 So. 625); (2) a bare denial of plaintiff's title being no obstacle to the entertainment of the suit. *White v. Smith* (N. J. Eq.), 60 Atl. 399; *Lucas v. King*, 10 N. J. Eq. 277. See also *McClaskey v. Barr*, 40 Fed. 559. But see *Simms v. Simms*, 88 Ky. 642, 11 S. W. 665. As to setting up title in defendant, see *infra*, VI, C, 4.

[c] The mere denial of plaintiff's title on information and belief, without setting up adverse title in the defendant filing the plea, does not put such title in issue. *Heinze v. Butte & B. Consol. Min. Co.*, 126 Fed. 1, 61 C. C. A. 63.

70. **Ala.**—*Mylin v. King*, 139 Ala. 319, 35 So. 998; *Sibley v. Alba*, 95 Ala. 191, 10 So. 831. **Ill.**—*Torrence v. Shedd*, 112 Ill. 466. **La.**—*Glancy's Succession*, 108 La. 414, 32 So. 356. **Me.**

sufficient. The answer may ask for an accounting for the rents and profits.⁷¹

2. Pleas in Abatement.—This is the proper method of attacking the ability of the petitioner to bring the action,⁷² and of presenting the question that necessary parties have not been joined as defendants,⁷³ or that one who is joined is not a proper party.⁷⁴

Death of Party.—In most jurisdictions, the death of a party abates an action of partition until the proper parties are brought in;⁷⁵ but in others a plea in abatement because of the death of a co-tenant is not recognized.⁷⁶

The requisites and sufficiency of the plea is treated elsewhere in this work.⁷⁷

3. General Issue or Denial.—At common law the plea of non tenant insimul constituted the general issue to the writ of partition.⁷⁸ In most code states, a general denial now is permitted in lieu of the general issue.⁷⁹ An answer setting up an argumentative denial is

Coombs *v.* Persons Unknown, 82 Me. 326, 19 Atl. 826. **Md.**—Claude *v.* Handy, 83 Md. 225, 34 Atl. 532; Chaney *v.* Tipton, 3 Gill 327. **Mass.**—Barnes *v.* Boardman, 157 Mass. 479, 32 N. E. 670. **N. Y.**—Spring *v.* Sandford, 7 Paige 550; Matthews *v.* Matthews, 1 Edw. Ch. 565. **N. C.**—Atkinson *v.* McIntyre, 90 N. C. 147. **Pa.**—Sill *v.* Blaney, 159 Pa. 264, 28 Atl. 251; Mitchell *v.* Harris, 2 Clark 443. **R. I.**—Bailey *v.* Sisson, 1 R. I. 233.

[a] Defendant cannot plead in bar of the action that he made improvements on the premises for which he has not been compensated. *Martindale v. Alexander*, 26 Ind. 104, 89 Am. Dec. 458.

[b] A plea of "sole seizure" not made prior to the order for partition is waived. *Wright v. McCormick*, 69 N. C. 14. See *Ashmore v. Ashmore*, 18 Pa. Dist. 878.

71. *Doerner v. Doerner*, 161 Mo. 407, 61 S. W. 802.

Accounting as incidental relief, see *infra*, X, B.

72. *Upham v. Bradley*, 17 Me. 423.

[a] Another Action Pending.—*Hornfager v. Hornfager*, 6 How. Pr. (N. Y.) 279.

[b] Prematurely Commenced.—*Wilson v. Anderson*, 13 Montg. Co. (Pa.) 44.

73. **Ala.**—*Cates v. Johnson*, 109 Ala. 126, 19 So. 416. **Me.**—*Jewett v. Persons Unknown*, 61 Me. 408. **R. I.** *Hoxsie v. Ellis*, 4 R. I. 123.

Who are necessary parties, see *supra*, IV, B, 2.

74. *Loomis v. Riley*, 24 Ill. 307.

75. **Fla.**—*Lyon v. Register*, 36 Fla. 273, 18 So. 589. **Me.**—*Dwinal v. Holmes*, 37 Me. 97. **Mass.**—*Mitchell v. Starbuck*, 10 Mass. 5; *Thomas v. Smith*, 2 Mass. 479. **N. H.**—*Osgood v. Taggard*, 18 N. H. 318. **N. Y.**—*Requa v. Holmes*, 16 N. Y. 193; *Reynolds v. Reynolds*, 5 Paige 161; *Reed v. Child*, 4 How. Pr. 125, 2 Code Rep. 69. **Pa.** *McKee v. Straub*, 2 Binn. 1.

See generally the titles "Revivor;" "Survival."

[a] If a petitioner dies before final judgment, his devisee cannot appear and prosecute the petition. *Brown v. Wells*, 12 Mete. (Mass.) 501.

[b] The death of a plaintiff after entry of introductory judgment of partition does not abate the action. *Frohock v. Gustine*, 8 Watts (Pa.) 121.

76. *Speck v. Pullman Palace Car Co.*, 121 Ill. 33, 12 N. E. 213; *Monroe v. Millizen*, 113 Ill. App. 157.

77. See 1 STANDARD PROC. 41, et seq.

78. **U. S.**—*Klever v. Seawall*, 65 Fed. 393, 12 C. C. A. 661. **N. H.**—*Morrill v. Foster*, 25 N. H. 333. **N. C.**—*Gregory v. Pinnix*, 158 N. C. 147, 73 S. E. 814.

See also *Bethel v. Lloyd*, 1 Dall. (U. S.) 2, 1 L. ed. 11; *McKee v. Staub*, 2 Binn. (Pa.) 1; *Bates v. McCrory*, 3 Yeates (Pa.) 192.

For form of plea non tenant insimul, see 9 STANDARD PROC. 917.

79. See 7 STANDARD PROC. 84, et seq.; also *Whitney v. Whitney*, 171 N. Y. 176, 63 N. E. 834. Compare *Cook v. Cook*, 81 N. J. Eq. 223, 87 Atl. 120.

insufficient.⁸⁰

4. **Setting Up Title in Defendant.**⁸¹ — When defendant's title is not set out in the complaint, as when plaintiff alleges his want of knowledge thereof, the defendant in his answer must set out such title as he claims.⁸² When the facts alleged in the answer show that the defendant is a tenant in common with the plaintiff, the setting up of a title superior to plaintiff is bad.⁸³

5. **Pleading Equities.** — Failure of defendant to plead an equity in his favor will prevent its consideration in the partition suit.⁸⁴ In some jurisdictions such equities as a defendant has may be set up in the answer, a cross-bill being unnecessary;⁸⁵ but in others, a cross-bill or petition is necessary.⁸⁶ The equities though pleaded in the answer must be sufficiently specific to support a cross-bill or an original bill for like relief.⁸⁷

6. **Signature.** — The general rules governing the necessity and form of signatures to pleadings obtain.⁸⁸

D. **CROSS-BILL OR CROSS-COMPLAINT.** — In some jurisdictions, a defendant must set up such equities as he has by cross-bill or cross-complaint;⁸⁹ but in others it seems that a cross-bill or cross-complaint

80. *Black v. Richards*, 95 Ind. 184. See also 7 STANDARD PROC. 40.

81. **Denying plaintiff's title**, see *supra*, VI, C, 1.

82. *Morenhout v. Higuera*, 32 Cal. 289.

[a] **If a will is the basis of title** it is sufficient to set out a summary of the material parts thereof, especially when the complaint does not set out the will verbatim. *Eisner v. Eisner*, 89 Hun 480, 35 N. Y. Supp. 393, 69 N. Y. St. 779.

83. *Cramton v. Rutledge*, 157 Ala. 141, 47 So. 214.

84. *Ala.*—*Franklin v. Snow*, 195 Ala. 569, 71 So. 93. *Ill.*—*Mehan v. Mehan*, 203 Ill. 180, 67 N. E. 770; *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210. *Mo.*—*Lee v. Lee*, 161 Mo. 52, 61 S. W. 630. *Tex.*—*Ivy v. Ivy* (Tex. Civ. App.), 128 S. W. 682. *W. Va.*—*Cosgray v. Core*, 2 W. Va. 353.

Adjusting equities as incidental relief, see *infra*, X, A.

85. *U. S.*—*Aspen Mining & S. Co. v. Rucker*, 28 Fed. 220. Compare *McClaskey v. Barr*, 48 Fed. 130. *Fla.*—*Koon v. Koon*, 55 Fla. 834, 46 So. 633. *Ga.*—*Latimer v. Irish-American Bank*, 119 Ga. 887, 47 S. E. 322. *Kan.*—*White v. White*, 41 Kan. 556, 21 Pac. 604. *Md.*—*Haines v. Haines*, 6 Md. 435. *N. Y.*—*Wainman v. Hampton*, 110 N. Y. 429, 18 N. E. 234; *German v. Machin*, 6 Paige 288. *Ohio.*—*Courter v. Courter*,

7 Ohio Dec. 527, 7 Ohio N. P. 154. *Okl.*—See *Chouteau v. Chouteau*, 152 Pac. 373.

[a] **Service of Answer.**—If relief is sought against a co-defendant, the answer must be served on such party. *Willes v. Loomis*, 94 App. Div. 67, 87 N. Y. Supp. 1086. See generally the title "**Service of Process and Papers.**"

86. See *infra*, VI, D.

87. *Ala.*—*Jordan v. Jordan*, 39 So. 992. *Ind.*—*Younglove v. Frank*, 37 Ind. 543. *Ky.*—*Reeves v. Morgan*, 30 Ky. L. Rep. 1158, 100 S. W. 836.

88. See generally the titles "**Answers;**" "**Bills and Answers;**" "**Pleading.**"

[a] **When an answer of a guardian ad litem** in a partition suit shows that it is made on the infant's behalf, the manner of signing is immaterial. *Thompson v. Buffalo Land & Coal Co.*, 77 W. Va. 782, 88 S. E. 1040, it is immaterial whether the guardian ad litem signs the infant's name "by" himself or signs his own name first as guardian ad litem "for" the infant.

89. See the following: *Ill.*—*Hurlbut v. Talbot*, 273 Ill. 299, 112 N. E. 693; *Cox v. Spurgin*, 210 Ill. 398, 71 N. E. 456; *Longshore v. Longshore*, 200 Ill. 470, 65 N. E. 1081; *Mahoney v. Mahoney*, 65 Ill. 406, when compensation for improvements is sought. *Ind.*—*Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531; *McFerran v. McFerran*, 69

is unnecessary, the defendant being able to obtain relief by answer.⁹⁰ Such a pleading is necessary also when a defendant seeks affirmative relief,⁹¹ or if a defendant seeks relief against a co-defendant.⁹² When necessary to settle all questions of conflicting or controverted titles and the removal of clouds upon the realty, resort may be had to a cross-bill.⁹³ But such a pleading cannot be filed by plaintiff.⁹⁴

The cross-complaint or cross-bill in a partition suit is tested by substantially the same rules as a complaint or cross-bill generally.⁹⁵ The proper time for filing a cross-bill or cross-complaint,⁹⁶ and the necessity for service of cross-bill or cross-complaint,⁹⁷ is treated elsewhere in this work.

E. **DISCLAIMER.**⁹⁸—A disclaimer in order to be sufficient must be absolute and unconditional.⁹⁹

F. **SET-OFF AND COUNTERCLAIM.**¹—A defendant may file a counterclaim for the purpose of putting in issue such claim or right as he has.²

Ind. 29; *Harness v. Harness*, 63 Ind. 1; *Stafford v. Nutt*, 35 Ind. 93, when value of improvements is sought. But see *Duncan v. Henry*, 125 Ind. 10, 24 N. E. 506; *Nicholson v. Caress*, 59 Ind. 39, holding that the equities may be set up in the answer. **Miss.**—*Harrison v. Harrison*, 56 Miss. 174. **N. J.**—*Greiss v. Noisky*, 82 N. J. Eq. 1, 87 Atl. 155; *Casper v. Walker*, 33 N. J. Eq. 35. **N. C.**—*Donnell v. Mateer*, 42 N. C. 94. **Tenn.**—*Smith v. Smith*, 57 S. W. 198; *Parks v. Van Dergriff*, 57 S. W. 177; *Apple v. Owens*, 1 Tenn. Ch. App. 135. **Utah.**—*Chalmers v. Trent*, 11 Utah 88, 39 Pac. 488.

See also *Betts v. Ward*, 196 Ala. 248, 72 So. 110.

[a] **Question of title may be put in issue** by cross-complaint. *Woolery v. Grayson*, 110 Ind. 149, 10 N. E. 935; *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. 266; *Cooter v. Baston*, 89 Ind. 185.

90. See *supra*, VI, C, 5.

91. **Ill.**—*Mehan v. Mehan*, 203 Ill. 180, 67 N. E. 770. **N. Y.**—*German v. Machin*, 6 Paige 288. **Pa.**—*Meurer v. Stokes*, 246 Pa. 393, 92 Atl. 506. **Utah.** *Chalmers v. Trent*, 11 Utah 88, 39 Pac. 488.

See also 6 STANDARD PROC. 262; 263; 298. Compare 6 STANDARD PROC. 267.

[a] **A cross-bill is not abandoned** because the answer contains a statement that it would not be insisted upon if defendant can obtain the relief sought by it under the original bill. *Stein v. McGrath*, 128 Ala. 175, 30 So. 792.

92. *Barret v. Coburn*, 3 Mete. (Ky.)

510. See also 6 STANDARD PROC. 264, 297. Compare *Kern v. Zink*, 55 Ill. 449.

93. **Ala.**—*Betts v. Ward*, 196 Ala. 248, 72 So. 110. **Ill.**—*Hurlbut v. Taylor*, 273 Ill. 299, 112 N. E. 693. **Ind.** *Benbow v. Studebaker*, 51 Ind. App. 450, 99 N. E. 1033.

94. *Russell v. Russell*, 48 Ind. 456, if filed, should be stricken out on motion.

[a] **It is not error** to dispose of the paper on a demurrer for want of sufficient facts. *Russell v. Russell*, 48 Ind. 456.

95. *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. 266. See also 6 STANDARD PROC. 301.

[a] **Thus** (1) it must be germane to the original bill (see 6 STANDARD PROC. 272, 304), (2) but it seems that partition may be sought in such a pleading though it was not within the purview of the original bill. *Dinsmoor v. Rowse*, 200 Ill. 555, 65 N. E. 1079. (3) New parties may be brought in when they are necessary to the determination of the cause. See 6 STANDARD PROC. 276, 302; also the title "Parties."

96. See 6 STANDARD PROC. 280, 306.

97. See 6 STANDARD PROC. 287, 308.

98. See generally the title "Disclaimer."

99. *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81, any reservation of title or interest in the property sought to be partitioned is not a disclaimer.

1. See generally the title "Set-off, Counterclaim and Recoupment."

2. *Ferris v. Reed*, 87 Ind. 123; *Crane*

G. REPLICATION OR REPLY.—When necessary plaintiff may file a reply to the answer.³ In accordance with the general rule, if the reply purports to be a reply to the whole answer, and is but a partial reply, it is demurrable.⁴

H. SUPPLEMENTAL PLEADINGS.—Matters occurring since the commencement of the action of which a party desires to avail himself on the trial may be set up by supplemental pleading in accordance with the general rules.⁵

I. DEMURRERS AND OBJECTIONS TO PLEADINGS.—The rules applicable generally to the demurrer⁶ apply to a demurrer interposed in a partition suit.⁷ A demurrer may be interposed if an answer contains insufficient facts to constitute a defense, or contains any other defect generally demurrable.⁸

When special demurrers are permissible they may be filed in partition suits for the same reasons as in other actions.⁹

Waiver of Objections.—Filing of an answer without objection to errors in the complaint waives all the defects therein, except the jurisdiction of the court or the right to maintain the action on all

v. Kimmer, 77 Ind. 215; *Schafer v. Schafer*, 68 Ind. 374. See also *Blakely v. Boruff*, 71 Ind. 93. Compare *Miller v. Noble*, 86 Ind. 527.

[a] But a counterclaim that has nothing to do with the specific property involved in the action is subject to demurrer. *Moses v. Moses*, 170 App. Div. 211, 155 N. Y. Supp. 1066.

3. *Duncan v. Henry*, 125 Ind. 10, 24 N. E. 506; *Loring v. Gay*, 9 Pick. (Mass.) 66, and therein deny such allegations of the answer as he deems necessary to controvert. See generally the title "Replication and Reply."

4. *Duncan v. Henry*, 125 Ind. 10, 24 N. E. 506.

5. *Nolan v. Command*, 11 Civ. Proc. (N. Y.) 295; *Diehl v. Lambart*, 9 Civ. Proc. (N. Y.) 347. See generally the title "Supplemental Pleading."

[a] Pertinent facts arising subsequent to the filing of the answer may be set up by supplemental answer. *Hieatt v. Black*, 14 Ohio Cir. Ct. 194, 8 Ohio Cir. Dec. 173.

6. See generally 6 STANDARD PROC. 845.

7. See *infra*, this section.

[a] Grounds of Demurrer Must Appear on the Face of the Complaint. Mich.—*Hoffman v. Ross*, 25 Mich. 175; Pa.—*Love v. Robinson*, 213 Pa. 480, 62 Atl. 1065; *Holmes v. Fulton*, 193 Pa. 270, 44 Atl. 426. See *Ashmore v. Ashmore*, 18 Pa. Dist. 878. Tenn.—*Turrentine v. Watson*, 3 Tenn. Ch. 307. See *Hall v. Condon*, 164 Ala. 393, 51 So. 20.

[b] When a tenant is made a party, allegations on the subject of tenancy being collateral to the regular issues in partition, can only be ground of demurrer on the part of tenants themselves. *Eberts v. Fisher*, 44 Mich. 551, 7 N. W. 211.

8. Ind.—*Miller v. Smith*, 98 Ind. 226; *Pulse v. Osborn* (Ind. App.), 60 N. E. 374. Mass.—*Black v. Tyler*, 1 Pick. 150. N. H.—*Jewell v. McQuesten*, 68 N. H. 233, 34 Atl. 742.

[a] When the answer sets up a denial to the facts alleged in the complaint but not a counterclaim to the partition suit, a demurrer on the ground that it fails to state a cause of action is bad; the demurrer should be upon the ground that the answer was insufficient in law on its face. *Evans v. Ogsbury*, 2 App. Div. 556, 37 N. Y. Supp. 1104, 74 N. Y. St. 399. See also 6 STANDARD PROC. 913.

9. Ala.—*Garnett Smelting & Dev. Co. v. Watts*, 140 Ala. 449, 37 So. 201. Md.—*Rice v. Donald*, 97 Md. 396, 55 Atl. 620. Mo.—*Rogers v. Miller*, 48 Mo. 378.

[a] Pendency of another action for partition (1) may be presented by special demurrer. *Lowe v. Maurer*, 4 Ohio Dec. (Reprint) 243, 1 Clev. L. Rep. 157; *Aylesworth v. Crocker*, 21 R. I. 436, 44 Atl. 308. See also 1 Dan. Ch. Pr. 632. (2) But if the second bill embraces the whole subject in dispute more completely than the first, it will be allowed to stand and the first will

the facts stated in the complaint.¹⁰ If after a demurrer to the answer the suit is proceeded with and no hearing on the demurrer is noticed, the demurrer is waived.¹¹

J. AMENDMENTS.—The general rule that the court in its discretion may allow pleadings to be amended applies in actions for partition,¹² and accordingly the petition or complaint may in the discretion of the court be amended on application therefor,¹³ at any time before entry of final judgment.¹⁴ The same is true of defendant's pleadings.¹⁵

K. BILLS OF PARTICULARS are sometimes required to be furnished to prevent surprise.¹⁶

VII. INTERVENTION.¹⁷—A party having an interest in the subject matter of the action may be allowed to intervene in a partition proceeding.¹⁸ As a rule a person claiming adversely cannot

be dismissed. *Aylesworth v. Crocker*, 21 R. I. 436, 44 Atl. 308. See also 1 Dan. Ch. Pr. 633.

10. *Broad v. Broad*, 40 Cal. 493; *White v. Smith* (N. J. Eq.), 60 Atl. 399.

11. *McNeile's Estate*, 15 Pa. Dist. 341.

12. See *Highland Park Mfg. Co. v. Steele*, 232 Fed. 10, 146 C. C. A. 202, *affirming* 212 Fed. 972, *modified*, 235 Fed. 465, 149 C. C. A. 11; also 1 STANDARD PROC. 860.

13. **U. S.**—*Mound City Co. v. Castleman*, 177 Fed. 510. **Ala.**—*Sherer v. Garrison*, 111 Ala. 228, 19 So. 988. **Cal.** *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712. **Fla.**—See *Milton v. Milton*, 62 Fla. 564, 56 So. 947. **Ga.**—*Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874. **La.** *Huber v. Huber*, 131 La. 144, 59 So. 44; *Fix v. Koepke*, 44 La. Ann. 745, 11 So. 39. **N. C.**—*Webster v. Williams*, 153 N. C. 309, 69 S. E. 233; *Simmons v. Jones*, 118 N. C. 472, 24 S. E. 114; *Godwin v. Early*, 114 N. C. 11, 18 S. E. 973. **Pa.**—*Cowan's Appeal*, 2 Monag. 609, 16 Atl. 28; *Ashmore v. Ashmore*, 18 Pa. Dist. 878; *In re Drum's Estate*, 8 Pa. Dist. 407. **S. C.** *McCown v. Rucker*, 88 S. C. 180, 70 S. E. 455.

14. **Ind.**—*Bower v. Bowen*, 139 Ind. 31, 38 N. E. 326; *Randles v. Randles*, 63 Ind. 93. **Me.**—*Swanton v. Crooker*, 52 Me. 415. **Md.**—*Claude v. Handy*, 83 Md. 225, 34 Atl. 532. **Mass.**—*Fay v. Fay*, 1 Cush. 93; *Loud v. Penniman*, 19 Pick. 539. **Pa.**—*Marcy Estate*, 9 Kulp 128.

But see *Carper v. Chenoweth*, 69 W. Va. 729, 72 S. E. 1031.

15. *Warfield v. Warfield*, 5 Har. &

J. (Md.) 459. See *Highland Park Mfg. Co. v. Steele*, 232 Fed. 10, 146 C. C. A. 202.

[a] **Laches** is ground for refusing an amendment. *Fread v. Fread*, 165 Ill. 228, 46 N. E. 268, *affirming* 61 Ill. App. 586.

16. *Crossman v. Wyckoff*, 32 App. Div. 32, 52 N. Y. Supp. 314; *Drake v. Drake*, 31 Misc. 8, 64 N. Y. Supp. 581; *Bender v. Van Allen*, 28 Misc. 304, 59 N. Y. Supp. 885; *Lewis v. Joiner*, 5 N. Y. St. 301. See also 4 STANDARD PROC. 378.

[a] But plaintiff will not be required to state the particular grounds on which it is claimed that a devise to one of the defendants referred to in the complaint is void. *Bennett v. Wardell*, 43 Hun 452, 6 N. Y. St. 767.

17. See generally the title "**Intervention**."

18. **U. S.**—*West v. East Coast Cedar Co.*, 101 Fed. 615, 41 C. C. A. 528. **Cal.** *Towle Bros. Co. v. Quinn*, 141 Cal. 382, 74 Pac. 1046. **Ky.**—*Logan v. Catron*, 19 Ky. L. Rep. 1200, 43 S. W. 213. **La.** *Woolfolk v. Woolfolk*, 30 La. Ann. 139. **Me.**—*Huntress v. Tiney*, 46 Me. 83; *Field v. Persons Unknown*, 34 Me. 35. **N. M.**—*Montoya v. Vigie*, 16 N. M. 349, 120 Pac. 676. **N. Y.**—*Glaser v. Burns*, 170 App. Div. 321, 155 N. Y. Supp. 936. **Tex.**—*Rosborough v. Cook* (Tex. Civ. App.), 148 S. W. 1120.

See also *In re Cochran's Est.*, 10 Del. Ch. 134, 85 Atl. 1070; 14 STANDARD PROC. 292, et seq.

[a] A general creditor having no lien will not be permitted to intervene. *Rice v. Donald*, 97 Md. 396, 55 Atl. 620.

[b] A purchaser of a tract of land

intervene.¹⁹ But leave to intervene will be granted if the judgment in partition will operate as a cloud upon the title of the party seeking intervention.²⁰

Time for Intervention. — In the absence of a prohibitory statute, intervention may be allowed at any time prior to the final disposition of the case.²¹

Matters Pleadable. — An intervenor stands on the same footing as other parties in respect to the extent and character of the issues and the relief he may seek.²²

VIII. TRIAL. — **A. SCOPE OF ISSUES AND INQUIRY UPON.** — **1. Generally.** — The court will not usually extend its inquiry in a partition suit beyond the property and the parties before it.²³ But under the reform procedure any question affecting plaintiff's right to a partition, or the rights of each and all of the parties in the land, may be put in issue and tried and determined.²⁴

(1) from one of the parties to the suit, pending the proceeding should not ordinarily be allowed to intervene (*Griffin v. Wilson*, 39 Tex. 213), (2) but if he is an innocent purchaser without notice or sets up other equities which can only be adjusted by his intervention in the suit, he should be allowed to come in. *Griffin v. Wilson*, 39 Tex. 213.

[c] **A surety of the purchaser at a partition sale** may intervene in an application to resell the land. *Rout v. King*, 103 Ind. 555, 3 N. E. 249.

19. **Ind.**—*Baker v. Riley*, 16 Ind. 479. **Ky.**—*McIntire v. McIntire's Exr.*, 82 Ky. 502. **N. C.**—*Jordan v. Faulkner*, 168 N. C. 466, 468, 84 S. E. 764. **Tex.**—*De la Vega v. League*, 64 Tex. 205.

[a] **One setting up adverse title** cannot intervene. *Hillens v. Brinsfield*, 113 Ala. 304, 21 So. 208.

20. *Clark v. Roller*, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. ed. 300.

21. **Ill.**—*Kester v. Stark*, 19 Ill. 328. **La.**—*Woolfolk v. Woolfolk*, 30 La. Ann. 139. **Me.**—*Elwell v. Sylvester*, 27 Me. 536. **Mo.**—*Parkinson v. Caplinger*, 65 Mo. 290.

See also *Montoya v. Gonzales*, 232 U. S. 375, 34 Sup. Ct. 413, 58 L. ed. 645; 14 STANDARD PROC. 317.

22. *Heinze v. Butte & B. Consol. Min. Co.*, 126 Fed. 1, 61 C. C. A. 63. See also 14 STANDARD PROC. 322.

[a] **Thus**, he cannot set up matters hostile to and adverse to all parties to the partition suit. **U. S.**—*West v. East Coast Cedar Co.*, 101 Fed. 615, 41 C. C. A. 528. **Md.**—*Rice v. Donald*, 97

Md. 396, 55 Atl. 620. **S. C.**—*Ex parte Crawford*, 27 S. C. 159, 3 S. E. 75.

[b] **To assert such title** he must proceed in an independent action. *West v. East Coast Cedar Co.*, 101 Fed. 615, 41 C. C. A. 528.

23. *Highland Park Mfg. Co. v. Steele*, 232 Fed. 10, 146 C. C. A. 202, *affirming* 212 Fed. 972; *decree modified*, 235 Fed. 465, 149 C. C. A. 11.

[a] **Scope will not be extended to involve collateral questions foreign to those properly cognizable and necessitating making of other parties.** *Highland Park Mfg. Co. v. Steele*, 232 Fed. 10, 146 C. C. A. 202, *affirming* 212 Fed. 972; *decree modified*, 235 Fed. 465, 149 C. C. A. 11.

24. See the following cases: **U. S.** *Gilbert v. Hopkins*, 204 Fed. 196, 122 C. C. A. 432. **Cal.**—*Middlecoff v. Cronise*, 155 Cal. 185, 100 Pac. 232; *Miller v. Sharp*, 48 Cal. 394; *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81. *Compare Tu Junga Co. v. Barelay*, 11 Cal. App. 60, 103 Pac. 1092. **Ga.**—*Griffin v. Griffin*, 33 Ga. 107. **Ind.**—*Sauer v. Schenck*, 159 Ind. 373, 64 N. E. 84; *Green v. Brown*, 146 Ind. 1, 44 N. E. 805. **Ia.**—*Metcalf v. Hoopingardner*, 45 Iowa 510. **Ky.**—*Shackelford v. Williams*, 21 Ky. L. Rep. 422, 51 S. W. 614. **La.**—*Lanphier's Succession*, 104 La. 384, 29 So. 122. **Mo.**—*Colvin v. Hauenstein*, 110 Mo. 575, 19 S. W. 948. **Neb.** *Schick v. Whitcomb*, 68 Neb. 784, 94 N. W. 1023; *Lynch v. Lynch*, 18 Neb. 586, 26 N. W. 390. **N. Y.**—*Barker v. Barker*, 166 App. Div. 863, 152 N. Y. Supp. 356; *Obermeyer v. Behn*, 123 App. Div. 440, 108 N. Y. Supp. 289; *Leiden-*

Issues involving title and possession will be tried in the partition suit.²⁵ Some authorities, however, maintain the doctrine that a suit in equity for partition is not a substitute for ejectment, and if there is disseizin, whether the adverse claimant be another cotenant²⁶ or

thal *v.* Leidenthal, 121 App. Div. 269, 105 N. Y. Supp. 807. **Ore.**—Walker *v.* Goldsmith, 14 Ore. 125, 12 Pac. 537. **Pa.**—Stockham *v.* Stockham, 185 Pa. 337, 39 Atl. 950. **Tex.**—Ford *v.* Boone, 32 Tex. Civ. App. 550, 75 S. W. 353.

[a] When there is a conflicting claim to share in the land under the same right under which partition is sought, and the determination of the conflict is merely incidental to the petition, the court may under some statutes decide such conflict. Carberry *v.* West Virginia & P. R. Co., 44 W. Va. 260, 28 S. E. 694. As to granting incidental relief, see generally *infra*, X.

25. See the following: **Ala.**—Brown *v.* Hunter, 121 Ala. 210, 25 So. 924; Hillens *v.* Brinsfield, 108 Ala. 605, 18 So. 604; Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67. **Cal.**—Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Jameson *v.* Hayward, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268. **Fla.**—Girtman *v.* Starbuck, 48 Fla. 265, 37 So. 731; Camp Phosphate Co. *v.* Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77. **Ill.**—Glos *v.* Carlin, 207 Ill. 192, 69 N. E. 928; Mott *v.* Danville Seminary, 129 Ill. 403, 21 N. E. 927; Gage *v.* Reid, 104 Ill. 509. **Ind.**—Millikan *v.* Patterson, 91 Ind. 515; Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865. **Kan.**—Chandler *v.* Richardson, 65 Kan. 152, 69 Pac. 168; Denton *v.* Fyfe, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272. **Ky.**—Overton's Heirs *v.* Woolfolk, 6 Dana 371; Shackelford *v.* Williams, 21 Ky. L. Rep. 422, 51 S. W. 614. **Minn.**—Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805; Cook *v.* Webb, 19 Minn. 167. **Miss.**—Claughton *v.* Claughton, 70 Miss. 384, 12 So. 340; Nugent *v.* Powell, 63 Miss. 99. **Mo.**—Lee *v.* Lee, 161 Mo. 52, 61 S. W. 630; Hart *v.* Steedman, 98 Mo. 452, 11 S. W. 993. *Compare* Shepperd *v.* Fisher, 206 Mo. 208, 103 S. W. 989; Chamberlain *v.* Waples, 193 Mo. 96, 91 S. W. 934; Hutson *v.* Hutson, 139 Mo. 229, 40 S. W. 886. **Neb.**—Carson *v.* Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Phillips *v.* Dorris, 56 Neb. 293, 76 N. W. 555. **N. H.**—Barker *v.* Jones, 62 N. H. 497, 13 Am. St.

Rep. 413; Miller *v.* Dennett, 6 N. H. 109. **N. Y.**—Wallace *v.* McEchron, 176 N. Y. 424, 68 N. E. 663; Satterlee *v.* Kobbe, 173 N. Y. 91, 65 N. E. 952 (*reversing* 39 App. Div. 420, 57 N. Y. Supp. 341); Weston *v.* Stoddard, 137 N. Y. 119, 33 N. E. 62, 33 Am. St. Rep. 697, 20 L. R. A. 624; Leidenthal *v.* Leidenthal, 121 App. Div. 269, 105 N. Y. Supp. 807. **N. C.**—Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. 232; Cox *v.* Beaufort County Lumb. Co., 124 N. C. 78, 32 S. E. 381; Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757. **Ohio.**—Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Perry *v.* Richardson, 27 Ohio St. 110. But see Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552; Delaney *v.* McFadden, 8 Ohio Dec. (Reprint) 381, 7 Cine. L. Bul. 267. **Va.**—Moon's Admx. *v.* Highland Development Co., 104 Va. 551, 52 S. E. 209; Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804. But see Preston *v.* Virginia Min. Co., 107 Va. 245, 57 S. E. 651. **Wash.**—Chapman *v.* Allen, 11 Wash. 627, 40 Pac. 219; Hill *v.* Young, 7 Wash. 33, 34 Pac. 144. **W. Va.**—Smith *v.* Vineyard, 58 W. Va. 98, 51 S. E. 871; Carberry *v.* West Virginia, etc. R. Co., 44 W. Va. 260, 28 S. E. 694; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216.

[a] If a plea of sole seisin is set up, the effect is to convert the proceeding into an action in the nature of ejectment. Haddock *v.* Stocks, 167 N. C. 70, 83 S. E. 9.

26. **U. S.**—Carlson *v.* Sullivan, 146 Fed. 476, 77 C. C. 32; Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225. **Ark.**—Criscoe *v.* Hambrick, 47 Ark. 235, 1 S. W. 150; London *v.* Overby, 40 Ark. 155. **Conn.**—Harrison *v.* International Silver Co., 78 Conn. 417, 62 Atl. 342; Adams *v.* Ames Iron Co., 24 Conn. 230. **Pa.**—McMasters *v.* Carothers, 1 Pa. 324; Wall's Estate, 24 Pa. Co. Ct. 560. But see McMahon's Estate, 211 Pa. 292, 60 Atl. 787; *In re* Bishop, 200 Pa. 598, 50 Atl. 156. **Vt.**—Broek *v.* Eastman, 28 Vt. 658, 67 Am. Dec. 733. **Eng.**—Moore *v.* Kempton, 18 Wkly. Rep. 803; Giffard *v.* Williams, L. R. 5 Ch. 546,

a stranger to the cotenancy,²⁷ equity is powerless to grant relief.

Under some authorities, when the partition suit is in chancery and plaintiff's title is doubtful or is denied, a suspension of the proceedings will be ordered until the legal title is adjudicated;²⁸ and this cause is also followed when there is a dispute as to the title between the defendants.²⁹ But it is only in the absence of substantial doubt and where it appears that a good legal title is set up, that resort to a law court will be required.³⁰ And in the absence of objection, a

39 L. J. Ch. 735, 21 L. T. N. S. 575, 18 Wkly. Rep. 776. **Can.**—Hopkins v. Hopkins, 9 Ont. Pr. 71.

27. **U. S.**—Sanders v. Devereux, 60 Fed. 311, 8 C. C. A. 629; Bearden v. Benner, 120 Fed. 690. **Ark.**—Landon v. Morris, 75 Ark. 6, 86 S. W. 672; Eagle v. Franklin, 71 Ark. 544, 75 S. W. 1093; Head v. Phillips, 70 Ark. 432, 68 S. W. 878. **Md.**—Savary v. Da Camara, 60 Md. 139. But see Boone v. Boone, 3 Md. Ch. 497. **Mich.**—Fenton v. Steere, 76 Mich. 405, 43 N. W. 437; Hoffman v. Beard, 22 Mich. 59. **N. J.**—Ellis v. Feist, 65 N. J. Eq. 548, 56 Atl. 369. **Ore.**—Sterling v. Sterling, 43 Ore. 200, 72 Pac. 741; Windsor v. Simpkins, 19 Ore. 117, 23 Pac. 669. **Pa.**—Carey v. Schaller, 10 Kulp 71. **S. D.**—Wells v. Sweeney, 16 S. D. 489, 94 N. W. 394, 102 Am. St. Rep. 813. **Tenn.**—Dean v. Snelling, 2 Heisk. 484; Trayner v. Brooks, 4 Hayw. 295.

28. See the following: **U. S.**—Clark v. Roller, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. ed. 300; McCall v. Carpenter, 18 How. 297, 15 L. ed. 389; Gilbert v. Hopkins, 204 Fed. 196, 122 C. C. A. 432; Woods v. Woods, 184 Fed. 159. **Ala.**—Harrison v. Taylor, 111 Ala. 317, 19 So. 986; Hillens v. Brinsfield, 108 Ala. 605, 18 So. 604; Kilgore v. Kilgore, 103 Ala. 614, 15 So. 897. See also Davis v. Bingham, 111 Ala. 292, 18 So. 660. **Ark.**—Cole v. Burnett, 119 Ark. 386, 177 S. W. 1146; Byers v. Danley, 27 Ark. 77. **D. C.**—Hasler v. Williams, 34 App. Cas. 319; Roller v. Clark, 19 App. Cas. 539. **Ga.**—Webb v. Till, 134 Ga. 388, 67 S. E. 1034. **Haw.**—Kanehoe Mill Co. v. Holi, 20 Hawaii 609. **Me.**—Pierce v. Rollins, 33 Me. 172, 22 Atl. 110; Nash v. Simpson, 73 Me. 142, 3 Atl. 53. **Mich.**—See Felt v. Felt, 155 Mich. 237, 118 N. W. 953. **Neb.**—See Sewall v. Whiton, 85 Neb. 478, 123 N. W. 1042. **N. J.**—Country Homes Land Co. v. DeGray, 71 N. J. Eq. 283, 71 Atl. 340; Roll v. Everett, 72 N. J. Eq. 20, 65 Atl. 732; White v. Smith (N. J. Eq.), 60 Atl. 399. But see Bryan v.

Bryan, 61 N. J. Eq. 45, 48 Atl. 341. **Pa.**—McClintock's Estate, 23 Pa. Dist. 777; Swan's Estate, 23 Pa. Dist. 737; Freiler's Estate, 19 Pa. Dist. 277. **Compare** Brandon v. McKinney, 233 Pa. 481, 82 Atl. 764; Cooley v. Houston, 229 Pa. 495, 78 Atl. 1129. **P. I.**—Rodriguez v. Ravilan, 17 Phil. Isl. 63; Sanidad v. Cabotaje, 5 Phil. Isl. 204. **S. C.**—Tyler v. Williams, 53 S. C. 367, 21 S. E. 298; Carrigan v. Evans, 31 S. C. 262, 9 S. E. 852. **Tenn.**—Carter v. Taylor, 3 Head 30; Whillock v. Hale's Heirs, 10 Humph. 64; Nicely v. Boyles, 4 Humph. 177, 40 Am. Dec. 638. **Va.**—Bailey v. Johnson, 118 Va. 505, 88 S. E. 62; Litz v. Rowe, 117 Va. 752, 86 S. E. 155, L. R. A. 1916B, 799. **W. Va.**—See Pickens v. Stout, 67 W. Va. 422, 68 S. E. 354. **Wis.**—O'Hearn v. O'Hearn, 114 Wis. 428, 90 N. W. 450, 58 L. R. A. 105; Morgan v. Mueller, 107 Wis. 241, 83 N. W. 313; Tobin v. Tobin, 45 Wis. 298; Hardy v. Mills, 35 Wis. 141. **Eng.**—Giffard v. Williams, L. R. 5 Ch. 546, 39 L. J. Ch. 735, 21 L. T. N. S. 575, 18 Wkly. Rep. 776; Bolton v. Bolton, L. R. 7 Eq. 298 note, 19 L. T. N. S. 298. **Can.**—Macdonell v. McGillis, 8 Ont. Pr. 339; Bennetto v. Bennetto, 6 Ont. Pr. 145.

Compare Del.—In re Cochran's Est., 10 Del. Ch. 134, 85 Atl. 1070. **Md.**—Eureka Life Ins. Co. v. Geis, 121 Md. 196, 88 Atl. 158; Barron v. Zimmerman, 117 Md. 296, 83 Atl. 258, Ann. Cas. 1914D, 574. **Tex.**—Miller v. Odom (Tex. Civ. App.), 152 S. W. 1185.

29. Mercer v. Jackson, 3 Pa. Co. Ct. 387.

30. **U. S.**—Forderer v. Schmidt, 146 Fed. 480, 77 C. C. A. 36; Heinze v. Butte, etc. Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63. **D. C.**—Smith v. Butler, 15 App. Cas. 345. **Fla.**—Keil v. West, 21 Fla. 508. **Ky.**—Phillips v. Johnson, 14 B. Mon. 172; Overton's Heirs v. Woolfolk, 6 Dana 371. **Mich.**—Hooper v. De Vries, 115 Mich. 231, 73 N. W. 132; Hoffman v. Beard, 22 Mich. 59. **Mo.**—Holloway v. Holloway, 97

court of chancery will determine the legal title.³¹ That court will also determine the controversy when the dispute concerns the equitable title.³² When the property involved is personalty, the existence of an adverse claim or the hostile holding of the property is immaterial.³³

2. As Affected by Pleadings.—While an equitable defense to a bill for partition cannot be availed of unless it be set up by answer or cross-bill,³⁴ when both parties offer evidence and treat the matter as within the pleadings, it will be so considered upon the trial.³⁵ And when plaintiff alleges that no actual partition can be equitably made, which defendants deny, a material issue is presented which must be tried on the pleadings and the proof.³⁶

B. MODE OF TRIAL.—**1. Generally.**—When the suit is in chancery, the evidence is taken generally by a master in chancery or an examiner in the shape of depositions.³⁷ In some jurisdictions, the cause is usually heard by a referee or commissioner,³⁸ while in others the evidence is taken by a notary,³⁹ auditor,⁴⁰ or clerk.⁴¹ The court

Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; *Reed v. Robertson*, 45 Mo. 580. **N. J.**—*Hay v. Estell*, 18 N. J. Eq. 251; *Iucas v. King*, 10 N. J. Eq. 277. **N. Y.** *Hulse v. Hulse*, 5 N. Y. Supp. 747, 17 Civ. Proc. 92, 23 N. Y. St. 123. **Pa.** *Wistar's Appeal*, 115 Pa. 241, 8 Atl. 797; *Galbraith v. Bowen*, 5 Pa. Dist. 552. **Wis.**—*O'Hearn v. O'Hearn*, 114 Wis. 428, 90 N. W. 450, 58 L. R. A. 105. **Eng.**—*Backhouse v. Paddon*, 13 L. T. N. S. 625, 14 Wkly. Rep. 273. **Can.**—*Wood v. Wood*, 16 Grant Ch. (U. C.) 471.

[a] Merely denying plaintiff's title in the answer does not of itself oust the court of jurisdiction. *Smith v. Butler*, 15 App. Cas. (D. C.) 345.

31. *Burt v. Hellyar*, L. R. (Eng.) 14 Eq. 160, 41 L. J. Ch. 430, 26 L. T. N. S. 833.

32. **U. S.**—*Lamb v. Burbank*, 1 Sawy. 227, 14 Fed. Cas. No. 8,012; *Lamb v. Starr*, 14 Fed. Cas. No. 8,021. **Ia.**—*Miller v. Chittenden*, 2 Iowa 315. **Md.** *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339. **N. J.**—*Woglom v. Kant*, 69 N. J. Eq. 489, 61 Atl. 9. **Pa.**—*Hayes' Appeal*, 123 Pa. 110, 16 Atl. 600.

See also *Waddle v. Frazier*, 245 Mo. 391, 151 S. W. 87.

33. **Ala.**—*Thompson v. Thompson*, 107 Ala. 163, 18 So. 247; *Smith v. Dunn*, 27 Ala. 315. **Ind.**—*Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417. **Mich.**—*Godfrey v. White*, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537. **N. C.**—*Weeks v.*

Weeks, 40 N. C. 111, 47 Am. Dec. 358; *Edwards v. Bennett*, 32 N. C. 361.

34. See *supra*, VI, C, 5; VI, D.

35. *Roberts v. Beckwith*, 79 Ill. 246.

36. *Fisk v. Grosevenor* (N. J. Eq.), 20 Atl. 261; *Waln v. Meirs*, 27 N. J. Eq. 77.

37. See the following. **Ill.**—*Blackaby v. Blackaby*, 185 Ill. 94, 56 N. E. 1053. **N. J.**—*Buzby v. Roberts*, 53 N. J. Eq. 566, 32 Atl. 9. **N. Y.**—*Dwight v. Lawrence*, 99 App. Div. 278, 90 N. Y. Supp. 970. **N. C.**—*Wooten v. Pope*, 22 N. C. 306. **Pa.**—*Lancaster v. Flowers*, 9 Pa. Dist. 241; *Ellis v. Ellis*, 8 Pa. Dist. 722.

38. **Haw.**—*Scott v. Stuart*, 22 Hawaii 459. **Pa.**—*Palethorp v. Palethorp*, 184 Pa. 585, 39 Atl. 489; *Lancaster v. Flowers*, 9 Pa. Dist. 241, 23 Pa. Co. Ct. 613. **W. Va.**—*Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215. **Can.** *McKay v. Keefer*, 12 Ont. Pr. Rep. 256; *In re Arnott*, 8 Ont. Pr. 39.

See generally *infra*, X.

39. *Lanphier's Succession*, 104 La. 384, 29 So. 122.

[a] When there is a contest the notary sends the parties back to the court for settlement. *Succession of Lanphier*, 104 La. 384, 29 So. 122. See *Harrell's Succession*, 12 La. Ann. 337.

40. *In re Buttrick*, 185 Mass. 107, 69 N. E. 1044.

41. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123; *Hill v. Hickin* (1897), 2 Ch. (Eng.) 579, 66 L. J. Ch. 717, 77 L. T. N. S. 127, 46 Wkly. Rep. 137.

may try the issues in the event of a default, or when the answer does not controvert plaintiff's title.⁴²

2. **Trial by Jury.**—The right to trial by jury in partition suits is fully treated elsewhere in this work.⁴³

C. **DISMISSAL.**⁴⁴—1. **Involuntary.**—In accordance with general rules, if the complaint fails to state a cause of action, the action will be dismissed.⁴⁵ But the action will not be dismissed by reason of the force and effect of a defense set up in the answer.⁴⁶ A dismissal because of the filing of a disclaimer can only be had if the disclaimer be in absolute and unconditional terms.⁴⁷ That some of the parties interested in the lands had died since the beginning of the suit is no ground for its dismissal.⁴⁸ The action may be dismissed as to defendants who never were proper parties.⁴⁹

2. **Voluntary Dismissal.**—As a rule, plaintiff may dismiss a partition suit, as in other actions, at any time prior to the submission of the cause.⁵⁰

[a] When an issue of fact is raised the cause should be returned to the docket for trial at term; but such right may be waived by failure to demand it. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123. See also *Covington v. Covington*, 73 N. C. 168, holding that issue when title in dispute should be tried by a jury.

42. *Brown v. Mooney*, 108 Ga. 331, 33 S. E. 942; *Rodgers v. Price*, 105 Ga. 67, 31 S. E. 126.

43. See 16 STANDARD PROC. 906, et seq.

44. See generally the title "Dismissal, Discontinuance and Nonsuit."

45. *Crippen v. White*, 28 Colo. 298, 64 Pac. 184.

[a] Alleging other facts which cannot be considered in such a suit is not ground for dismissal. *Hoffman v. Ross*, 25 Mich. 175.

[b] Failure to allege that the land lies within the county is not ground for dismissal. *Upham v. Bradley*, 17 Me. 423.

46. Cal.—*De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81. N. Y.—*Harlem Savings Bank v. Larkin*, 156 App. Div. 666, 142 N. Y. Supp. 122. S. C. See *Broom v. Helms*, 83 S. C. 447, 65 S. E. 602; *Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516; *Barnes v. Rodgers*, 54 S. C. 115, 31 S. E. 885.

[a] When plaintiff's legal title to the property is denied, a dismissal may be awarded. *Tobin v. Tobin*, 45 Wis. 298.

47. *De Uprey v. De Uprey*, 27 Cal.

329, 87 Am. Dec. 81. See *Urban v. Hopkins*, 17 Iowa 105.

48. *Mitchell v. Starbuck*, 10 Mass. 5; *Thomas v. Smith*, 2 Mass. 479. See *Havens v. Seashore Land Co.*, 57 N. J. Eq. 142, 41 Atl. 753.

49. *Stevens v. McCormick*, 90 Va. 735, 19 S. E. 742.

[a] When two tracts of land are sought to be partitioned, and all the parties are not in one of the tracts, the bill will be dismissed as to such tract. *Havens v. Seashore Land Co.*, 57 N. J. Eq. 142, 41 Atl. 753.

50. Mo.—*Ivory v. Delore*, 26 Mo. 505. N. Y.—*Furman v. Furman*, 12 Hun 441. Pa.—*Rainey v. H. C. Frick Coke Co.*, 8 Pa. Dist. 144, 21 Pa. Co. Ct. 482.

See 7 STANDARD PROC. 659; also *Miller v. Miller*, 263 Ill. 18, 104 N. E. 1078; *Haddock v. Stocks*, 167 N. C. 70, 83 S. E. 9.

[a] Dismissal as to those defendants who have ceased to have an interest, permitted. *McClure v. McClure*, 1 Phila. (Pa.) 117.

[b] Plaintiff's right to this course after evidence has been taken has been denied. *Reilly v. Reilly* (Ill.), 26 N. E. 604. See also *Haddock v. Stocks*, 167 N. C. 70, 83 S. E. 9, holding that a voluntary nonsuit cannot be taken and the proceedings dismissed after joinder of issue, except by consent of all parties before the court.

[c] Too late after the finding of the court has been announced. *Randles v. Randles*, 63 Ind. 93; *Succession of Platz*, 122 La. 14, 47 So. 119.

D. FINDINGS OR VERDICT.⁵¹ — When the cause is tried by the court, the findings are the basis for the interlocutory judgment or decree, and hence all the issues must be disposed of.⁵² It is necessary only to find the ultimate facts, however.⁵³

When in a suit in equity for partition there arises an issue which must be tried at law, the verdict on that question is conclusive and not merely advisory.⁵⁴ When permitted by statute the verdict may be amended.⁵⁵

A general verdict includes a finding of every material and well pleaded fact.⁵⁶

IX. INTERLOCUTORY JUDGMENT OR DECREE. — A. NECESSITY FOR. — The making of an interlocutory judgment or decree authorizing the partition is indispensable.⁵⁷

B. SCOPE AND SUBSTANCE. — The interlocutory judgment or decree should determine the various interests in the property sought to be partitioned,⁵⁸ and dispose of all the issues presented by the pleadings,⁵⁹ and all other questions involving or relating to the title to property within the issues.⁶⁰ The determination of the court as to these matters must be incorporated therein,⁶¹ as must any provision for such

51. See generally the titles "**Findings and Conclusions**;" "**Verdict**."

52. **Ill.**—*Tibbs v. Allen*, 27 Ill. 119. **N. Y.**—*Adams v. Bristol*, 108 App. Div. 303, 95 N. Y. Supp. 628; *Levine v. Goldsmith*, 71 App. Div. 204, 75 N. Y. Supp. 706, reversing 34 Misc. 7, 69 N. Y. Supp. 446. **Pa.**—See *Dunshee v. Dunshee*, 234 Pa. 550, 83 Atl. 422.

As to interlocutory judgment or decree, see *infra*, IX.

53. **Cal.**—*Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Mayer v. Mayer*, 118 Cal. 510, 50 Pac. 650. **Ill.**—*Glos v. Carlin*, 207 Ill. 192, 69 N. E. 928; *Miller v. McMannis*, 104 Ill. 421. **Mo.**—*Bayha v. Kessler*, 79 Mo. 555.

[a] Objections to findings of immaterial facts should be made on the report of the referees in partition. *East Shore Co. v. Richmond Belt Ry. Co.*, 172 Cal. 174, 155 Pac. 999.

[b] Evidentiary facts need not be reported in findings of referees unless required by statute. *Robbins v. Hobart*, 133 Minn. 49, 157 N. W. 908.

54. *Gilbert v. Hopkins*, 204 Fed. 196, 122 C. C. A. 432, leaving only the remaining equitable matter for the determination of the court of equity. *Compare Williams v. Williams*, 82 Wis. 393, 52 N. W. 429.

55. *Barelay v. Kerr*, 110 Pa. 130, 1 Atl. 220. See generally the title "**Verdict**."

56. *Ackermann v. Ackermann*, 22 Tex. Civ. App. 612, 55 S. W. 801.

57. *Rainey v. H. C. Frick Coke Co.*, 8 Pa. Dist. 144, 21 Pa. Co. Ct. 482; *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

[a] An informal judgment has, however, been held sufficient. *Sewall v. Ridlon*, 5 Me. 458; *Akers v. Hobbs*, 105 Mo. 127, 16 S. W. 682, the want of a formal judgment does not render the proceedings void.

[b] If the parties agree to the naming of commissioners, the whole purpose of the interlocutory judgment is fulfilled. *Symonds v. Kimball*, 3 Mass. 299.

58. **Cal.**—*Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418. **Ill.**—*Henricksen v. Hodgen*, 67 Ill. 179. **Me.**—*Ham v. Ham*, 37 Me. 216. **N. Y.**—*Phelps v. Green*, 3 Johns. Ch. 302; *Brownson v. Gifford*, 8 How. Pr. 389. **N. C.**—*Ledbetter v. Gash*, 30 N. C. 462. **Pa.**—*Rainey v. H. C. Frick Coke Co.*, 8 Pa. Dist. 144, 21 Pa. Co. Ct. 482.

59. *Metheny v. Bohn*, 74 Ill. App. 377.

60. **Fla.**—*Dallam v. Sanchez*, 56 Fla. 779, 47 So. 871. **Ill.**—*Henrichsen v. Hodgen*, 67 Ill. 179; *Scott v. Bassett*, 71 Ill. App. 641. **Ind.**—*Lease v. Carr*, 5 Blackf. 353. See *Garretson v. Garretson*, 43 Ind. App. 688, 88 N. E. 624. **Pa.**—*Pittsburgh Cent. Bank v. Earley*, 10 Sad. 526, 14 Atl. 427.

61. **Cal.**—*Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418. But see *Regan v. McMahon*, 41 Cal. 679. **D. C.**—*Mudd*

incidental relief as may be granted by the court.⁶²

As a general rule the interlocutory judgment or decree can provide only that partition be made, and appoint commissioners or referees to make the same; it can neither partition the property, nor provide how it shall be made;⁶³ but in some jurisdictions the court may itself make partition without the aid of commissioners.⁶⁴ Statu-

v. Grindler, 1 App. Cas. 418. **Fla.** Dallah v. Sanchez 56 Fla. 779, 47 So. 871; Street v. Benner, 20 Fla. 700. **Ill.**—Kilgour v. Crawford, 51 Ill. 249; Tibbs v. Allen, 27 Ill. 119; Greenup v. Sewell, 18 Ill. 53. **Ind.**—Milligan v. Poole, 35 Ind. 64; Aldridge v. Montgomery, 9 Ind. 302; Shaw v. Parker, 6 Blackf. 345. **La.**—Harrell's Succession, 12 La. Ann. 337. **N. C.**—Ledbetter v. Gash, 30 N. C. 462. **Tex.**—Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Parker v. Cockrell (Tex. Civ. App.), 31 S. W. 221. **Va.** Stevens v. McCormick, 90 Va. 735, 19 S. E. 742. But see Lucy v. Kelly, 117 Va. 318, 84 S. E. 661. **Wyo.**—Field v. Leiter, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997. But see Lyeon v. Miller, 112 Mo. 548, 20 S. W. 36, 700.

[a] When partition is made subject to a general lien (1), it is not essential that the judgment so declare (*Ill.* Stevens v. Plummer, 195 Ill. App. 278. *Ind.*—Quick v. Brenner, 101 Ind. 230. *N. Y.*—Winfield v. Stacom, 40 App. Div. 95, 57 N. Y. Supp. 563. But see Moore v. Moore [Tex. Civ. App.], 31 S. W. 532); (2) but it should determine the rights, interests, and shares affected by specific liens. Winfield v. Stacom, 40 App. Div. 95, 57 N. Y. Supp. 563; Kelly v. Werner, 34 App. Div. 68, 53 N. Y. Supp. 1067; Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 466. And see Horne's Estate, 10 Pa. Dist. 226.

[b] There can be no binding adjudication regarding lienholders not parties to the suit. *Ark.*—Jackman v. Beck, 37 Ark. 125. *Ill.*—Loomis v. Riley, 24 Ill. 307. *N. Y.*—Stephenson v. Cotter, 5 N. Y. Supp. 749, 23 N. Y. St. 74.

62. *Ill.*—Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869; Litch v. Clineh, 136 Ill. 410, 26 N. E. 579, affirming 35 Ill. App. 654. *Ind.*—Scott v. Harris, 127 Ind. 520, 27 N. E. 150. *N. Y.*—Braker v. Devereaux, 8 Paige 513; Hosford v. Merwin, 5 Barb. 51; Brownson v. Gifford, 8 How. Pr. 389; Bell v. Gittere, 9 N. Y. Supp. 400, affirmed, 134 N. Y. 616, 32 N. E. 649. *N. C.*—Simmons v.

Jones, 118 N. C. 472, 24 S. E. 114. *Tex.*—Gray v. King & Co., 39 Tex. 616; Jarrell v. Crow, 30 Tex. Civ. App. 629, 71 S. W. 397.

As to incidental relief, see *infra*, X.

63. See the following: *Ill.*—Coffin v. Argo, 134 Ill. 276, 24 N. E. 1068; Rohn v. Harris, 130 Ill. 525, 22 N. E. 587; Illinois Land, etc. Co. v. Bonner, 75 Ill. 315. *Ia.*—Doan v. Metcalf, 46 Iowa 120. *Ky.*—Rudy v. Ramey, 160 Ky. 842, 170 S. W. 179; Eakins v. Eakins, 112 Ky. 347, 65 S. W. 811; Garth v. Thompson, 110 Ky. 984, 63 S. W. 40. *Mass.*—Symonds v. Kimball, 3 Mass. 299. *Miss.*—Lawson v. Bonner, 88 Miss. 235, 40 So. 488, 117 Am. St. Rep. 738. *Mo.*—George v. Murphy, 1 Mo. 777; Murphy v. Murphy, 1 Mo. 741. *Nev.*—Dondero v. Van Siekle, 11 Nev. 389. *N. C.*—Harvey v. Harvey, 72 N. C. 570; Medford v. Harrell, 10 N. C. 41. *Tex.*—Black v. Black, 95 Tex. 627, 69 S. W. 65 (reversing 67 S. W. 928); Reed v. Howard, 71 Tex. 204, 9 S. W. 109; Keener v. Moss, 66 Tex. 181, 18 S. W. 447; Grassmeyer v. Beeson, 18 Tex. 753, 70 Am. Dec. 309; Freeman v. Preston (Tex. Civ. App.), 29 S. W. 495.

[a] Surrender of possession should not be provided for in the interlocutory judgment. Chicago, etc. R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113.

[b] Decreeing partition without observing the statutory provision relative to commissioners is merely an irregularity. Jack v. Cassin, 9 Tex. Civ. App. 228, 28 S. W. 832.

[c] In England partition may be made by the court where all the parties consent. Stanley v. Wrigley, 3 Eq. Rep. 448, 1 Jur. N. S. 695, 24 L. J. Ch. 176, 3 Smale & G. 18, 3 Wkly. Rep. 202, 65 Eng. Reprint 544; Bull v. Bull, 13 L. T. Rep. N. S. 870.

As to commissioners or referees in partition suits, see *infra*, XI.

64. Montoya v. Vigil, 16 N. M. 349, 368, 120 Pac. 676. See McCrady v. Jones, 36 S. C. 136, 192, 15 S. E. 430;

tory provisions and directions need not be inserted.⁶⁵

The interlocutory judgment should describe the property to be partitioned with such particularity as to exclude any doubt as to the property affected by the judgment, and make unnecessary any reference to extrinsic sources in order to ascertain what property is included.⁶⁶

C. TIME FOR ENTRY. — When issues of fact are presented by the pleadings, the interlocutory judgment or decree should be given after such issues are disposed of.⁶⁷ It may be entered when the defendants have been served with process and are in default for failure to appear or answer.⁶⁸

D. AMENDMENT AND VACATION. — Amendment⁶⁹ of the interlocu-

Elk Valley Coal, etc. Co. v. Douglass (Tenn.), 48 S. W. 365.

[a] It may direct (1) the manner in which it shall be made (*Harrell v. Harrell*, 12 La. Ann. 549; *Harrell's Succession*, 12 La. Ann. 337; *McCollum v. Palmer*, 1 Rob. [La.] 512), (2) and may even go to the extent of directing a sale. Ky.—*Irvin v. Divine*, 7 B. Mon. 246. Md.—*Earle v. Turton*, 26 Md. 23. S. C.—*McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430. W. Va.—*Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245. See also *Smith v. Trustees of Brookhaven*, 36 App. Div. 386, 55 N. Y. Supp. 370.

65. Ohio.—*Ellis v. Hicks*, 9 Ohio Dec. (Reprint) 240, 11 Wkly. L. Bul. 263. S. C.—*Trammell v. Trammell*, 57 S. C. 89, 35 S. E. 533; *Barnes v. Rodgers*, 54 S. C. 115, 31 S. E. 885. Tex.—*Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520.

[a] When the court, subsequent to the entry of the interlocutory judgment, makes a direction involving a statutory provision, it does not involve the rendition of another or different judgment than that originally entered. *Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520.

66. See the following: Ind.—*Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228. Mo.—*Turner v. Dixon*, 150 Mo. 416, 51 S. W. 725; *Calloway v. Henderson*, 130 Mo. 77, 32 S. W. 34. N. C.—*Morrison v. Laughter*, 47 N. C. 354. Tex.—*Black v. Black*, 95 Tex. 627, 69 S. W. 65, reversing 67 S. W. 923.

Compare *Elk Valley Coal, etc. Co. v. Douglass* (Tenn.), 48 S. W. 365.

[a] But a description which is intelligible to all interested persons has been deemed sufficient. *Sewall v. Ridlon*, 5 Me. 458.

[b] Reference to the pleadings and

findings may be made by the commissioners to ascertain the lands referred to in the judgment; and if need be the court may amend the interlocutory judgment by inserting the description. *Hanrick v. Hanrick*, 98 Tex. 269, 83 S. W. 181.

67. Ill.—See *Henrichsen v. Hodgen*, 67 Ill. 179. N. J.—See *Waln v. Meirs*, 27 N. J. Eq. 351. N. Y.—*Curry v. Colgan*, 3 How. Pr. (N. S.) 26. Tex.—See *Reed v. Howard*, 71 Tex. 204, 9 S. W. 109.

[a] A default judgment cannot be entered against a defendant while his plea remains undisposed of. *Davis v. Brady & Co.*, *Morris* (Iowa) 101.

68. *Neilson v. Cox*, 1 Caines (N. Y.) 121.

[a] But the entry thereof prior thereto is improper. *Ropes v. McCabe*, 40 Fla. 388, 25 So. 273.

69. Ind.—*Randles v. Randles*, 63 Ind. 93. Mo.—*Warren v. Williams*, 25 Mo. App. 22. N. Y.—*Mingay v. Lackey*, 142 N. Y. 449, 37 N. E. 471, affirming 74 Hun 89, 26 N. Y. Supp. 161, 57 N. Y. St. 270. Wash.—*Hamlin v. Hamlin*, 90 Wash. 467, 156 Pac. 393.

Amendment of judgment generally, see 15 STANDARD PROC. 98, et seq.

[a] Amendments may be made nunc pro tunc after the report of the partition commissioners. *Randles v. Randles*, 63 Ind. 93.

[b] Time for.—(1) In the absence of an appeal, the interlocutory judgment may be amended at any time prior to the final order of distribution (*Aull v. Day*, 133 Mo. 337, 34 S. W. 578), or (2) at least at any time before the final decree. *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231; *Montoya v. Vigil*, 16 N. M. 349, 120 Pac. 676. (3) Such relief may be granted

tory judgment or decree is proper, or it may be vacated or modified.⁷⁰

E. EFFECT OF.—The interlocutory judgment is final as to the right of partition,⁷¹ and in so far as it determines the titles or interests of the parties.⁷² It is not final in respect to the mode of partition, it remaining open for the purpose of controlling the mode of partition.⁷³

X. INCIDENTAL RELIEF.⁷⁴—A. GENERALLY.—If properly presented by the pleadings, certain incidental relief may be granted.⁷⁵ The court may settle all controversies between the parties as to the legal title,⁷⁶ and adjust the equities between the parties arising out of their relation to the property to be partitioned,⁷⁷ the maxim that he who comes into equity must do equity applying where the pro-

on a motion for a new trial. *Regan v. McMahon*, 43 Cal. 625.

70. *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231; *Aull v. Day*, 133 Mo. 337, 34 S. W. 578.

[a] The fact that the answer admits the allegations of the petition, does not deprive the court of power to correct it before final distribution. *Aull v. Day*, 133 Mo. 337, 34 S. W. 578.

Opening and vacating judgments generally, see 15 STANDARD PROC. 151, et seq.

71. *Roach v. Baker*, 130 Ind. 362, 30 N. E. 310.

72. *Chicago, etc. R. Co. v. Vaughn*, 206 Ill. 234, 69 N. E. 113.

[a] Title under an interlocutory decree does not vest until after confirmation, however. *Haden v. Sims*, 127 Ga. 717, 56 S. E. 989; *Kaufmann v. Pittsburgh*, 248 Pa. 41, 93 Atl. 779.

73. Ill.—*Chicago, P. & St. L. Ry. Co. v. Vaughn*, 206 Ill. 234, 69 N. E. 113. Ind.—*Roach v. Baker*, 130 Ind. 362, 30 N. E. 310. Ia.—*Brown v. Cooper*, 98 Iowa 444, 67 N. W. 378, 60 Am. St. Rep. 190, 33 L. R. A. 61.

Compare *supra*, IX, B.

74. Scope of issues and inquiry upon trial, see generally *supra*, VIII, A.

75. See *supra*, VI, B, 2, e.

76. See generally *supra*, VIII, A, 1; *infra*, X, D.

77. See the following: U. S.—*Highland Park Mfg. Co. v. Steele*, 232 Fed. 10, 146 C. C. A. 202; *Grider v. Groff*, 202 Fed. 685, 121 C. C. A. 95. Ala.—*Long v. Long*, 195 Ala. 560, 70 So. 733. Ark.—*Lester v. Kirtley*, 83 Ark. 554, 104 S. W. 213. Colo.—*Packard v. King*, 3 Colo. 211. Fla.—*Christopher v. Munger*, 61 Fla. 513, 55 So. 273; *Griffith v. Griffith*, 59 Fla. 512, 52 So. 609, 138

Am. St. Rep. 138; *Koon v. Koon*, 55 Fla. 834, 46 So. 633. Ga.—*Beavers v. Wilson*, 144 Ga. 231, 86 S. E. 1089. Ill.—*Longshore v. Longshore*, 200 Ill. 470, 65 N. E. 1081; *Rhodes v. Rhodes*, 78 Ill. App. 117. Ind.—*Cravens v. Kitts*, 64 Ind. 581; *Milligan v. Poole*, 35 Ind. 64. Ia.—*Price v. Ewell*, 169 Iowa 206, 151 N. W. 79; *McNamara v. McNamara*, 167 Iowa 479, 149 N. W. 642. Ky.—*Webster v. Cadwallader*, 133 Ky. 500, 118 S. W. 327, 134 Am. St. Rep. 470. Miss.—*Bland v. Bland*, 105 Miss. 478, 62 So. 641; *Walker v. Williams*, 84 Miss. 392, 36 So. 450. Mo.—*Davidson v. I. M. Davidson Inv. Co.*, 249 Mo. 474, 155 S. W. 1; *Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1, 131 Am. St. Rep. 595. N. Y.—*Warfield v. Crane*, 4 Abb. Dec. 525, 4 Keyes 448; *Skidmore v. Gueutal*, 143 App. Div. 407, 128 N. Y. Supp. 402. Compare *Harris v. Curtis*, 139 App. Div. 393, 124 N. Y. Supp. 263. Ohio.—*Miller v. Peters*, 25 Ohio St. 270. Pa.—*Weiskircher v. Connelly*, 248 Pa. 327, 93 Atl. 1068. S. C.—*Vaughan v. Langford*, 81 S. C. 282, 62 S. E. 316, 128 Am. St. Rep. 912; *Green v. Canaday*, 77 S. C. 193, 57 S. E. 832. Tex.—*Hanrick v. Gurley*, 93 Tex. 453, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330 (*reversing* in part 48 S. W. 994); *Broom v. Pearson* (Tex. Civ. App.), 180 S. W. 895; *Miller v. Odom* (Tex. Civ. App.), 152 S. W. 1185. Va.—*Neathery v. Neathery*, 114 Va. 650, 77 S. E. 465; *Oneal v. Stimson*, 70 W. Va. 452, 74 S. E. 413; *McCoy v. McCoy*, 105 Va. 829, 54 S. E. 995. W. Va.—*James v. James*, 77 W. Va. 229, 87 S. E. 364; *Solesbury v. Virginian R. Co.*, 73 W. Va. 642, 81 S. E. 985. Can.—*Stuart v. Taylor*, 33 Ont. L. Rep. 20, 7 Ont. W. N. 551 (*modifying* 6 Ont. W. N. 217); *McNeil v. McDougall*, 28 Nova Scotia 296.

ceeding is in a court of equity.⁷⁸ But issues that are foreign to and disconnected from the cotenancy will not be passed on.⁷⁹

B. ACCOUNTING.⁸⁰—A court of equity as incidental to decreeing partition may require an accounting and compel contribution, when such a claim for relief is properly presented.⁸¹ Thus, as incidental to partition, a cotenant will be required to account for the use and value of the joint estate beyond such tenant's individual interest therein,⁸² as well as any sum which may have been collected and

78. See the following: **Ga.**—Smith v. Smith, 141 Ga. 629, 81 S. E. 895. **Ky.**—Brown v. Brown, 157 Ky. 804, 164 S. W. 70. **N. J.**—Barrell v. Barrell, 25 N. J. Eq. 173.

79. U. S.—See Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 146 C. C. A. 202. **Ill.**—Crane v. Stafford, 217 Ill. 21, 75 N. E. 424; Jeffers v. Jeffers, 139 Ill. 363, 28 N. E. 913; Stahl v. Stahl, 166 Ill. App. 236. **La.**—Faure v. Faure, 117 La. 204, 41 So. 494; Baltimore v. New Orleans, 45 La. Ann. 526, 12 So. 878. **N. J.**—White v. Smith, 70 N. J. Eq. 418, 62 Atl. 560; Cole v. Cole, 69 N. J. Eq. 3, 59 Atl. 895; Shipman v. Shipman, 65 N. J. Eq. 556, 56 Atl. 694. **N. Y.**—Palmer v. Palmer, 3 App. Div. 213, 38 N. Y. Supp. 195, 73 N. Y. St. 686. **Tenn.**—Johnson v. Johnson, 53 S. W. 226. **Va.**—Adkins v. Adkins, 117 Va. 445, 85 S. E. 490; Stuart's Heirs v. Coalter, 4 Rand. (25 Va.) 74, 15 Am. Dec. 731.

Compare Hanrick v. Gurley, 93 Tex. 453, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, *affirming* in part 48 S. W. 994. See generally *supra*, VIII, A, 1.

[a] **Complainant will not be credited with money loaned to defendants.** Severy v. McDougall, 190 Ill. App. 193.

[b] **Centroversies growing out of a general indebtedness between the cotenants will not be settled in a partition suit.** Adkins v. Adkins, 117 Va. 445, 85 S. E. 490.

80. See generally the title "Account and Accounting."

81. See the following: **Cal.**—Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603. **Ga.**—Johnson v. Hopkins, 145 Ga. 817, 90 S. E. 60. **Ia.**—Price v. Ewell, 169 Iowa 206, 151 N. W. 79. **Mich.**—Godfrey v. White, 60 Mich. 443, 27 N. W. 593, 1 Am. St. Rep. 537. **Miss.**—Walker v. Williams, 84 Miss. 392, 36 So. 450. **Mo.**—Barnard v. Keathley, 230 Mo. 209, 130 S. W. 306; Sheppard v. Fisher, 206 Mo. 208, 103 S. W. 989. **Neb.**—Bald-

ridge v. Coffman, 71 Neb. 286, 98 N. W. 811. **Nev.**—Dall v. Confidence Silver Min. Co., 3 Nev. 531, 93 Am. Dec. 419. **N. J.**—Obert v. Obert, 10 N. J. Eq. 98, *affirmed*, 12 N. J. Eq. 423. **Pa.**—Harris' Appeal, 6 Sad. 530, 10 Atl. 135; Enyard v. Enyard, 24 Pa. Co. Ct. 319. **Eng.**—Wills v. Slade, 6 Ves. Jr. 498, 31 Eng. Reprint 1163; Tuckfield v. Buller, Dick. 240, 21 Eng. Reprint 260.

[a] **Parties may expressly or impliedly waive right to an accounting.** **Ill.**—Rhodes v. Rhodes, 78 Ill. App. 117. **Ia.**—Rice v. Rice, 158 Iowa 128, 138 N. W. 1111. **Ky.**—Ostermeyer v. Ostermeyer, 18 Ky. L. Rep. 1024, 39 S. W. 22.

82. U. S.—McGahan v. National Bank, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. ed. 403. **Ala.**—Sanders v. Robertson, 57 Ala. 465; Ormond v. Martin, 37 Ala. 598. **Ark.**—Clark v. Hershey, 52 Ark. 473, 12 S. W. 1077. **Cal.**—Bradley v. Harkness, 26 Cal. 69; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540. **Ga.**—Huff v. McDonald, 22 Ga. 131, 68 Am. Dec. 487. **Ill.**—McFarland v. Larkin, 155 Ill. 84, 39 N. E. 609; Boley v. Barutio, 120 Ill. 192, 11 N. E. 393. **Ia.**—Plant v. Fate, 114 Iowa 283, 86 N. W. 276; Willeke v. Willeke, 102 Iowa 173, 71 N. W. 201. **Miss.**—Walker v. Williams, 84 Miss. 392, 36 So. 450. **Neb.**—Mills v. Miller, 3 Neb. 87; Hanson v. Hanson, 4 Neb. (Unof.) 880, 97 N. W. 23. **N. H.**—Roberts v. Claremont R., etc. Co., 74 N. H. 217, 66 Atl. 485, 124 Am. St. Rep. 962; Gage v. Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829. **N. C.**—McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416. **Ohio.**—West v. Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552. **Pa.**—Slifer v. Slifer, 16 Pa. Dist. 239. **R. I.**—Almy v. Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654. **S. C.**—Thomson v. Peake, 38 S. C. 440, 17 S. E. 45, 725; Annely v. De Saussure, 26 S. C. 497, 2 S. E. 490, 4

appropriated by such tenant as revenues arising therefrom.⁸³ This is especially true where one of the cotenants has been in exclusive possession of the property,⁸⁴ or where there has been an ouster of the other cotenants.⁸⁵ There is authority, however, to the effect that where the other co-owners are neither ousted nor excluded a coparcener is not chargeable either for use and occupation, or for the profits.⁸⁶ This rule has also been followed when the property was

Am. St. Rep. 725. **Tenn.**—Johnson *v.* Johnson, 53 S. W. 226. **Vt.**—Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372. **Va.**—Graham *v.* Pierce, 19 Gratt. (60 Va.) 28, 100 Am. Dec. 658; Early *v.* Friend, 16 Gratt. (57 Va.) 21, 78 Am. Dec. 649. **W. Va.**—Ward *v.* Ward's Heirs, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

[a] But he is not chargeable with speculative profits. Ruffners *v.* Lewis, 7 Leigh (34 Va.) 720, 30 Am. Dec. 513.

83. **Ala.**—Wheat *v.* Wheat, 190 Ala. 461, 67 So. 417; Stein *v.* McGrath, 128 Ala. 175, 30 So. 792. **Ark.**—Cooke *v.* Clausen, 67 Ark. 455, 55 S. W. 846. **Cal.**—Burnett *v.* Pierce, 149 Cal. 178, 86 Pac. 603. **Haw.**—Waiwaiole *v.* Kulaea, 22 Hawaii 651. **Ill.**—Bayley *v.* Nichols, 263 Ill. 116, 104 N. E. 1054; Poiset *v.* Townsend, 166 Ill. App. 384. **Ind.**—Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Barnett *v.* Thomas, 36 Ind. App. 441, 75 N. E. 868, 114 Am. St. Rep. 385. **Ia.**—In re Smith, 133 Iowa 142, 109 N. W. 196. **Ky.**—Kirk *v.* Crutcher's Admr., 145 Ky. 52, 139 S. W. 1076; Bridgeford *v.* Barbour, 80 Ky. 529; McGill *v.* Cromwell, 12 Ky. Op. 259. **La.**—Hanna *v.* Hanna, 139 La. 824, 72 So. 289; Meredith *v.* Eason's Heirs, 130 La. 384, 58 So. 15. **Md.**—Lawes *v.* Lumpkin, 18 Md. 334. **Mich.**—Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502; Hunt *v.* Hunt, 109 Mich. 399, 67 N. W. 510. **Miss.**—Bowles *v.* Wood, 90 Miss. 742, 44 So. 169; Robinson *v.* Jones, 68 Miss. 794, 10 So. 79; Hardy *v.* Gregg, 2 So. 358. **Mo.**—Barnard *v.* Heathley, 230 Mo. 209, 130 S. W. 306; Doerner *v.* Doerner, 161 Mo. 407, 61 S. W. 802. **Neb.**—Miller *v.* Mills, 4 Neb. 362. **N. J.**—Hanneman *v.* Richter, 63 N. J. Eq. 753, 53 Atl. 177. **N. Y.**—Moses *v.* Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066; Ryder *v.* Kennedy, 166 App. Div. 146, 151 N. Y. Supp. 1036; McCrum *v.* McCrum, 141 App. Div. 83, 125 N. Y. Supp. 717. **Ohio.**—Perry *v.* Richardson, 27

Ohio St. 110. **Pa.**—Broadhurst *v.* Broadhurst, 248 Pa. 594, 94 Atl. 237. **S. C.**—Vaughan *v.* Langford, 81 S. C. 282, 62 S. E. 316, 128 Am. St. Rep. 912; McCants *v.* McCants, 51 S. C. 503, 29 S. E. 387. **Wash.**—Blackwell *v.* McLean, 9 Wash. 301, 37 Pac. 317. **Eng.**—Lorimer *v.* Lorimer, 5 Madd. 363, 56 Eng. Reprint 934; Teasdale *v.* Sanderson, 33 Beav. 534, 55 Eng. Reprint 476; Pascoe *v.* Swan, 5 Jur. N. S. 1235, 29 L. J. Ch. 159, 1 L. T. N. S. 17, 8 Wkly. Rep. 130.

[a] In partitioning personal property, a defendant joint owner in possession is properly chargeable with the value of some of the property which he converted to his own use. Halferty *v.* Karr, 188 Mo. App. 241, 175 S. W. 146.

84. **Ind.**—Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725. **Mich.**—Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502. **N. J.**—Cole *v.* Cole, 69 N. J. Eq. 3, 59 Atl. 895; Davidson *v.* Thompson, 22 N. J. Eq. 83. *Compare* Weise *v.* Welsh, 30 N. J. Eq. 431. **Pa.**—Friedrich's Estate, 24 Pa. Dist. 275; Lee *v.* Hamilton, 22 Pa. Dist. 75. **S. C.**—Windham *v.* Howell, 91 S. C. 348, 74 S. E. 754.

Compare Sarbach *v.* Newell, 28 Kan. 642.

85. **Ind.**—Crane *v.* Waggoner, 27 Ind. 52, 89 Am. Dec. 493. **Kan.**—Saville *v.* Saville, 63 Kan. 861, 66 Pac. 1043. **N. Y.**—Hitchcock *v.* Skinner, 1 Hoff. Ch. 21; Willes *v.* Loomis, 94 App. Div. 67, 87 N. Y. Supp. 1086; Stephenson *v.* Cotter, 5 N. Y. Supp. 749, 23 N. Y. St. 74. **Tex.**—Ford *v.* Boone, 32 Tex. Civ. App. 550, 75 S. W. 353; Kalteyer *v.* Wipff (Tex. Civ. App.), 65 S. W. 207. **W. Va.**—Rust *v.* Rust, 17 W. Va. 901. See also Ward *v.* Ward's Heir, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

86. **Mass.**—Chandler *v.* Simmons, 105 Mass. 412. *Compare* Dewing *v.* Dewing, 165 Mass. 230, 42 N. E. 1128. **Mo.**—Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994. **N. J.**—White *v.* Smith,

non-productive at the time of the cotenant's taking possession, but because of improvements made by him, it became productive.⁸⁷

C. ESTABLISHING AND ENFORCING LIENS.—When lienors are by statute parties to the partition suit, they may be required to disclose their liens; and the court has jurisdiction to determine the extent and validity thereof, and to make proper directions in the premises so as to preserve their rights.⁸⁸

D. ESTABLISHING AND PERFECTING TITLE, ETC.—As incidental relief, the court may determine issues respecting the title when they are properly presented by the pleadings.⁸⁹ Specific performance of

70 N. J. Eq. 418, 62 Atl. 560. See also *Weise v. Welsh*, 30 N. J. Eq. 431. **Tex.**—*Bailey v. Laws*, 3 Tex. Civ. App. 529, 23 S. W. 20. **W. Va.**—*Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

See also: **Fla.**—*Mattair v. Payne*, 15 Fla. 682. **Md.**—*Lawes v. Lumpkin*, 18 Md. 334. **N. Y.**—*Burhans v. Burhans*, 2 Barb. Ch. 398.

[a] Except where he has occupied more than his joint share of the common estate, and then only for the excess. *Medford v. Frazier*, 58 Miss. 241.

87. **Ky.**—*Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 138, 23 Am. Dec. 387. **Md.**—*Worthington v. Hiss*, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026. **N. Y.**—*Ford v. Knapp*, 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782. **Wash.**—*Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

88. See the following: **Cal.**—*Bradley v. Harkness*, 26 Cal. 69. **Ill.**—*Appell v. Appell*, 235 Ill. 27, 85 N. E. 205; *Kingsbury v. Buckner*, 70 Ill. 514; *Stevens v. Plummer*, 195 Ill. App. 278. **Kan.**—*Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096, 93 Am. St. Rep. 276. **Ky.**—*Webster v. Cadwallader*, 133 Ky. 500, 118 S. W. 327, 134 Am. St. Rep. 470. **Md.**—*Ridgely v. Iglehart*, 6 Gill & J. 49, 25 Am. Dec. 322. But see *Belt v. Bowie*, 65 Md. 350, 4 Atl. 295. **Mo.**—*Grogan v. Grogan*, 177 S. W. 649; *Stevens v. Stevens*, 172 Mo. 28, 72 S. W. 542. **N. J.**—*Adams v. Beideman*, 33 N. J. Eq. 77. But see *Cole v. Cole*, 69 N. J. Eq. 3, 59 Atl. 895. **N. Y.**—*Teal v. Woodworth*, 3 Paige 470; *Bell v. Golding*, 151 App. Div. 945, 136 N. Y. Supp. 278. **Pa.**—*Bingaman v. McCandless*, 55 Pa. Super. 155. **S. C.**—*Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838. **Tenn.**—*Savage v. Gaut*, 57 S. W. 170. **Tex.**—*Wil-*

liamson v. McElroy (Tex. Civ. App.), 155 S. W. 998. **Wash.**—*Easly v. Easly*, 78 Wash. 505, 139 Pac. 200. **W. Va.**—*Oneal v. Stimson*, 70 W. Va. 452, 74 S. E. 413.

But see *Greene v. Brown* (Ind.), 38 N. E. 519.

89. **U. S.**—*Gillespie v. Pocahontas Coal, etc. Co.*, 162 Fed. 742. **Cal.**—See *Middlecoff v. Cronise*, 155 Cal. 185, 100 Pac. 232. **Fla.**—*Gracy v. Fielding*, 71 Fla. 1, 70 So. 625; *Dallam v. Sanchez*, 56 Fla. 779, 47 So. 871. **Ia.**—*Price v. Ewell*, 169 Iowa 206, 151 N. W. 79. **Kan.**—*Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096, 93 Am. St. Rep. 276; *English v. English*, 53 Kan. 173, 35 Pac. 1107. **N. Y.**—*Leidenthal v. Leidenthal*, 121 App. Div. 269, 105 N. Y. Supp. 807; *Place v. Kennedy*, 89 App. Div. 167, 85 N. Y. Supp. 766; *Drake v. Drake*, 61 App. Div. 1, 70 N. Y. Supp. 163. **Wash.**—*Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113. **Can.**—*Stuart v. Taylor*, 33 Ont. L. Rep. 20, 7 Ont. W. N. 551 (*modifying* 6 Ont. W. N. 217); *Heath v. Kean*, 1 Newfoundl. 193.

[a] Thus (1), if warranted by the evidence the court may decree in whom the title rests and quiet such title. *Goodnough v. Webber*, 75 Kan. 209, 88 Pac. 879; *Cartmell v. Chambers* (Tex. Civ. App.), 54 S. W. 362. (2) So also, a deed under which plaintiff claims may be reformed (*Price v. Ewell*, 169 Iowa 206, 151 N. W. 79; *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556), or (3) corrected (*Rann v. Rann*, 95 Ill. 433); (4) one affecting his title may be set aside. **Ill.**—*Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; *Metheny v. Bohn*, 74 Ill. App. 377. **N. Y.**—*Leidenthal v. Leidenthal*, 121 App. Div. 269, 105 N. Y. Supp. 807; *Best v. Zeh*, 82 Hun 232, 31 N. Y. Supp. 230. **Va.**—See *Seefried v. Clarke*, 113 Va. 365, 74 S. E. 204. (5) A sale of the property may be set aside

a contract to convey may be required.⁹⁰ If the complaint will not sustain the partition suit, however, no incidental relief can be granted.⁹¹ Nor can relief be obtained unless all the necessary parties are before the court.⁹²

E. ENFORCING OWELTY.—For the purpose of equalizing the value of an allotment, the court may grant and enforce owelty,⁹³ though formerly such power was possessed only in equity.⁹⁴ The amount awarded should be made a charge or lien upon the share against which it is charged, and a reasonable time for its payment should be given, the allotment against which it is charged standing as security for its payment.⁹⁵ When owelty is awarded, the title in common is

(Walker v. Williams, 84 Miss. 392, 36 So. 450; McClintic v. Manns, 4 Munf. [18 Va.] 328); (6) an instrument, though in form a deed, may be declared a mortgage (Savage v. Gaut [Tenn.], 57 S. W. 170); (7) a mistake in an earlier decree may be corrected (Smith v. Smith [Tenn.], 57 S. W. 198); (8) a resulting trust declared (Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Buchanan v. Buchanan, 38 S. C. 410, 17 S. E. 218); (9) a mortgage decreed to be a forgery and its cancellation and expunging from the records ordered. Raeyling's Estate, 13 Pa. Dist. 63.

[b] **Removal of cloud on title** will not be considered as incidental relief in a partition suit. Bell v. Bell, 256 Ill. 175, 99 N. E. 934.

90. **Ill.**—Ellis v. Hill, 162 Ill. 557, 44 N. E. 858; Rann v. Rann, 95 Ill. 433. **Ia.**—Noecker v. Wallingford, 133 Iowa 605, 111 N. W. 37. **N. Y.**—Heyman v. Swift, 91 App. Div. 352, 86 N. Y. Supp. 584.

See generally the title "**Specific Performance.**"

91. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622; Brown v. Reed, 20 Tex. Civ. App. 74, 48 S. W. 537.

92. **Ga.**—Cock v. Callaway, 141 Ga. 774, 82 S. E. 286. **Mass.**—Wamesit Power Co. v. Sterling Mills, 158 Mass. 435, 33 N. E. 503. **Pa.**—Doyle v. Brundred, 189 Pa. 113, 41 Atl. 1107.

93. **Ala.**—Smith v. Hill, 168 Ala. 317, 52 So. 949; Terrell v. Cunningham, 70 Ala. 100; Norman v. Harrington, 62 Ala. 107. **Ga.**—Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655. **Ill.**—Ames v. Ames, 160 Ill. 599, 43 N. E. 592; Field v. Leiter, 117 Ill. 341, 7 N. E. 279; Cooter v. Dearborn, 115 Ill. 509, 4 N. E. 388. **Kan.**—Sawin v. Osborn, 87 Kan. 828, 126 Pac. 1074, Ann. Cas.

1914A, 647. **Ky.**—Mitchell v. Owings, 3 A. K. Marsh. 312. But see Wrenn v. Gibson, 90 Ky. 189, 13 S. W. 766, under statute. **Mass.**—Nichols v. Nichols, 181 Mass. 490, 63 N. E. 1072; King v. Reed, 11 Gray 490; Codman v. Tinkham, 15 Pick. 364. **Miss.**—Bennett v. Bennett, 84 Miss. 493, 36 So. 452; Calhoun v. Rail, 26 Miss. 414. **Neb.**—Lynch v. Lynch, 18 Neb. 586, 26 N. W. 390. **N. Y.**—Smith v. Smith, 10 Paige 470; Eisner v. Curiel, 20 Misc. 245, 45 N. Y. Supp. 1010. **N. C.**—Dobbin v. Rex, 106 N. C. 444, 11 S. E. 260; Cheatham v. Crews, 88 N. C. 38. **Pa.** In re Neel's Appeal, 88 Pa. 94; Schrade v. Schrade, 33 Pa. Co. Ct. 227; Kletzly v. Marks, 22 Pa. Co. Ct. 71. **R. I.** Robinson v. Robinson, 24 R. I. 222, 52 Atl. 992; Updike v. Adams, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711. **S. C.**—Covington v. Covington, 47 S. C. 263, 25 S. E. 193; Graydon v. Graydon, McMull. Eq. 63. **Va.**—Neathery v. Neathery, 114 Va. 650, 77 S. E. 465; Martin v. Martin, 95 Va. 26, 27 S. E. 810. **W. Va.**—See Cresap v. Brown, 69 W. Va. 658, 72 S. E. 751.

[a] **The share allotted (1) to an infant** cannot be charged with owelty (In re Milligan's Appeal, 82 Pa. 389. And see Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380; Jones v. Cameron, 81 N. C. 154), (2) nor will an infant be compelled to accept an allotment charged with owelty. Gooch v. Green, 102 Ill. 507.

94. Pulliam v. Capital Traction Co., 37 App. Cas. (D. C.) 301; Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655.

95. **Ill.**—Stortz v. Ruttiger, 249 Ill. 494, 94 N. E. 181; Lacy v. Gard, 60 Ill. App. 72. **Ind.**—Applegate v. Edwards, 45 Ind. 329. **Ia.**—Walsh v. McNutt's Syndies, 7 Mart. N. S. 311. **Md.**—Baltimore & O. R. Co. v. Trimble, 51 Md.

not divested until payment of the amount charged.⁹⁶

The procedure for enforcing the payment of owelty in a judicial proceeding for partition is by execution;⁹⁷ where partition by agreement, it is by action.⁹⁸ When made by commissioners, it may be enforced by venditioni exponas at the instance of the party entitled, and also in some cases by process of attachment.⁹⁹ Scire facias is used in some jurisdictions to enforce owelty.¹ In others, the owelty is collected by foreclosing the lien.²

When it is sought to collect owelty, the personal representative of a deceased person whose share was charged therewith is not a necessary party.³

F. TO PRESERVE PROPERTY, ETC.—1. **Injunction.**—Waste either present or threatened may be enjoined.⁴ And a court of equity may

99; *Thomas v. Farmers' Bank*, 32 Md. 57. **Miss.**—*Bennett v. Bennett*, 84 Miss. 493, 36 So. 452. **Mo.**—*Caldwell v. Wright*, 88 Mo. App. 604. **Neb.**—*Lynch v. Lynch*, 18 Neb. 586, 26 N. W. 390. **N. Y.**—*Ford v. Belmont*, 7 Robt. 508. **N. C.**—*Meyers v. Rice*, 107 N. C. 24, 12 S. E. 66; *Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 260. **Pa.**—*Stewart v. Allegheny Nat. Bank*, 101 Pa. 342; *Allegheny Nat. Bank's Appeal*, 99 Pa. 148. **R. I.**—*Robinson v. Robinson*, 24 R. I. 222, 52 Atl. 992; *Udike v. Adams*, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711. **S. C.**—*Brown v. Coney*, 12 S. C. 144. **Va.**—*Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; *Cox v. McMullin*, 14 Gratt. (55 Va.) 82.

[a] Such a lien partakes of the nature of the vendor's lien and follows the land into whosoever hands it may come. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

[b] No personal liability is created by the imposition of owelty. *Newsome v. Harrell*, 168 N. C. 295, 84 S. E. 337; *Waring v. Wadsworth*, 80 N. C. 345; *Stone v. McGregor*, 99 Tex. 51, 87 S. W. 334; *Ker v. Paschal*, 1 Posey Unrep. Cas. (Tex.) 692.

[c] When owelty is awarded to one who has encumbered his share, so much thereof as is necessary to discharge the encumbrance should be paid to the encumbrancer. *Seaton v. Barry*, 4 Watts & S. (Pa.) 183; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466.

96. *Harlan v. Langham*, 69 Pa. 235; *McClure v. McClure*, 14 Pa. 134. And see *McKibben v. Salinas*, 36 S. C. 279, 15 S. E. 208; *Burris v. Gooch*, 5 Rich. L. (S. C.) 1. Compare *Archer v. Munday*, 17 S. C. 84.

[a] None of the co-tenants will be compelled (1) to accept his allotment charged with owelty (*Wilson v. European, etc. R. Co.*, 62 Me. 112; *Whitney v. Parker*, 63 N. H. 416), (2) except in case of necessity. *Burdett v. Norwood*, 15 Lea (Tenn.) 491.

97. *Newsome v. Harrell*, 168 N. C. 295, 84 S. E. 337; *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16; *Deckard's Estate*, 10 Pa. Dist. 377.

98. *Newsome v. Harrell*, 168 N. C. 295, 84 S. E. 337; *Sumner v. Early*, 134 N. C. 233, 46 S. E. 492; *Keener v. Den*, 73 N. C. 132.

99. *Newsome v. Harrell*, 168 N. C. 295, 84 S. E. 337; *In re Ausborn*, 122 N. C. 42, 29 S. E. 56; *Pardue v. Givens*, 108 N. C. 413, 13 S. E. 112; *Meyers v. Rice*, 107 N. C. 24, 12 S. E. 66.

1. *Davis v. Norris*, 8 Pa. 122; *Burris v. Gooch*, 5 Rich. L. (S. C.) 1. See generally the title "Scire Facias."

2. See *Stone v. McGregor* (Tex. Civ. App.), 84 S. W. 399, holding that one not a party to the suit, who accepts the provisions of the decree, in so far as the same established a lien upon the property to secure payment of his debt, becomes entitled to enforce the lien.

3. *Newsome v. Harrell*, 168 N. C. 295, 84 S. E. 337.

4. **U. S.**—*Rainey v. H. C. Frick Coke Co.*, 73 Fed. 389. **N. J.**—*Weise v. Welsh*, 30 N. J. Eq. 431; *Coffin v. Loper*, 25 N. J. Eq. 443. **N. Y.**—*Hawley v. Clowes*, 2 Johns. Ch. 122. **N. C.**—*Thompson v. Silverthorne*, 142 N. C. 12, 54 S. E. 782. **Eng.**—*Bailey v. Hobson*, L. R. 5 Ch. 180, 39 L. J. Ch. 270, 22 L. T. N. S. 594, 18 Wkly. Rep. 124.

See generally the title "Waste."

enjoin all proceedings at law, where that court alone can grant substantial justice to all the parties, and the prosecution of proceedings at law would result in the great prejudice of some of the parties to the suit in equity.⁵ Relief by injunction will also be granted after judgment to prevent any interference or molestation of a party in the possession of his allotment.⁶ But such remedy cannot be invoked when there is an adequate remedy at law.⁷

2 **Receiver.**⁸—The court may, in aid of the final judgment in partition, appoint a receiver when necessary to protect all parties in interest;⁹ and a receiver may also be appointed to take charge of the property pending a final adjudication.¹⁰ It does not follow that because one of the cotenants is in exclusive possession of the property that a receiver will be appointed.¹¹

XI. COMMISSIONERS OR REFEREES.¹²—A. GENERALLY.

5 **N. J.**—Hall *v.* Piddock, 21 N. J. Eq. 311. **N. C.**—Donnell *v.* Mateer, 42 N. C. 94; Gash *v.* Ledbetter, 41 N. C. 183. **Ohio.**—McMasters *v.* Smith, 2 Ohio Dec. (Reprint) 723, 5 West. L. Month. 25. **Pa.**—Monroe *v.* Monroe, 26 Pa. Super. 51. **S. C.**—Muir *v.* Thomson, 28 S. C. 499, 6 S. E. 309.

6. King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394.

7. Hopkins *v.* Medley, 99 Ill. 509. See generally the title "**Legal Remedy.**"

8. See generally the title "**Receivers.**"

9. See the following: **U. S.**—Heinze *v.* Butte & B. C. M. Co., 126 Fed. 1, 61 C. C. A. 63; Higgins Oil & Fuel Co. *v.* Snow, 113 Fed. 433, 51 C. C. A. 267. **Cal.**—Reas *v.* Clemence, 173 Cal. 106, 159 Pac. 432; Mesnager *v.* De Leonis, 140 Cal. 402, 73 Pac. 1052; Woodward *v.* Superior Court, 95 Cal. 272, 30 Pac. 535. **Ga.**—Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655. **Ill.**—Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Fluke *v.* Phelps, 177 Ill. App. 95. **Ind.**—Rapp *v.* Reehling, 122 Ind. 255, 23 N. E. 68. **Ky.**—Webster *v.* Cadwallader, 133 Ky. 500, 118 S. W. 327, 134 Am. St. Rep. 470; Jackson *v.* Macey, Hard. 582. **Mich.**—Duncan *v.* Campau, 15 Mich. 415. **Mo.**—Stark *v.* Grimes, 88 Mo. App. 409. **N. J.**—Weise *v.* Welsh, 30 N. J. Eq. 431; Low *v.* Holmes, 17 N. J. Eq. 148. **N. Y.**—Weiher *v.* Simon, 41 Misc. 202, 83 N. Y. Supp. 927; Smith *v.* Lavelle, 13 Misc. 528, 34 N. Y. Supp. 695, 68 N. Y. St. 737; Goldberg *v.* Richards, 5 Misc. 419, 26 N. Y. Supp. 335. But see Glaser *v.* Burns, 170 App. Div. 321, 155 N. Y. Supp. 936. **N. C.**—Thompson *v.*

Silverthorne, 142 N. C. 12, 54 S. E. 782. **S. C.**—Christ Church *v.* Fishburne, 83 S. C. 304, 65 S. E. 238. **Tex.**—Stone *v.* Stone, 18 Tex. Civ. App. 80, 43 S. W. 567; Campbell *v.* Ruiz (Tex. Civ. App.), 30 S. W. 837. **Eng.**—Holmes *v.* Bell, 2 Beav. 298, 9 L. J. Ch. (N. S.) 217, 48 Eng. Reprint 1195; Porter *v.* Lopes, 7 Ch. D. 358, 37 L. T. N. S. 824; Fall *v.* Elkins, 9 Wkly. Rep. 861.

But see McCarty *v.* Patterson, 186 Mass. 1, 71 N. E. 112.

10. **U. S.**—Hinze *v.* Butte, etc. Consol. Min. Co., 126 Fed. 1, 61 C. C. A. 63. **Ind.**—Robinson *v.* Dickey, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417. **Mo.**—Halferty *v.* Karr, 188 Mo. App. 241, 175 S. W. 146. **W. Va.**—Ohio Fuel Oil Co. *v.* Burdett, 72 W. Va. 803, 79 S. E. 667, Ann. Cas. 1915D, 1033.

[a] **There is no precedent for the appointment of a receiver where no tenant in common is attempting to oust the plaintiff or is in any way interfering with his common possession and use of the property, or otherwise endangering the rights of the plaintiff therein.** Goodale *v.* Fifteenth Dist. Court, 56 Cal. 26.

11. **Ia.**—Varnum *v.* Leek, 65 Iowa 751, 23 N. W. 151. **N. Y.**—Bathmann *v.* Bathmann, 79 Hun 477, 29 N. Y. Supp. 959. **S. C.**—Christ Church *v.* Fishburne, 83 S. C. 304, 65 S. E. 238. **Tenn.**—Cassetty *v.* Capps, 3 Tenn. Ch. 524.

But see Low *v.* Holmes, 17 N. J. Eq. 148.

[a] **Especially in the Absence of an Allegation of Insolvency.**—Cassetty *v.* Capps, 3 Tenn. Ch. 524.

12. See generally the title "**References.**"

At common law the writ de partitione facienda issued to the sheriff, who acted with the aid of a jury, in making the partition.¹³ The proceedings in equity were largely the same except that commissioners were substituted for the jury.¹⁴ And now provision is generally made by statute for the appointment of commissioners or referees to make the partition.¹⁵ The interlocutory judgment or decree usually names the commissioners or referees.¹⁶ But any statutory method of appointment must be followed.¹⁷ New commissioners may be appointed when the occasion demands.¹⁸

The commission must contain the statutory directions as to the manner in which the commissioners shall perform their duties.¹⁹ Where the land is situate in separate districts, a separate writ must issue for each district.²⁰

The commissioners should take their oath of office before entering upon

13. Cecil v. Dorsey, 1 Md. Ch. 223.

14. Cecil v. Dorsey, 1 Md. Ch. 223.

15. See the statutes, and *infra*, this section.

[a] **Number appointed** (1) is regulated by statute. See the statutes, and *Ky.*—Railey v. Railey, 5 B. Mon. 110. *Minn.*—Robbins v. Hobart, 133 Minn. 49, 157 N. W. 908. *S. C.*—Yates v. Gridley, 16 S. C. 496; Zinn v. Prior, 1 Brev. 482. (2) When the statute provides for three commissioners and four are appointed, the error becomes immaterial when one dies before acting. *Stith v. Carter*, 22 Ky. L. Rep. 1488, 60 S. W. 725. (3) When permitted by statute, the appointment of one commissioner is sufficient. *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227.

[b] **Compensation fixed** (1) by court (*Smyth v. Bradstreet*, 5 Cow. [N. Y.] 213), unless (2) fixed by statute. See the statutes.

16. See *supra*, IX, B.

[a] **The commissioners or referee cannot be named by consent**, in the absence of statute, though all concur. *Bellas v. Dewart*, 17 Pa. 85. *Compare* *Wilkinson v. Stuart*, 74 Ala. 198; *Hood v. Montgomery*, 73 N. H. 405, 62 Atl. 651.

[b] **Order of appointment not necessary** when the appointment appears of record. *Rye v. J. M. Guffey Petroleum Co.*, 42 Tex. Civ. App. 185, 95 S. W. 622.

17. *Schulz v. Haase*, 129 Ill. App. 193 (*affirmed*, 227 Ill. 156, 81 N. E. 50); *Charleston, C. & C. Ry. Co. v. Leech*, 35 S. C. 146, 14 S. E. 730.

[a] **An irregular appointment** (1) is waived unless timely objection there-

to is taken. *Wilkinson v. Stuart*, 74 Ala. 198. (2) Objection is timely if interposed as an objection to the report of the commissioners before its confirmation. *Jordan v. McNulty*, 14 Colo. 280, 23 Pac. 460. (3) Failure of the court to act on the objection until after the commissioner's report is made does not waive an objection properly made. *Hood v. Montgomery*, 73 N. H. 405, 62 Atl. 651.

18. See *infra*, this note.

[a] **Where Unsuitable Commissioner (1) Is Named**.—*Hood v. Montgomery*, 73 N. H. 405, 62 Atl. 651; *Pickering v. Pickering*, 20 N. H. 541. (2) But a commissioner cannot be arbitrarily removed without cause. *Donaldson v. Duncan*, 199 Ill. 167, 65 N. E. 146.

[b] **Where One Declines To Serve**. *Colo.*—*Jordan v. McNulty*, 14 Colo. 280, 23 Pac. 460. *Ind.*—*Coggeshall v. State*, 112 Ind. 561, 14 N. E. 555, even in absence of statute providing therefor. *Me.*—*Parsons v. Copeland*, 38 Me. 537. *Tex.*—*McShan v. Johnson* (Tex. Civ. App.), 151 S. W. 597.

[c] **When Report Fails To Receive Approval of the Court**.—*Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520. See also *infra*, XI, D, 2, b.

[d] **If objection be made to a person named as commissioner**, it must be heard and determined judicially by the appointing power, before appointing either the person objected to or a substitute in his place. *Oram v. Young*, 18 N. J. L. 54. *Compare* *Pickering v. Pickering*, 20 N. H. 541.

19. *Stallings v. Stallings*, 22 Md. 41; *Barnes v. Rodgers*, 54 S. C. 115, 31 S. E. 885.

20. *Daniels v. Moses*, 12 S. C. 130.

the discharge of their duties.²¹ But if taken before they complete their labors, their return is not vitiated.²²

Notice of Proceedings.—Statutes require the commissioners or referees to give notice of their proceedings;²³ but irrespective of statute, notice is deemed necessary.²⁴

B. POWERS AND DUTIES GENERALLY.—The duties of the commissioners are statutory and the statute must be strictly complied with in order to give validity to their proceedings.²⁵ Their powers are ministerial rather than judicial.²⁶ The making of the allotment or

21. *Williamson v. Swindle*, McMull. Eq. (S. C.) 67.

[a] **Substantial compliance (1) with statute required** (Ill.—*Tibbs v. Allen*, 27 Ill. 119. **S. C.**—*Williamson v. Swindle*, McMull. Eq. 67. **Tenn.**—*Wilcox v. Cannon*, 1 Coldw. 369; *Bledsoe v. Wiley's Lessee*, 7 Humph. 507), (2) and the record should show these facts. *Smith v. Moore's Heirs*, 6 Dana (Ky.) 417; *Williamson v. Swindle*, McMull. Eq. (S. C.) 67. *Compare Wilcox v. Cannon*, 1 Coldw. (Tenn.) 369.

[b] **Taking Oath Prior to the Appointment Is Irregular.**—*Sullivan v. Sullivan*, 42 Ill. 315.

[c] **Oath should be administered (1) by an officer authorized by law to administer oaths.** *Claude v. Handy*, 83 Md. 225, 34 Atl. 532. (2) The appointing officer need not administer it. *McMullin v. Doughty*, 62 N. J. Eq. 252, 49 Atl. 914, *affirmed*, 63 N. J. Eq. 800, 52 Atl. 1132.

22. **Colo.**—*Jordan v. McNulty*, 14 Colo. 280, 23 Pac. 460, failure to take oath before viewing premises no cause for reversing judgment. **Ky.**—*McClanahan v. McClanahan*, 12 Ky. L. Rep. 440, 14 S. W. 496. **Md.**—*Basford v. Cranford*, 125 Md. 15, 93 Atl. 295.

But see *Ela v. McConihe*, 35 N. H. 279.

23. See the statutes, and **Ga.**—*Ralph v. Ward*, 109 Ga. 363, 34 S. E. 610. **Me.**—*Ware v. Hunnewell*, 20 Me. 291. **Md.**—*Basford v. Cranford*, 125 Md. 15, 93 Atl. 295; *Stallings v. Stallings*, 22 Md. 41. **Mich.**—*Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285; *McLaughlin v. Wayne* Circ. Judge, 57 Mich. 35, 23 N. W. 472. **N. H.**—*Gage v. Gage*, 64 N. H. 543, 14 Atl. 869; *Brown v. Seeggell*, 22 N. H. 548, jurisdictional. **Pa.**—*Morrow v. Morrow*, 152 Pa. 516, 25 Atl. 1107; *Biddle v. Starr*, 9 Pa. 461. **Vt.**—*Corliss v. Corliss*, 8 Vt. 373. **Wash.**—*Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249.

[a] **When report is referred back to the commissioners and new hearings are held, notice is necessary.** *Tolsma v. Tolsma*, 180 Mich. 79, 146 N. W. 412.

[b] **A reasonable time is sufficient.** *Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249.

[c] **No special form of notice is necessary in the absence of statute.** *Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249.

[d] It need not be written unless the statute so specifies. *Ralph v. Ward*, 109 Ga. 366, 34 S. E. 610.

[e] **Return of the manner (1) of giving notice necessary.** *Ware v. Hunnewell*, 20 Me. 291. (2) Return merely that they gave sufficient notice is not conclusive on the court. *Hathaway v. Persons Unknown*, 32 Me. 136.

24. **Mich.**—*Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285. **N. Y.**—*Double-day v. Newton*, 9 How. Pr. 71. **W. Va.**—*Wamsley v. Mill Creek Coal, etc. Co.*, 56 W. Va. 296, 49 S. E. 141.

But see *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. 516.

[a] **Failure is an irregularity and cause for setting aside the report on application of a party who had no notice and made no appearance.** **Mich.**—*Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285; *McLaughlin v. Wayne* Circuit Judge, 57 Mich. 35, 23 N. W. 472. **N. H.**—*Gage v. Gage*, 64 N. H. 543, 14 Atl. 869. **Pa.**—*Morrow v. Morrow*, 152 Pa. 516, 25 Atl. 1107.

25. *Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285; *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213.

[a] **Commissioners have no authority to direct a sale of the property, the court only having the power to make such an order.** *Post v. Post*, 65 Barb. (N. Y.) 192.

26. **Cal.**—*Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227. **La.**—*Traverso*

partition,²⁷ and directing the distribution thereof,²⁸ usually devolves upon the commissioners or referees.

An inventory and appraisement of the property is sometimes required of the commissioners;²⁹ but otherwise an appraisement is necessary only to aid in determining the value of the allotments.³⁰

Viewing the Land.—The mandate usually requires that the commissioners go upon the land; but where they are familiar with the property, their report will not be set aside for failure to do so.³¹

It will be presumed that the commissioners regularly performed their duties.³²

C. THE ALLOTMENT OR PARTITION. — 1. Manner of Generally.—The drawing of lots is the mode of making allotments under some statutes.³³

v. Row, 11 La. 494; *Stewart v. Pickard*, 1 Rob. 415. **Me.**—*Allen v. Hall*, 50 Me. 253; *Ham v. Ham*, 39 Me. 216. **Tex.**—See *Fagan v. Fagan*, 56 Tex. Civ. App. 175, 120 S. W. 550.

Compare Brokaw v. McDougall, 20 Fla. 212.

[a] **Cannot Determine Ownership or Title.**—**Ky.**—*Loughbridge v. Cawood*, 23 Ky. L. Rep. 1127, 64 S. W. 854. **Mass.**—*Brown v. Bulkley*, 11 Cush. 168. **Miss.**—*Wildy v. Bonney*, 28 Miss. 710. **N. J.**—*Van Riper v. Berdan*, 14 N. J. L. 132.

[b] **May Examine Witnesses in Order To Determine Mode of Allotment.** *Cecil v. Dorsey*, 1 Md. Ch. 223; *Meers v. Stourton*, Dick. 21, 21 Eng. Reprint 174.

[c] **May determine (1) location and boundaries of the real property** (*Allen v. Hall*, 50 Me. 253), and (2), if necessary, have surveys, maps and plats of the realty made. **Conn.**—*Coply v. Crane*, 1 Root 69. **Ind.**—*Lewis v. Cincinnati Central Ins. Co.*, 23 Ind. 445. **Ky.**—*Hunter v. Brown*, 7 B. Mon. 283. **Me.**—*Field v. Hanscomb*, 15 Me. 365. **Mass.**—*Buck v. Wolcott*, 15 Gray 502; *Mitchell v. Starbuck*, 10 Mass. 5. **S. C.**—*Ervin v. Epps*, 15 Rich. L. 223; *Witherspoon v. Dunlap*, 1 McCord 546.

[d] **May determine what the whole estate is**, by distinguishing real from personal property. *Allen v. Hall*, 50 Me. 253.

[e] **May determine the value of the land**, and the amount of the improvements, when directed by the court. *McCutchen v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140. See *Johnson v. Hoover*, 75 Md. 486, 23 Atl. 903.

[f] **When necessary to obtain possession of the property, the necessary**

process to accomplish that purpose may be issued by them. *Stewart v. Pickard*, 1 Rob. (La.) 415.

27. See *supra*, IX, B; and *infra*, XI, C.

28. *Cox v. McMullin*, 14 Gratt. (55 Va.) 82; *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

29. See the statutes, and *Barnett v. Bernstein*, 22 La. Ann. 394; *Millaudon v. Percy*, 5 Mart. N. S. (La.) 551; *Nott v. Daunoy*, 2 Mart. N. S. (La.) 1.

[a] **When there is but one tract of land**, an inventory is unnecessary. *Paul v. Lamothe's Heirs*, 36 La. Ann. 318.

30. **Kan.**—*Morris v. Tracy*, 58 Kan. 137, 48 Pac. 571. **N. C.**—*Toomer v. Toomer*, 5 N. C. 93. **Pa.**—*Kennedy v. Condran*, 244 Pa. 264, 90 Atl. 620; *Whitman v. O'Connor*, 145 Pa. 642, 23 Atl. 234; *Wistar's Appeal*, 105 Pa. 390.

See also *Knapp v. Gass*, 63 Ill. 492.

31. *Yates v. Gridley*, 16 S. C. 496; *Robb v. Robb* (Tex. Civ. App.), 62 S. W. 125. But see *Araullo v. Araullo*, 3 Phil. Isl. 567.

32. *Bryant's Heirs v. Stearns*, 16 Ala. 302. See also *Robbins v. Hobart*, 133 Minn. 49, 157 N. W. 908.

[a] **Presumption is especially applicable when the commissioner's report is assailed after final judgment.** **Ill.**—*Tibbs v. Allen*, 27 Ill. 119. **Ind.**—*Lucas v. Peters*, 45 Ind. 313. **Ky.**—*Caudill v. Caudill*, 9 Ky. L. Rep. 904, 7 S. W. 545. **Md.**—*Crouch v. Smith*, 1 Md. Ch. 401. **Mass.**—*Warren v. Greenwood*, 121 Mass. 112. **N. C.**—*Nicelar v. Barbrick's Heirs*, 18 N. C. 257.

33. See the statutes, and **La.**—*Rhodes v. Cooper*, 118 La. 299, 42 So. 943. **Md.**—*Cecil v. Dorsey*, 1 Md. Ch. 223. **Miss.**—*Paddock v. Shields*, 57 Miss.

There is no right of seniority in selection by the coparceners as to the allotment of particular parcels,³⁴ unless expressly provided for by statute.³⁵ When allotments of equal value cannot be made, a valuation of the several allotments by the commissioners is sometimes made, and those entitled to shares allowed to bid for the privilege of selecting allotments at the value fixed.³⁶

The allotment should be in the names of the original cotenants.³⁷ When a conveyance by metes and bounds of a part of the common land has been made by a coparcener, allotments should, if practicable, make such conveyance effective;³⁸ and in carrying out equity prin-

340. **Tex.**—*Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520. **Va.**—*Cox v. McMullin*, 14 Gratt. (55 Va.) 82. **Eng.** *Ames v. Comyns*, 17 L. T. N. S. 163, 16 Wkly. Rep. 74.

But see *Davis v. Palmer*, 78 N. J. Eq. 78, 81 Atl. 573; *McMullin v. Dougherty*, 62 N. J. Eq. 252, 49 Atl. 914, *affirmed*, 63 N. J. Eq. 800, 52 Atl. 1132.

[a] **Not Exclusive.**—*Paddock v. Shields*, 57 Miss. 340.

34. *Johnson v. Hoover*, 75 Md. 486, 23 Atl. 903; *Catlin v. Catlin*, 60 Md. 573; *Klohs v. Reifsnyder*, 61 Pa. 240.

[a] **The presumption** is that land held in common tenancy can be equitably divided between the parties by allotting to each a tract in severalty, equal to his interest in the whole measured by value. *East Shore Co. v. Richmond Belt Ry. Co.*, 172 Cal. 174, 155 Pac. 999.

[b] By the same rule that provides for the giving of improved parcels to those who have made the improvements, a cotenant who has committed waste should have allotted to him the part so wasted. *McDonald v. Donaldson*, 47 Fed. 765; *Polhemus v. Emson*, 30 N. J. Eq. 405, *affirmed*, 32 N. J. Eq. 827.

35. *Klohs v. Reifsnyder*, 61 Pa. 240; *Dana v. Jackson*, 6 Pa. 234.

36. **La.**—See *Amite Bank & Tr. Co. v. Singleton*, 135 La. 185, 65 So. 102. **N. H.**—*Timon v. Moran*, 54 N. H. 441. **Ore.**—See *Leonard v. Walker*, 70 Ore. 170, 140 Pac. 755. **Pa.**—*Whitman v. O'Connor*, 145 Pa. 642, 23 Atl. 234; *Eyerma v. Detwiler*, 136 Pa. 285, 20 Atl. 511. See also *Wilson v. Mehard*, 248 Pa. 325, 93 Atl. 1061.

[a] **Division need not be made into the same number of parts** as there are persons entitled to share therein. *Darrah's Appeal*, 10 Pa. 210.

[b] **Bids** (1) must be in writing

(*Eyerma v. Detwiler*, 136 Pa. 285, 20 Atl. 511; *Bartholomew's Appeal*, 71 Pa. 291), (2) and sealed (*Bartholomew's Appeal*, 71 Pa. 291; *Klohs v. Reifsnyder*, 61 Pa. 240), (3) one bid being allowed to each party. *Klohs v. Reifsnyder*, 61 Pa. 240. (4) After the bid is made it cannot be withdrawn. *Emerick's Estate*, 11 Phila. (Pa.) 74. (5) The bids should all be handed to the court at the same time. *Bartholomew's Appeal*, 71 Pa. 291; *Klohs v. Reifsnyder*, 61 Pa. 240.

[c] **If there be conflicting bids** a sale will be ordered. *Burch v. Brooks*, 15 Ohio Cir. Ct. (N. S.) 443, *affirmed*, 82 Ohio St. 441, 92 N. E. 1110.

[d] **In the absence of a statutory provision requiring bids**, this practice need not be followed. *Hanna v. Clark*, 204 Pa. 149, 53 Atl. 758.

37. *Kennedy v. Armstrong*, 20 N. J. L. 693, although one who stands in the relation of heir or purchaser to any one of the original tenants will be entitled to such share, it need not so appear upon the record.

38. **Cal.**—*Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Gates v. Salmon*, 46 Cal. 361. **Me.**—*Webber v. Mallett*, 16 Me. 88. **Mass.**—*Barnes v. Lynch*, 151 Mass. 510, 24 N. E. 783, 21 Am. St. Rep. 470. **Mich.**—*Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. **Miss.** *Paddock v. Shields*, 57 Miss. 340. **N. H.** *Great Falls Co. v. Worster*, 15 N. H. 412. **N. J.**—*Doremus v. Doremus*, 8 N. J. Eq. 556. **S. C.**—*Young v. Edwards*, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55. **Tenn.** *Estell v. University of the South*, 12 Lea 476. **Tex.**—*Grigsby v. Peak*, 68 Tex. 235, 4 S. W. 474, 2 Am. St. Rep. 487; *Furrrh v. Winston*, 66 Tex. 521, 1 S. W. 527. **Va.**—*McKee v. Barley*, 11 Gratt. (52 Va.) 340. **W. Va.**—*Boggess v. Meredith*, 16 W. Va. 1.

ciples, commissioners will respect a previous voluntary partition.³⁹ When it can be done without injustice, the commissioners may allot to a cotenant a parcel contiguous to land already owned by him in severalty.⁴⁰ When the allotments are susceptible of an accurate description by reference to known public boundaries or government surveys, they may be so described.⁴¹

The interests of mortgagees should be protected in making the allotment.⁴²

Consideration of Value.—The commissioners must be guided by the comparative value of the land assigned and not exclusively by the quantity.⁴³ The payment of owelty for the purposes of equalization is elsewhere discussed.⁴⁴

39. **U. S.**—*McDonald v. Donaldson*, 47 Fed. 765. **Ala.**—*Betts v. Ward*, 196 Ala. 248, 72 So. 110. **Mich.**—*Campau v. Campau*, 19 Mich. 116.

40. **U. S.**—*Cochran v. Shoenberger*, 33 Fed. 397. **Ky.**—*Middleton v. Fields*, 142 Ky. 352, 134 S. W. 180. **R. I.**—*Robinson v. Robinson*, 24 R. I. 222, 52 Atl. 992. **W. Va.**—*See Carper v. Chenoweth*, 69 W. Va. 729, 72 S. E. 1031.

41. *Marvin v. Titsworth*, 10 Wis. 320, without designation of boundaries by posts, stones or other permanent monuments, the latter being necessary to those cases where such monuments are essential to an accurate and clear description of the several parts or portions allotted.

[a] **In the absence of such surveys or permanent monuments**, the commissioners should have such monuments or corner posts erected. *Kane v. Parker*, 4 Wis. 123.

[b] **Description by metes and bounds** sufficient. *Heard v. Cherry*, 150 Ky. 318, 150 S. W. 361.

42. **Ill.**—*Cheney v. Ricks*, 168 Ill. 533, 48 N. E. 75. **Ind.**—*Martindale v. Alexander*, 26 Ind. 104, 89 Am. Dec. 458. **Ky.**—*Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 138, 23 Am. Dec. 287; *Ward v. Ward*, 15 Ky. L. Rep. 706. **Miss.**—*Bennett v. Bennett*, 84 Miss. 493, 36 So. 452. **Neb.**—*Carson v. Broady*, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691. **Nev.**—*Dondero v. Van Sickle*, 11 Nev. 389. **Pa.**—*Appeal of Kelsey*, 113 Pa. 119, 5 Atl. 447, 57 Am. Rep. 444. **R. I.**—*Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466. **S. C.**—*Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838; *Buck v. Martin*, 21 S. C. 590, 53 Am. Rep. 702. **Tex.**—*Tevis v. Collier*, 84 Tex. 638, 19 S. W. 801; *Robinson v.*

McDonald, 11 Tex. 385, 62 Am. Dec. 480.

43. **Ind.**—*See Burger v. Schnaus*, 61 Ind. App. 614, 112 N. E. 246. **Ky.**—*Hunter v. Brown*, 7 B. Mon. 283. **Me.**—*Dyer v. Lowell*, 30 Me. 217; *Field v. Hanscomb*, 15 Me. 365. **Minn.**—*La Motte v. Mohr*, 78 Minn. 127, 80 N. W. 850. **Nev.**—*Dondero v. Van Sickle*, 11 Nev. 389. **N. J.**—*McMullin v. Doughty*, 62 N. J. Eq. 252, 49 Atl. 914, *affirmed*, 63 N. J. Eq. 800, 52 Atl. 1132. **N. D.**—*See Hammond v. Northwestern Const. & Imp. Co.*, 19 N. D. 709, 124 N. W. 427. **Ore.**—*Leonard v. Walker*, 70 Ore. 170, 140 Pac. 755. **R. I.**—*Richardson v. Armington*, 10 R. I. 339. **Tex.**—*McShan v. Johnson* (Tex. Civ. App.), 151 S. W. 597; *Henyan v. Trevino* (Tex. Civ. App.), 137 S. W. 458.

[a] **Destruction of property to equalize values prohibited.** *Vail v. Vail*, 52 Hun 520, 5 N. Y. Supp. 872, 17 Civ. Proc. 38, 23 N. Y. St. 574.

[b] **The area or character of the allotments is rarely material.** *Ga.*—*Grimes v. Little*, 56 Ga. 649. **Minn.**—*La Motte v. Mohr*, 78 Minn. 127, 80 N. W. 850. **N. J.**—*McMullin v. Doughty*, 62 N. J. Eq. 252, 49 Atl. 914, *affirmed*, 63 N. J. Eq. 800, 52 Atl. 1132.

44. *See supra*, X, E.

[a] **Commissioners to make partition have no power to award owelty.** *Mole v. Mansfield*, 15 Sim. 41, 60 Eng. Reprint 531. But see *Dacre v. Gorges*, 4 L. J. Ch. (O. S.) 50, 2 Sim. & St. 454, 25 Rev. Rep. 246, 57 Eng. Reprint 420.

[b] **The commissioners when authorized by statute may fix the sum to be paid as owelty.** **Mass.**—*Nichols v. Nichols*, 181 Mass. 490, 63 N. E. 1072. **N. Y.**—*Post v. Post*, 65 Barb. 192;

Right To Create Easement or Servitude. — The commissioners may if necessary to a just division create an easement in or impose a servitude on the land apportioned to one of the distributees in favor of the share set apart to another one.⁴⁵

2. When Property Indivisible. — It was formerly a practice to assign to the parties the right to use and occupy the property for alternating periods of time when it was indivisible,⁴⁶ or to rent the property under the direction of a receiver and pay the rent over to the cotenants according to their respective rights;⁴⁷ but this practice has now become obsolete.⁴⁸

Mineral Lands. — A tract of land known to have oil or gas or both under its surface cannot be partitioned in kind;⁴⁹ nor can the oil and gas be partitioned separate from the surface.⁵⁰ Partition can only be made by sale of the property.⁵¹

3. When Property Consists of Several Tracts or of Large Tract. It is not required that a portion of each tract should be set aside in severalty to each party in such case.⁵²

Eisner v. Curiel, 20 Misc. 245, 45 N. Y. Supp. 1010. **Pa.**—*Schrade v. Schrade*, 33 Pa. Co. Ct. 227. **S. C.**—*Graydon v. Graydon*, McMull. Eq. 63; *Buckler v. Farrow*, Rich. Eq. Cas. 178.

45. **Ind.**—*Long v. Schowe*, 181 Ind. 13, 103 N. E. 785. **Mass.**—*Bornstein v. Doherty*, 204 Mass. 280, 90 N. E. 531; *Mount Hope Iron Co. v. Dearden*, 140 Mass. 430, 4 N. E. 803. **N. H.**—*Merrill v. Durrell*, 67 N. H. 108, 36 Atl. 613; *Cheswell v. Chapman*, 38 N. H. 14, 75 Am. Dec. 158. **N. J.**—*Rosenkrans v. Snover*, 19 N. J. Eq. 420, 97 Am. Dec. 668. **R. I.**—*Richardson v. Armington*, 30 R. I. 339. **Eng.**—*Lister v. Lister*, 3 Y. & C. Exch. 540.

Compare: Me.—*Dyer v. Lowell*, 30 Me. 217. **N. Y.**—*Pagenstecher v. Carlson*, 146 App. Div. 738, 131 N. Y. Supp. 413. **Wis.**—*Kane v. Parker*, 4 Wis. 123.

[a] **They May Not Dedicate Streets.** (1) *New Albany v. Williams*, 126 Ind. 1, 25 N. E. 187; *Kitchen v. Sheets*, 1 Ind. 138, Smith 27. (2) But when the parcel abuts on a public street, the allotment may include the fee in the street subject to the easement. *Mott v. Eno*, 97 App. Div. 580, 90 N. Y. Supp. 608.

46. **Ga.**—*Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655. **Me.**—*Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162. **Mass.**—*Adam v. Briggs Iron Co.*, 7 Cush. 361. **N. H.**—*Morrill v. Morrill*, 5 N. H. 134. **Vt.**—*Conant v. Smith*, 1 Aik. 67, 15 Am. Dec. 669.

47. *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655.

48. *Crowell v. Woodbury*, 52 N. H. 613, even in partitioning water rights. But see, as to water rights, *Smith v. Smith*, 10 Paige (N. Y.) 470.

Present practice is to sell the property and divide the proceeds. As to sale, see *infra*, XII.

49. *Dangerfield v. Caldwell*, 151 Fed. 554, 81 C. C. A. 400; *Gulf Refining Co. v. Hayne*, 138 La. 555, 70 So. 509, Ann. Cas. 1917D, 130.

50. *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791. But see *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592.

51. *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791.

[a] **Partition by licitation** may be had of such lands. *Gulf Refining Co. v. Hayne*, 138 La. 555, 70 So. 509, Ann. Cas. 1917D, 130.

[b] **A sale should be directed** when the election of the tenants in common to take the property is inconsistent and conflicting. *Burch v. Brooks*, 15 Ohio Cir. Ct. (N. S.) 443, *affirmed*, 82 Ohio St. 441, 92 N. E. 1110.

52. **Conn.**—*Stannard v. Sperry*, 56 Conn. 541, 16 Atl. 261. **Ind.**—*Hanlon v. Waterbury*, 31 Ind. 168. **Md.**—*Claude v. Handy*, 83 Md. 225, 34 Atl. 532. **Mass.**—*Buck v. Wolcott*, 15 Gray 502; *Hagar v. Wiswall*, 10 Pick. 152. **N. Y.** See *Van Meter v. Kelly* 115 N. Y. Supp. 943. **Ohio.**—*Smith v. Barber*, 1 Ohio (Pt. II) 118. **Okla.**—*Perry v. Jones*, 48 Okla. 362 150 Pac. 168. **R. I.** *Richardson v. Armington*, 10 R. I. 339.

When a large tract is subdivided, it is not necessary in the absence of statute that a single parcel be allotted to each distributee or even contiguous parcels.⁵³

4. When both real and personal property are to be partitioned, the court may direct that this may be separately done, without great prejudice to the owners.⁵⁴

5. Where Improvements. — If practicable and the equities of the parties be not thereby affected, cotenants in possession of property, who have made improvements thereon, should have the premises including the improvements set off to them.⁵⁵

6. Partial partition cannot be had unless with the consent of all the cotenants,⁵⁶ though the court may decree partial partition, when

See also *Hay v. Estell*, 19 N. J. Eq. 133.

53. *Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520.

[a] When two co-tenants occupy the tract each having built a home thereon, they are each entitled, if it can be equitably accomplished, to the land upon which the home is situated. *Hollis v. Watkins*, 189 Ala. 292, 66 So. 29.

54. *Woodward v. Raum*, 97 Cal. xviii, 31 Pac. 930; *Calhoun v. Rail*, 26 Miss. 414.

[a] It is not required that the division of both classes of property be made and reported at the same time. *Calhoun v. Rail*, 26 Miss. 414.

55. *U. S.*—*Highland Park Mfg. Co. v. Steele*, 232 Fed. 10, 146 C. C. A. 202; *McDonald v. Donaldson*, 47 Fed. 765. *Ala.*—*Ferris v. Montgomery Land & Imp. Co.*, 94 Ala. 557, 10 So. 607, 33 Am. St. Rep. 146. *Ariz.*—*Pesqueira v. Kellogg*, 8 Ariz. 266, 71 Pac. 915. *Ark.*—*Drennen v. Walker*, 21 Ark. 539, 557. *Cal.*—*East Shore Co. v. Richmond Belt Ry.*, 155 Pac. 999; *Rich v. Smith*, 26 Cal. App. 775, 148 Pac. 545. *Fla.*—*Boley v. Skinner*, 38 Fla. 291, 20 So. 1017. *Ga.*—*Walton v. Ward*, 142 Ga. 385, 82 S. E. 1067; *Smith v. Smith*, 133 Ga. 170, 65 S. E. 414. *Ill.*—*Bayley v. Nichols*, 263 Ill. 116, 104 N. E. 1054; *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645. *Ind.*—*Carver v. Coffman*, 109 Ind. 547, 10 N. E. 567. *Ia.*—*Shelangowski v. Schrack*, 162 Iowa 176, 143 N. W. 1081. *Ky.*—*Milligan v. Masden*, 25 Ky. L. Rep. 144, 74 S. W. 1049; *Stith v. Carter*, 22 Ky. L. Rep. 1488, 60 S. W. 725. *La.*—*Jones v. Crocker*, 4 La. Ann. 8. *Md.*—*Dugan v. Baltimore*, 70 Md. 1, 16 Atl. 501. *Mass.* *Fair v. Fair*, 121 Mass. 559. *Miss.*

Bennett v. Bennett, 84 Miss. 493, 36 So. 452. *Mo.*—*Burford v. Aldridge*, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720. *Neb.*—*Carson v. Broady*, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691. *N. H.*—*Leavitt v. Locke*, 68 N. H. 17, 40 Atl. 395. *N. J.*—*Booraem v. Wells*, 19 N. J. Eq. 87. *N. Y.*—*Granville v. Needham*, 3 Paige 545, 24 Am. Dec. 246; *Stephenson v. Cotter*, 5 N. Y. Supp. 749, 23 N. Y. St. 74. *N. C.* *Daniel v. Dixon*, 163 N. C. 137, 79 S. E. 425; *Pipkin v. Pipkin*, 120 N. C. 161, 26 S. E. 697. *Ohio.*—*Cincinnati Sav. Soc. v. Thompson*, 6 Ohio Dec. (Reprint) 1198, 12 Am. L. Rec. 310. *Pa.* *Kelsey's Appeal*, 113 Pa. 119, 5 Atl. 447, 57 Am. Rep. 444. *S. C.*—*Hall v. Boatwright*, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864. *Tenn.*—*Polk v. Gunther*, 107 Tenn. 16, 64 S. W. 25. *Tex.*—*Whitmire v. Powell*, 103 Tex. 232, 125 S. W. 889; *Osborn v. Osborn*, 62 Tex. 495. *Va.*—*Dennis v. Dennis*, 116 Va. 619, 82 S. E. 696; *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733. *Wash.*—*Hamlin v. Hamlin*, 90 Wash. 467, 156 Pac. 393. *W. Va.* *Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449. *Can.*—*Biehn v. Biehn*, 18 Grant Ch. (U. C.) 497; *Wood v. Wood*, 16 Grant Ch. (U. C.) 471.

But see *Bull v. Nichols*, 15 Vt. 329. Compare *Allen v. Hall*, 50 Me. 253, distinguishing *Parsons v. Copeland*, 38 Me. 537.

56. *Cal.*—*Sutter v. San Francisco*, 36 Cal. 112. *Me.*—*Duncan v. Sylvester*, 16 Me. 88; *Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162. *Mass.*—*Miller v. Miller*, 13 Pick. 237. *Pa.*—*Sweeney v. Meany*, 1 Miles 167. *Va.*—*Jackson v. Jackson*, 110 Va. 393, 66 S. E. 721. *W. Va.*—*Stewart v. Tennant*, 52 W. Va.

possible, allotting to some of the cotenants the shares to which they are entitled, and holding the other moieties together and undivided, when the best interests of the parties make such disposition advisable.⁵⁷ Under statutes, it is sometimes permissible to make partition partly by a sale of the property and partly by partition in kind.⁵⁸

D. THE REPORT.—1. Generally.—The commissioners are required to make a written report of their proceedings, stating the facts and not mere conclusions as to what they have done.⁵⁹ Under some

559, 44 S. E. 223. **Can.**—Mount *v.* Farrell, 21 Queb. Super. 231.

See also: **Ky.**—Marmaduke *v.* Tenant's Heirs, 4 B. Mon. 210. **Ohio.** Kerr *v.* Hooks, Wright 609. **Tenn.** Robertson *v.* Robertson, 2 Swan 197.

[a] When there are infants, partial partition cannot be made unless it appears to the court to be for the best interest of the infants to do so. Custis *v.* Snead, 12 Gratt. (53 Va.) 260.

57. **Ala.**—Letcher *v.* Allen, 180 Ala. 254, 60 So. 828; Smith *v.* Hill, 168 Ala. 317, 52 So. 949. **Cal.**—See Baldwin *v.* Foster, 157 Cal. 643, 108 Pac. 714. **Idaho.**—Richardson *v.* Ruddy, 10 Idaho 151, 77 Pac. 972. **Ind.**—Brown *v.* Brown, 43 Ind. 474. **Me.**—Upham *v.* Bradley, 17 Me. 423. **Mass.**—Allen *v.* Hoyt, 5 Mete. 324; Symonds *v.* Kimball, 3 Mass. 299. **Mich.**—Page *v.* Webster, 8 Mich. 263, 77 Am. Dec. 446. **Minn.**—Howe *v.* Spalding, 50 Minn. 157, 52 N. W. 527. **Miss.**—Paddock *v.* Shields, 57 Miss. 340. **Mo.**—Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451. **N. H.** Abbott *v.* Berry, 46 N. H. 369. **N. J.** Davis *v.* Palmer, 78 N. J. Eq. 78, 81 Atl. 573. **N. Y.**—Murray *v.* Wooden, 17 Wend. 531. **N. C.**—Carland *v.* Jones, 45 N. C. 235. **Tex.**—Glasscock *v.* Hughes, 55 Tex. 461. **Va.**—Cox *v.* McMullin, 14 Gratt. (55 Va.) 82. **W. Va.**—Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918. **Eng.**—Hobson *v.* Sherwood, 4 Beav. 184, 49 Eng. Reprint 309; Clarendon *v.* Hornby, 1 P. Wms. 446, 24 Eng. Reprint 465.

58. See the statutes, and. **N. Y.** See Moore *v.* Hatfield, 71 Misc. 282, 130 N. Y. Supp. 115. **Tex.**—Gorman *v.* Campbell (Tex. Civ. App.), 135 S. W. 177. **W. Va.**—Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

59. **Ark.**—McGee *v.* Russell, 49 Ark. 104, 4 S. W. 284. **Ill.**—Knapp *v.* Gass, 63 Ill. 492. **Ind.**—Lake *v.* Jarrett, 12 Ind. 395. **La.**—Lecarpentier *v.* Lecar-

pentier, 5 La. Ann. 497; Nott *v.* Danno, 2 Mart. N. S. 1. **Me.**—Hathaway *v.* Persons Unknown, 32 Me. 136. **N. J.** Van Riper *v.* Berdan, 14 N. J. L. 132. **N. Y.**—Tucker *v.* Tucker, 19 Wend. 226. **N. C.**—Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 161. **Pa.**—Vidal *v.* Girard, 1 Miles 322. **S. C.**—Steedman *v.* Weeks, 2 Strobb. Eq. 145, 49 Am. Dec. 660. **Tenn.**—Burdett *v.* Norwood, 15 Lea 491; Hardin *v.* Cogswell, 5 Heisk. 549. **Tex.**—Hensel *v.* Sturn (Tex. Civ. App.), 25 S. W. 817. **Va.**—Lucy *v.* Kelly, 117 Va. 318, 84 S. E. 661. **W. Va.**—Smith *v.* Greene, 76 W. Va. 276, 85 S. E. 537 (without report, final decree invalid); Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

[a] Facts which may have influenced their action and which may aid in determining the propriety of their action are properly stated. **Ill.**—Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164. **Mo.**—Caldwell *v.* Layton, 44 Mo. 220. **N. Y.**—Eisner *v.* Curiel, 20 Misc. 245, 45 N. Y. Supp. 1010; Jones *v.* Carroll, 3 Hun 556. **Ohio.**—Biggins *v.* Jones, 39 Ohio St. 95. **Tex.**—Shiner *v.* Shiner, 15 Tex. Civ. App. 666, 40 S. W. 439. **Va.**—Lucy *v.* Kelly, 117 Va. 318, 84 S. E. 661.

[b] Any testimony taken by the commissioners should be contained in the report. Brokaw *v.* McDougall, 20 Fla. 212; Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 161.

[c] Various allotments and the boundaries thereof and to whom made must be set out. **Miss.**—Mansfield *v.* Olsen, 4 So. 545. **Pa.**—Christy's Appeal, 110 Pa. 538, 5 Atl. 205. **Vt.** Harrington *v.* Barton, 11 Vt. 31. As to allotment, etc., see *infra*, XI, C.

[d] It should show either that the commissioners went upon the land or that they had such a personal knowledge as to make a personal examination unnecessary. Knapp *v.* Gass, 63 Ill. 492.

statutes, the commissioners to make partition must report as to whether or not actual partition can be made.⁶⁰

The deliberations of the commissioners should be had together,⁶¹ and all must be present when final action is taken and the report is made and signed.⁶²

When they make and file their report, their duties are ended, and they are functi officio, unless they act under a new order of court.⁶³

2. Objections and Confirmation.—a. *Objections Generally.*—In the absence of objections, a report will be held sufficient,⁶⁴ the report standing as a verdict until set aside for cause shown.⁶⁵

[e] It cannot be amended by the commissioners, after filing, without an order of court. *Clinard v. Brummel*, 130 N. C. 547, 41 S. E. 675.

60. *Post v. Post*, 65 Barb. (N. Y.) 192; *Eisner v. Curiel*, 20 Misc. 245, 45 N. Y. Supp. 1010; *Kennedy v. Condran*, 244 Pa. 264, 90 Atl. 620. See also *Moore v. Willey*, 77 Ark. 317, 91 S. W. 184, 113 Am. St. Rep. 151.

If actual partition cannot be made an appraisement should be had, and the report show the value of the property. See *supra*, XI, B.

61. *Mich.*—*Tolsma v. Tolsma*, 180 Mich. 79, 146 N. W. 412; *Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285. *N. H.*—*Odiorne v. Seavey*, 4 N. H. 53. *N. Y.*—*Schuyler v. Marsh*, 37 Barb. 350; *Underhill v. Jackson*, 1 Barb. Ch. 73. *R. I.*—*Townsend v. Hazard*, 9 R. I. 436. *Va.*—*Custis v. Snead*, 12 Gratt. (53 Va.) 260. *Wis.*—*Kane v. Parker*, 4 Wis. 123.

[a] Report should show affirmatively (1) that all were present. *Townsend v. Hazard*, 9 R. I. 436. (2) Failing to show such fact, or in which the contrary appears, report will be set aside. *Loyd v. Malone*, 23 Ill. 43, 76 Am. Dec. 179; *Railey v. Railey*, 5 B. Mon. (Ky.) 110. But see *Cole v. Hall*, 2 Hill (N. Y.) 625, holding that it will be presumed that all met and deliberated though but a majority sign the report.

[b] Viewing the premises, and conferences at different times by less than all the commissioners will not invalidate the proceedings, if all were present at the hearing and all fairly conferred before and when the report was finally agreed upon. *Townsend v. Hazard*, 9 R. I. 436.

62. *Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285; *Kane v. Parker*, 4 Wis. 123.

[a] But a majority can sign and

acknowledge the report. *Ia.*—*Bowlsby v. Gregory*, 137 Iowa 271, 114 N. W. 1060. *Mich.*—*Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285. *Minn.*—*Robbins v. Hobart*, 133 Minn. 49, 157 N. W. 908. *N. Y.*—*Cole v. Hall*, 2 Hill 625. *N. C.*—*Thompson v. Shemwell*, 93 N. C. 222; *Simmons v. Foseue*, 81 N. C. 86. *R. I.*—*Townsend v. Hazard*, 4 R. I. 436. *Wis.*—*Kane v. Parker*, 4 Wis. 123. See generally the title "References."

[b] Report Must Explain Why They Did Not All Sign.—*Underhill v. Jackson*, 1 Barb. Ch. (N. Y.) 73; *Townsend v. Hazard*, 9 R. I. 436.

63. *Ky.*—*Bates v. Thornberry*, 5 Dana 9. *N. C.*—*Clinard v. Brummel*, 130 N. C. 547, 41 S. E. 675. *Ohio.*—*Nichols v. Balser*, 1 Ohio Cir. Ct. 47, 1 Ohio Cir. Dec. 29.

Compare Jordan v. McNulty, 14 Colo. 280, 23 Pac. 460.

[a] Court may recommit report for further action. *Partridge v. Luce*, 36 Me. 16.

64. *Lake v. Jarrett*, 12 Ind. 395.

[a] Acquiescence in the report or the acquisition of rights thereunder waives the right of a party to avoid the report. *Ga.*—See *Webb v. Till*, 134 Ga. 388, 67 S. E. 1034. *Md.*—*Godwin v. Banks*, 89 Md. 679, 43 Atl. 863. *N. C.*—*Ex parte Pittingir*, 142 N. C. 85, 54 S. E. 845. *Pa.*—*Sutton's Appeal*, 112 Pa. 598, 4 Atl. 6. *R. I.*—*Walker v. Walker*, 47 Atl. 1091. *S. C.*—See *Ayer v. Hughes*, 87 S. C. 382, 69 S. E. 657. *Tenn.*—*Gass v. Waterhouse*, 61 S. W. 450. *Va.*—*Phillips v. Dulany*, 114 Va. 681, 77 S. E. 449.

[b] One not a party to the proceeding waives no rights by failure to object. *Deputy v. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344.

65. *Kern v. Maginniss*, 55 Ind. 459; *In re William & Anthony streets*, 19 Wend. (N. Y.) 678.

When the time for filing objections is fixed by statute, they cannot be filed after the time provided therefor.⁶⁶

The mode of taking objections to the report is sometimes to move to set aside or vacate the report.⁶⁷

b. *Hearing on Objections.*—A jury trial cannot be had on the objections to the report, though an issue of fact is presented.⁶⁸ The report will not as a rule be set aside if there is any evidence to sustain it.⁶⁹ It is otherwise if it appears that acts necessary to be done by commissioners or referees were not done.⁷⁰

When permitted by statute the court may set aside the report of referees appointed to make partition, and if necessary appoint new referees,⁷¹ or if the proceeding be in equity, the court may modify the report.⁷²

[a] **Irregularities in the report must** be presented in the form of objections thereto. *Stewart v. Pickard*, 1 Rob. (La.) 415.

[b] **Any party to the proceeding** may file objections. *Shumate v. Chennault*, 108 Ga. 438, 33 S. E. 991. See *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. 516.

[c] **Objections to a second report** may be made as if it were a first report. *Lancaster v. Morgan*, 54 Ga. 76.

66. *Roberts v. Roberts*, 143 N. C. 309, 55 S. E. 721; *Floyd v. Rook*, 128 N. C. 10, 38 S. E. 33.

[a] **Before Confirmation.**—Cal.—*East Shore Co. v. Richmond Belt Ry. Co.*, 172 Cal. 174, 155 Pac. 999. Ga.—*Leverett v. Stephenson*, 81 Ga. 701, 8 S. E. 72. Ill.—*McCracken v. Droft*, 108 Ill. 428.

[b] **At Term at Which Report Submitted.**—*Allen v. Hall*, 50 Me. 253. See also *Terry v. Logue*, 97 Ark. 314, 133 S. W. 1135.

67. *Clark v. Stephenson*, 73 Ind. 489. See *Hay v. Estell*, 19 N. J. Eq. 133.

[a] **But opposition to a motion for confirmation of report is sufficient.** Mass.—*Hall v. Hall*, 152 Mass. 136, 25 N. E. 84. N. J.—*Bentley v. Long Dock Co.*, 14 N. J. Eq. 480. N. C.—*McDevitt v. McDevitt*, 150 N. C. 644, 64 S. E. 761. Pa.—*Horne's Estate*, 10 Pa. Dist. 226, 8 Del. Co. 146.

[b] **If sale is asked for, opposition to the decree for sale sufficient.** *Bentley v. Long Dock Co.*, 14 N. J. Eq. 480.

[c] **Objection Should Specifically Indicate Grounds.**—*Martin v. Martin*, 95 Va. 26, 27 S. E. 810.

68. *Dillman v. Cox*, 23 Ind. 440. Compare *Lancaster v. Morgan*, 54 Ga. 76.

[a] **Heard by Court.**—Ind.—*Van Buskirk v. Stover*, 162 Ind. 448, 70 N. E. 520; *Patterson v. Blake*, 12 Ind. 436. Ky.—*Hancock v. Craddock*, 2 R. Mon. 389. La.—*Morris v. Harrell*, 14 La. Ann. 185. Va.—*McClanahan v. Hockman*, 96 Va. 392, 31 S. E. 516.

Right to jury trial generally, see the title "*Juries and Jurors.*"

69. Conn.—*Stannard v. Sperry*, 56 Conn. 541, 16 Atl. 261. Ky.—*Garth's Guardian v. Thompson*, 24 Ky. L. Rep. 1961, 72 S. W. 782; *Lang v. Constance*, 20 Ky. L. Rep. 502, 46 S. W. 693. Md.—*Crouch v. Smith*, 1 Md. Ch. 401. N. J.—*McMullin v. Doughty*, 62 N. J. Eq. 252, 49 Atl. 914, *affirmed*, 63 N. J. Eq. 800, 52 Atl. 1132. N. Y.—*Livingston v. Clarkson*, 4 Edw. Ch. 596. P. I.—*Matter of Malignad*, 11 Phil. Isl. 158. S. C.—*Parrott v. Barrett*, 81 S. C. 255, 62 S. E. 241; *Aldrich v. Aldrich*, 75 S. C. 369, 55 S. E. 887, 117 Am. St. Rep. 909. Tex.—*Jewett v. Scott*, 19 Tex. 567. See *Bond v. Garrison*, 59 Tex. Civ. App. 620, 127 S. W. 839. W. Va.—*Smith v. Greene*, 76 W. Va. 276, 85 S. E. 537; *Carper v. Chenoweth*, 69 W. Va. 729, 72 S. E. 1031. Wyo.—*Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622, 125 Am. St. Rep. 997.

70. Ky.—*Rudy v. Ramey*, 160 Ky. 842, 170 S. W. 179. Md.—*Stallings v. Stallings*, 22 Md. 41. Neb.—*Godfrey v. Cunningham*, 77 Neb. 462, 109 N. W. 765.

71. *Hamlin v. Hamlin*, 90 Wash. 467, 156 Pac. 393.

72. Ind.—See *Burger v. Schnaus*, 61 Ind. App. 614, 112 N. E. 246. Ia.—*Shearer v. Shearer*, 125 Iowa 394, 101 N. W. 175. N. C.—See *Tayloe v. Carrow*, 156 N. C. 6, 72 S. E. 76. Wash.

c. *Confirmation*.—A judgment confirming the report of the referees or commissioners making actual partition is essential.⁷³

XII. SALE.⁷⁴—A. **POWER OF SALE**.—The power of the court to direct a sale in partition proceedings is regulated by statute, and hence can only be ordered under circumstances provided for thereby.⁷⁵ Whether a sale should be ordered must be determined as a fact.⁷⁶

B. **PROCEEDINGS TO OBTAIN ORDER OF SALE**.—1. **Generally**.—The order of sale in partition should not be made before the rights and

Hamlin *v.* Hamlin, 90 Wash. 467, 156 Pac. 393.

73. **Ga.**—Rowe *v.* Henderson Naval Stores Co., 143 Ga. 756, 85 S. E. 917. **Minn.**—See Robbins *v.* Hobart, 133 Minn. 49, 157 N. W. 908. **Miss.**—Calhoun *v.* Rail, 26 Miss. 414. **N. C.** McDevitt *v.* McDevitt, 150 N. C. 644, 64 S. E. 761. **Pa.**—See Sanders' Estate, 41 Pa. Super. 77.

But see Cooney's Heirs *v.* Clark, 7 La. 156.

[a] **Acceptance of the report by the court** and recording it with the register of deeds is sufficient under some statutes. Southgate *v.* Burnham, 1 Me. 369.

[b] **Proof of Approval**.—An entry on the court record that the report of commissioners of partition was received and filed, is sufficient evidence of approval when there is nothing to the contrary. Fishback *v.* Young, 19 Tex. 515.

As to final judgment or decree, see *infra*, XIV.

74. See generally the title "Judicial Sales."

75. See the statutes, and the following: **Ala.**—Johnson *v.* Kelly, 80 Ala. 135; Wilkinson *v.* Stuart, 74 Ala. 198. **Ark.**—Cowling *v.* Nelson, 76 Ark. 146, 88 S. W. 913. **Colo.**—Brown *v.* Challis, 23 Colo. 145, 46 Pac. 679. **Conn.**—Richardson *v.* Monson, 23 Conn. 94. **Ga.** Rutherford *v.* Jones, 14 Ga. 521, 60 Am. Dec. 655. **Ia.**—Metcalf *v.* Hoopingardner, 45 Iowa 510. **Ky.**—Kirk *v.* Crutcher's Admr., 145 Ky. 52, 139 N. W. 1076; Adams *v.* De Dominiques, 129 Ky. 599, 112 S. W. 663. **Md.**—Booth *v.* Eberly, 124 Md. 22, 91 Atl. 767. **Miss.** Forest Product & Mfg. Co. *v.* Buckley, 107 Miss. 897, 66 So. 279. **N. Y.**—Scheu *v.* Lehning, 31 Hun 183, 4 Civ. Proc. 385, 66 How. Pr. 231; Hughes *v.* Hughes, 30 Hun 349. **N. C.**—Thompson *v.* Rospigliosi, 162 N. C. 145, 77 S. E. 113. **Ohio.**—Eberle *v.* Gaier, 89 Ohio St. 118, 105 N. E. 282. **S. C.**—Ayer *v.*

Hughes, 87 S. C. 382, 69 S. E. 657. **Tex.**—Stephenson *v.* Luttrell (Tex. Civ. App.), 160 S. W. 666. **Va.**—Cunningham *v.* Johnson, 116 Va. 610, 82 S. E. 690; Neathery *v.* Neathery, 114 Va. 650, 77 S. E. 465. **W. Va.**—Croston *v.* Male, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918.

[a] **Such power is not dependent** (1) upon the common law or the general principles of equity (Forest Product & Mfg. Co. *v.* Buckley, 107 Miss. 897, 66 So. 279), (2) though in some jurisdictions the right of courts of equity to make partition by sale is recognized irrespective of statute. Holley *v.* Glover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883, 16 L. R. A. 776; Dinckle *v.* Timrod, 1 Desaus. Eq. (S. C.) 109; Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Blagge *v.* Shaw (Tex. Civ. App.), 41 S. W. 756.

[b] **When the right of partition does not exist**, a sale of the property cannot be ordered. Eberle *v.* Gaier, 89 Ohio St. 118, 105 N. E. 282.

76. **Ark.**—See Nelson *v.* Cowling, 77 Ark. 351, 91 S. W. 773, 113 Am. St. Rep. 155. **Cal.**—Mitchell *v.* Cline, 84 Cal. 409, 24 Pac. 164. **Ky.**—Irvin *v.* Divine, 7 Mon. 246. **N. Y.**—Smith *v.* Trustees of Brookhaven, 36 App. Div. 386, 55 N. Y. Supp. 370; Eisner *v.* Curriel, 20 Misc. 245, 45 N. Y. Supp. 1010. **N. C.**—Tayloe *v.* Carrow, 156 N. C. 6, 72 S. E. 76.

[a] **When the property cannot be conveniently divided in kind**, a sale is necessary. **U. S.**—Dangerfield *v.* Caldwell, 151 Fed. 554, 81 C. C. A. 400. **Alaska.**—Boone *v.* Manley, 2 Alaska 552. **La.**—Amite Bank & Tr. Co. *v.* Singleton, 135 La. 185, 65 So. 102. **Md.** Brendel *v.* Klopp, 69 Md. 1, 13 Atl. 589. **Miss.**—Forest Product & Mfg. Co. *v.* Buckley, 107 Miss. 897, 66 So. 279. **Va.** Cunningham *v.* Johnson, 116 Va. 610, 82 S. E. 690. **W. Va.**—Hall *v.* Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791. See also *infra*, XII, B, 1.

interest of the parties are ascertained and fixed.⁷⁷ And it must appear from the record that the preliminary steps to ascertain the necessity for a sale have been had.⁷⁸ It must appear either from the commissioner's report or the depositions of witnesses that partition cannot conveniently be made and that the interests of the parties will be promoted by a sale;⁷⁹ though in some jurisdictions, whether a sale should be ordered is a matter to be tried by the court, the issue having been raised by the pleadings.⁸⁰ A reference is sometimes necessary prior to the sale to determine the amount and extent of any liens upon the property to be partitioned.⁸¹

But see *Ball v. Clark*, 150 Ky. 383, 150 S. W. 359.

[b] When there are infants, a sale will not be ordered unless it appears that their interests will be thereby best subserved. *Hartmann v. Hartmann*, 59 Ill. 103.

[c] Injunction cannot issue to enjoin the sale. *Morrison v. Morrison*, 105 Ala. 637, 17 So. 109.

77. *Stevens v. McCormick*, 90 Va. 735, 19 S. E. 742. But see *Ramsey v. Humphrey*, 162 Mass. 385, 38 N. E. 975.

[a] Unless there is no dispute as to such interests. *Lucy v. Kelly*, 117 Va. 318, 84 S. E. 661.

78. Ark.—*Moore v. Willey*, 77 Ark. 317, 91 S. W. 184, 113 Am. St. Rep. 151. Ill.—*Denning v. Clark*, 59 Ill. 218; *McLain v. Van Winkle*, 46 Ill. 406. La.—*Gernon v. Bestick*, 15 La. Ann. 697. Md.—*Earle v. Turton*, 26 Md. 23. Miss.—*Tindall v. Tindall*, 3 So. 581. N. Y.—*Gallatian v. Cunningham*, 8 Cow. 361.

[a] That commissioners to make partition were appointed must appear even in default cases. *Moore v. Willey*, 77 Ark. 317, 91 S. W. 184, 113 Am. St. Rep. 151. As to commissioners or referees generally, see *supra*, XI.

79. Ill.—*Watke v. Stine*, 214 Ill. 563, 73 N. E. 793; *McLain v. Van Winkle*, 46 Ill. 406. La.—*Mackin v. Wilds*, 106 La. 1, 30 So. 257. Md.—*Rowe v. Gillelan*, 112 Md. 108, 76 Atl. 500. N. H.—*Abbott v. Abbott*, 77 N. H. 601, 93 Atl. 460. N. J.—*Fisk v. Grosvenor* (N. J. Eq.), 20 Atl. 261. Pa.—*Kaufmann v. City of Pittsburgh*, 248 Pa. 41, 93 Atl. 779. Tenn.—*Davis v. Solari*, 132 Tenn. 225, 177 S. W. 939; *Rutherford v. Rutherford*, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799. Va.—*Cunningham v. Johnson*, 116 Va. 610, 82 S. E. 690. Compare *Stevens v. McCormick*, 90 Va. 735, 19 S. E. 742; *Zirkle v. McCue*, 26 Gratt. (67 Va.)

517. W. Va.—*Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223.

80. N. J.—*Fisk v. Grosvenor* (N. J. Eq.), 20 Atl. 261; *Enyard v. Nevius* (N. J. Eq.), 18 Atl. 192; *Waln v. Meirs*, 27 N. J. Eq. 351. S. C.—*Green v. Cannady*, 77 S. C. 193, 57 S. E. 832; *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430. Tex.—*Saunders v. Saunders* (Tex. Civ. App.), 62 S. W. 797. Can.—*Bennett v. Bennett*, 8 Grant Ch. (U. C.) 446.

[a] Judge may select the best means of discovering (1) the most efficient mode of effecting the partition; he may appoint experts for the purpose of examining and reporting the most efficient mode (Cameron v. Lane, 36 La. Ann. 716), or (2) may examine witnesses for that purpose (*Florance v. Hills*, 11 La. Ann. 338), or (3) he may decide the question upon the report of a master or commissioners to whom the matter has been referred. N. Y.—*Thompson v. Hardman*, 6 Johns. Ch. 436. W. Va.—*Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223. Can.—*Steven v. Hunter*, 14 Grant Ch. (U. C.) 541; *O'Lone v. O'Lone*, 2 Grant Ch. (U. C.) 642.

[b] Final determination is with the court; the report of the master or commissioners may be disregarded. *McCann v. Brown*, 43 Ga. 336; *Barnes v. Taylor*, 30 N. J. Eq. 7. But see *Loyd's Exr. v. Loyd's Exr.*, 23 La. Ann. 213.

81. Ill.—*Kilgour v. Crawford*, 51 Ill. 249; *Stevens v. Plummer*, 195 Ill. App. 278. La.—See *Williams' Succession*, 138 La. 383, 70 So. 334. Md.—*Thruston v. Minke*, 32 Md. 571. N. Y.—*Horton v. Buskirk*, 1 Barb. 421; *Connor v. Connor*, 59 Hun 623, 13 N. Y. Supp. 402, 20 Civ. Proc. 308, 36 N. Y. St. 823; *Lippert v. Gates*, 74 Misc. 36, 133 N. Y. Supp. 733. But see *Gardiner v. Luke*, 12 Wend. 269. Pa.—*In re Hummel's Appeal*, 1 Sad. 410, 5 Atl. 669.

2. Who May Obtain Order.—When actual partition appears to be impossible, any co-owner is entitled to apply for an order of sale.⁸²

C. ORDER OF SALE.⁸³—The order of sale must recite the facts upon which the order is based.⁸⁴ It should contain the terms and conditions of the sale,⁸⁵ and describe the property to be sold.⁸⁶

D. NOTICE OF SALE, when required by statute, should be given in the manner provided for thereby.⁸⁷

E. THE SALE.—A partition sale is a judicial sale,⁸⁸ and the general rules applying to judicial sales and the proceedings thereunder are applicable.⁸⁹

[a] **Notice of such proceedings** must be given. *Doremus v. Doremus*, 66 Hun 111, 21 N. Y. Supp. 13, 49 N. Y. St. 800; *O'Grady v. O'Grady*, 55 Hun 40, 8 N. Y. Supp. 278, 28 N. Y. St. 903.

As to reference in partition proceedings generally, see *supra*, XI.

82. Conn.—*Johnson v. Olmsted*, 49 Conn. 509. **Ky.**—*Kean v. Tilford*, 81 Ky. 600. **N. J.**—*Bentley v. Long Dock Co.*, 14 N. J. Eq. 480.

As to who may maintain partition suit generally, see *supra*, IV, A.

83. See generally 16 STANDARD PROC. 723, et seq.

84. Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223.

85. McLain v. Van Winkle, 46 Ill. 406. See generally 16 STANDARD PROC. 729, et seq.

[a] **When the land is sold subject to an existing mortgage**, the order of sale should state the amount due thereon. *Stevens v. Plummer*, 195 Ill. App. 278.

86. Hickenbotham v. Blackledge, 54 Ill. 316. See generally 16 STANDARD PROC. 725, et seq.

[a] **An order of sale of realty** owned by persons in common cannot direct a sale of personalty owned exclusively by one of the parties. *White v. Le-foldt*, 78 Miss. 173, 28 So. 818.

87. See the statutes, and **N. J.** *Craig v. Smith*, 84 N. J. Eq. 593, 95 Atl. 194; *Rudderow v. Dudley*, 41 N. J. Eq. 611, *affirmed*, 42 N. J. Eq. 370, 7 Atl. 891. **N. Y.**—*Romaine v. McMillan*, 5 How. Pr. 318. **W. Va.**—*Thompson v. Buffalo Land & Coal Co.*, 77 W. Va. 782, 88 S. E. 1040.

See generally 16 STANDARD PROC. 738, et seq.

[a] **Defects therein** cannot be made the subject of collateral attack, but must be urged either on the hearing to confirm the sale or on an application to set the sale aside. *Le Fevre v. Laramay*, 22 Barb. (N. Y.) 167; *Goodwin*

v. Crooks, 58 App. Div. 464, 69 N. Y. Supp. 578 (*affirming* 33 Misc. 39, 68 N. Y. Supp. 219); *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

88. See 16 STANDARD PROC. 716.

89. See *infra*, this note and generally 16 STANDARD PROC. 750, et seq.

[a] **It is governed by the order directing** it and is subject to such restrictions as appear therein. *Hughes v. Hughes*, 72 Mo. 136.

[b] **Manner of Sale.**—(1) It is usually required to be at public auction, to the highest bidder (*Hache v. Ayraud*, 14 La. Ann. 178; *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317), (2) though private sale is sometimes authorized. **La.**—*Bruhn v. Firemen's Bldg. Assn.*, 42 La. Ann. 481, 7 So. 556. **N. C.**—*Wooten v. Cunningham*, 171 N. C. 123, 88 S. E. 1; *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113. **Va.**—*Conrad's Admr. v. Fuller*, 98 Va. 16, 34 S. E. 893. (3) Selling property at private sale is irregular when statute requires sale to be made at public auction. *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317. (4) If the land is susceptible of division it must be offered in parcels. *Bowen v. Bowen*, 265 Ill. 638, 107 N. E. 129; *Gernon v. Bestick*, 15 La. Ann. 697. (5) But if the property cannot be sold to the best advantage in separate tracts, then it should be offered in other combinations and sold in such a way as to bring the best results, taking all the property together. *Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Ward v. Ward*, 174 Ill. 432, 51 N. E. 806. See *Walker v. Kilian*, 62 S. C. 482, 40 S. E. 887. As to manner of sale generally, see 16 STANDARD PROC. 760, et seq.

[c] **Terms of Sale Cannot Be Changed.**—*Eshelman v. Witmer*, 2 Watts (Pa.) 263; *Murphy v. Bedford*, 35 Leg. Int. (Pa.) 262.

[d] **Sale must be held at time and**

F. REPORT, CONFIRMATION, VACATION AND RESALE.—The report of sale in partition is usually governed by the same rules as other reports of judicial sales.⁹⁰ So also the general rules relating to confirmation of judicial sales are applicable.⁹¹ The same is true as to the rules governing the vacation and setting aside of such sales,⁹² and as to a resale thereafter.⁹³

G. REMEDIES TO ENFORCE BID.—Proceedings to compel one to comply with his bid in a partition suit are no different than in judicial sales generally.⁹⁴

H. COLLECTING AND DISTRIBUTING PROCEEDS.—The general rules relating to the collecting of the proceeds of judicial sales are applicable in the main to partition sales.⁹⁵ So also, the general rules

place designated in notice of sale, or at some time to which regularly adjourned. *Davidson v. Davidson Real Estate & Inv. Co.*, 226 Mo. 1, 125 S. W. 1143, 136 Am. St. Rep. 615; *Hughes v. Hughes*, 72 Mo. 136.

[e] **Sale must be for cash** when statute so provides. *Dickson v. Dickson*, 33 La. Ann. 1370.

By whom conducted, see generally 16 STANDARD PROC. 755, et seq.

Who may purchase, see generally 16 STANDARD PROC. 768, et seq.

90. See *Thomas v. Elliott*, 215 Mo. 598, 114 S. W. 987; *Patton v. Hanna*, 46 Mo. 314; and generally 16 STANDARD PROC. 781, et seq.

91. See *infra*, this note and, generally 16 STANDARD PROC. 786, et seq.

[a] **Necessity for.**—Sale is not final until confirmed. *Ark.*—*Gailey v. Ricketts*, 123 Ark. 18, 184 S. W. 422. *Miss.* *Bank of Hickory v. McPherson*, 102 Miss. 852, 59 So. 934. *Mo.*—*Thomas v. Elliott*, 215 Mo. 598, 114 S. W. 987.

[b] **Objectors to a confirmation of sale** (1) must in addition to filing a statement of objections, sustain the charges by proof. *Bowen v. Bowen*, 265 Ill. 638, 107 N. E. 129. (2) Exceptions to the report should state facts rather than conclusions. *Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16. (3) When the pleadings are insufficient to authorize a sale, it will be set aside though no exceptions on that ground were filed. *Walton Bank & Tr. Co. v. Glinn*, 161 Ky. 60, 170 S. W. 511.

[c] **All objections must be presented** before the sale is confirmed, as the order of confirmation is res adjudicata as to any matter which was presented or should have been presented on the application to confirm the sale. *Ky.*—*Lampton v. Usher's Heirs*, 7 B.

Mon. 57. *N. Y.*—*Kirk v. Kirk*, 137 N. Y. 510, 33 N. E. 552, *affirming* 12 N. Y. Supp. 326. *Pa.*—*Landreth v. Howell*, 24 Pa. Super. 210; *Scheile's Estate*, 5 Pa. Co. Ct. 601. *S. C.*—*Smith v. Winn*, 38 S. C. 188, 17 S. E. 717, 751; *Fuller v. Missrnoon*, 35 S. C. 314, 14 S. E. 714.

As to objections generally, see 16 STANDARD PROC. 791, et seq.

92. See generally 16 STANDARD PROC. 801, et seq.

93. See generally 16 STANDARD PROC. 823, et seq.

94. See generally 16 STANDARD PROC. 827, et seq., and *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Hore's Estate*, 11 Phila. (Pa.) 63.

[a] **It is usually by an independent action** to enforce the contract of purchase. *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Wooten v. Cunningham*, 171 N. C. 123, 88 S. E. 1.

95. See generally 16 STANDARD PROC. 830, et seq.

[a] **Purchase price should be paid** (1) **in cash** (*Walke v. Moody*, 65 N. C. 599; *Rice v. Hunt*, 12 Heisk. [Tenn.] 344), and (2) if the entire amount be not so received, title to the land must be retained as security. *Walke v. Moody*, 65 N. C. 599. (3) But the parties in interest may with the approval of the court waive cash payment. *Wiggins v. Howard*, 83 N. Y. 613, *affirming* 22 Hun 126. (4) And credit may be extended when permitted by statute. *Perin v. Megibben*, 53 Fed. 86; *Kendall v. Briggs*, 81 Ky. 119.

[b] **When notes may be taken**, those interested should be the payees, in the absence of other express direction. *Preston v. Compton*, 30 Ohio St. 299.

[c] **When property is bid in by one of the parties** (1), his share may be considered as payment on account of

as to the distribution of such proceeds obtained.⁹⁶ But as a rule each distributee is entitled to have his share paid to him, sometimes the court for the purpose of retaining the proceeds of the sale within its control will order its payment into the court or other court depository,⁹⁷ less such sum as may be deducted⁹⁸ by reason of improve-

his bid (*La.*—*Wade v. Murray*, 35 *La. Ann.* 546; *Hollier v. Gonor*, 13 *La. Ann.* 591. *Ohio.*—*Glemser v. Glemser*, 5 *Ohio Dec.* 267, 5 *Ohio N. P.* 170. *Pa.* *Bloodgood's Estate*, 8 *Pa. Co. Ct.* 545); (2) but he is required to pay cash for the residue over and above his share. *People's Bank v. David*, 49 *La. Ann.* 136, 21 *So.* 174. See also *Bloodgood's Estate*, 8 *Pa. Co. Ct.* 545.

[d] **Payment to One Other Than Court Directs Improper.**—*Unangst v. Kraemer*, 8 *Watts & S. (Pa.)* 391; *Hise v. Geiger*, 7 *Watts & S. (Pa.)* 273.

[e] **When deferred payments are permitted**, they must be made direct to those beneficially interested; payments to any other person will not operate to relieve the purchaser from liability. *Preston v. Compton*, 30 *Ohio St.* 299; *Welsh v. Freeman*, 21 *Ohio St.* 402.

[f] **When the officer collecting the proceeds fails to pay over the sum**, an action on his bond may be brought in the name of the state on the relation of the owners of the property. *Owen v. State*, 25 *Ind.* 107.

96. See generally 16 *STANDARD PROC.* 831.

[a] **Notice of proceedings for distribution** are necessary in order to conclude all parties entitled to an interest therein. *Beery v. Irick*, 22 *Gratt. (63 Va.)* 614.

97. *Ind.*—*Chisham v. Way*, 73 *Ind.* 362. *Ia.*—*Walters-Cates v. Wilkinson*, 92 *Iowa* 129, 60 *N. W.* 514. *N. J.* *Morgan v. Morgan*, 71 *N. J. Eq.* 606, 64 *Atl.* 155. *N. Y.*—*People ex rel. Miller v. Ryder*, 124 *N. Y.* 500, 26 *N. E.* 1040; *Wood v. Hubbard*, 29 *App. Div.* 166, 51 *N. Y. Supp.* 526. *N. C.*—*Lawrence v. Hardy*, 151 *N. C.* 123, 65 *S. E.* 766, 134 *Am. St. Rep.* 976. *Pa.*—*Mehrten's Estate*, 41 *Pa. Co. Ct.* 169; *Himmlenspark's Estate*, 8 *Pa. Dist.* 698.

98. *Ala.*—*McDaniel v. Louisville, etc. R. Co.*, 155 *Ala.* 553, 46 *So.* 981. *Ill.*—*Bayley v. Nichols*, 263 *Ill.* 116, 104 *N. E.* 1054; *Cooter v. Dearborn*, 115 *Ill.* 509, 4 *N. E.* 388; *Severy v. McDougall*, 190 *Ill. App.* 193. *Ia.*—*Berry v. Donald*, 168 *Iowa* 744, 150 *N. W.* 1048. *Kan.*—*Sarbach v. Newell*, 28 *Kan.* 642.

Mich.—*Fenton v. Miller*, 116 *Mich.* 45, 74 *N. W.* 384, 72 *Am. St. Rep.* 502. *Mo.*—*State v. Cummiskey*, 34 *Mo. App.* 189. *Neb.*—*Carson v. Broady*, 56 *Neb.* 648, 77 *N. W.* 80, 71 *Am. St. Rep.* 691. *N. J.*—See *Shipman v. Shipman*, 65 *N. J. Eq.* 556, 56 *Atl.* 694. *N. Y.*—*Barker v. Barker*, 172 *App. Div.* 244, 158 *N. Y. Supp.* 413; *Yung v. Blake*, 156 *App. Div.* 211, 141 *N. Y. Supp.* 300. *N. C.* *Fisher v. Toxaway Co.*, 171 *N. C.* 547, 88 *S. E.* 887. *Pa.*—*Weiskircher v. Connelly*, 248 *Pa.* 327, 93 *Atl.* 1068; *Jevons v. Kline*, 9 *Kulp* 305. *R. I.*—*Moore v. Thorp*, 16 *R. I.* 655, 19 *Atl.* 321, 7 *L. R. A.* 731. *S. C.*—*Sutton v. Sutton*, 26 *S. C.* 33, 1 *S. E.* 19. *Tex.*—*Holloway v. Hall (Tex. Civ. App.)*, 151 *S. W.* 895. *W. Va.*—*Ward v. Ward's Heirs*, 40 *W. Va.* 611, 21 *S. E.* 746, 52 *Am. St. Rep.* 911, 29 *L. R. A.* 449. *Eng.*—*In re Jones (1893)*, 2 *Ch.* 461, 62 *L. J. Ch.* 996, 69 *L. T. N. S.* 45, 3 *Rep.* 498; *Watson v. Gass*, 51 *L. J. Ch.* 480, 45 *L. T. N. S.* 582, 30 *Wkly. Rep.* 286.

[a] **Purchaser of an interest of a distributee** is entitled to receive the share purchased by him. *Barnett v. Thomas*, 36 *Ind. App.* 441, 75 *N. E.* 868, 114 *Am. St. Rep.* 385.

[b] **A married woman (1)** is entitled to receive directly and without condition her proportion of a fund in which she has a vested interest (*Wilson v. Sailer*, 18 *Pa. Dist.* 435), though (2) when necessary special directions will be made to protect her interests. *Ky.*—*Stump v. Martin*, 9 *Bush* 285; *Reed v. Reed*, 25 *Ky. L. Rep.* 2324, 80 *S. W.* 520. *N. J.*—*Osborne v. Edwards*, 11 *N. J. Eq.* 73; *Anonymous*, 10 *N. J. L. J.* 339. *N. Y.*—*Sears v. Hyer*, 1 *Paige* 483. *Pa.*—*Com. v. Reesor*, 1 *Clark* 445, 3 *Pa. L. J.* 110. *Va.*—*James v. Gibbs*, 1 *Pat. & H.* 277. *Eng.*—*Ashton v. Meredith*, *L. R.* 13 *Eq.* 492, 26 *L. T. N. S.* 281.

[c] **Infant's share** will be paid to the guardian upon a proper bond being given. *Scott v. Graves*, 153 *Ky.* 221, 154 *S. W.* 1084.

[d] **Share of a bankrupt** should be paid over to the trustee in bankruptcy.

ments made by another cotenant, or for other legitimate purposes.⁹⁹

I. REMEDIES OF PURCHASER. — The purchaser of property upon a partition sale has the usual remedies of a purchaser at a judicial sale to compel the execution of a deed and the giving of possession of the property.¹

XIII. COSTS AND ATTORNEY'S FEES. — A. COSTS GENERALLY. Costs in partition suits are awarded to the successful party, as in other cases, in the absence of other statutory provisions.² When the suit is in equity, their allowance rests in the discretion of the court, however.³

Loving v. Moore, 37 App. Cas. (D. C.) 214.

[e] When the property is sold for a sum less than the value fixed by the partition commissioners, the loss is to be apportioned according to the interests of those entitled to the proceeds. *Lucy v. Kelly*, 117 Va. 318, 84 S. E. 661.

99. See *infra*, this note.

[a] Claims and liens against the property are payable out of the proceeds. *Haw.*—*Brown v. Cornwell*, 20 Hawaii 457. *N. J.*—*McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030. Compare *Harris v. Hibbard* (N. J. Eq.), 71 Atl. 737. *N. Y.*—*Schwarz v. McKenzie*, 7 Misc. 565, 28 N. Y. Supp. 87, 58 N. Y. St. 358; *Platt v. Platt*, 3 N. Y. St. 179. *N. C.*—*In re Harding*, 25 N. C. 320.

[b] Costs of suit including sums allowed as attorney's fees must be first paid. *Kan.*—*Sarbach v. Newell*, 35 Kan. 180, 10 Pac. 529. *Mo.*—*Lucas Bank v. King*, 73 Mo. 590. *N. J.*—*Shivers v. Hand*, 50 N. J. Eq. 231, 24 Atl. 911. *N. Y.*—*Johnston v. Johnston*, 165 App. Div. 24, 151 N. Y. Supp. 65; *Lewis v. Moore*, 21 App. Div. 628, 47 N. Y. Supp. 303. See also *Scott v. Marley*, 124 Tenn. 388, 137 S. W. 492.

1. See generally 16 STANDARD PROC. 827, et seq., and *Fla.*—*Keil v. West*, 21 Fla. 508, writ of assistance. *Ill.*—*Jennings v. Jennings*, 94 Ill. App. 26, may maintain forcible detainer. *Tenn.*—*Robnett v. Howard*, 61 S. W. 1082, may recover possession and rent for use thereof. *Tex.*—*Holt v. Love*, 63 Tex. Civ. App. 65, 131 S. W. 857.

See also *Edwards v. Dykeman*, 95 Ind. 509.

[a] Purchaser may bring summary proceedings against a tenant of the premises under a lease from the parties to the partition action. *R. S. S. Co. v. Apfel*, 69 Misc. 318, 125 N. Y. Supp. 484.

[b] Purchaser cannot recover (1) because of a defect in or for failure of title (*Ill.*—*Bassett v. Lockard*, 60 Ill. 164. *Ind.*—*Weakley v. Conradt*, 56 Ind. 430. *La.*—*Dodds v. Lannaux*, 45 La. Ann. 287, 12 So. 345. *Md.*—*Duvall v. Speed*, 1 Md. Ch. 229. *Mo.*—*Farrar v. Comfort*, 33 Mo. 44), or (2) because the property was incumbered. *McNamee v. Cole*, 134 Mo. App. 266, 114 S. W. 46. (3) But he may recover back the purchase price when the sale is void. *Taylor v. Conner*, 7 Ind. 115.

[c] An order for a survey of the property may be obtained prior to taking the deed thereto. *Kelly v. Sale*, 161 Ky. 148, 170 S. W. 513.

2. *Ky.*—*Collier v. Holland's Admr.*, 3 Ky. Op. 702. *N. Y.*—*Wood v. Hubbard*, 29 App. Div. 166, 51 N. Y. Supp. 526, 31 App. Div. 635, 53 N. Y. Supp. 1119. *Eng.*—*In re Vase*, 84 L. T. N. S. 761; *Catton v. Banks* (1893), 2 Ch. 221, 62 L. J. Ch. 600, 68 L. T. N. S. 245, 3 Rep. 413, 41 Wkly. Rep. 429; *Belcher v. Williams*, 45 Ch. Div. 510, 63 L. T. N. S. 673, 39 Wkly. Rep. 266.

See also *Williams v. Washington*, 43 S. C. 355, 21 S. E. 259; 5 STANDARD PROC. 803. But see *Counce v. Persons Unknown*, 76 Me. 548.

[a] By statute the court is sometimes vested with discretionary power to allow costs to both plaintiff and defendants. *Shannon v. Pickell*, 61 Hun 623, 15 N. Y. Supp. 949, 40 N. Y. St. 559; *Schierloh v. Schierloh*, 14 Hun (N. Y.) 572.

[b] Notice of application for costs is sometimes necessary. *Roberts v. St. Louis Merchants' Land Imp. Co.*, 126 Mo. 460, 29 S. W. 584.

[c] Until costs are fixed and ordered paid, no right exists to their payment. *Arnold v. Carter*, 19 App. Cas. (D. C.) 259.

3. *Ala.*—*Winkles v. Powell*, 173 Ala. 46, 55 So. 536. *Ill.*—*Warren v. Sheldon*, 173 Ill. 340, 50 N. E. 1065. *Ind.*

The costs are as a rule allowed out of the estate;⁴ though in some jurisdictions the costs are charged to the several shares in proportion to their respective values.⁵ But in some jurisdictions, a judgment in personam, enforceable by execution, may be rendered against a party to the suit for the costs.⁶ When the property is divided in kind, the court may order a sale thereof when the parties refuse to

Merrill v. Shirk, 128 Ind. 503, 28 N. E. 95; Wileox v. Monday, 83 Ind. 335. **Ky.** Williamson v. Williamson, 1 Mete. 303. **N. Y.**—Weston v. Stoddard, 62 Hun 619, 16 N. Y. Supp. 605, 22 Civ. Proc. 51, 42 N. Y. St. 76; Byrnes v. Labagh, 12 N. Y. Civ. Proc. 417, 10 N. Y. St. 728. **S. C.**—McCarter v. Caldwell, 58 S. C. 65, 36 S. E. 507; Young v. Edwards, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55. **Tenn.** Scott v. Marley, 124 Tenn. 388, 137 S. W. 492. **Tex.**—Nelson v. Brown (Tex. Civ. App.), 111 S. W. 1106. **Eng.**—*In re Vase*, 84 L. T. N. S. 761. **Can.** Cartwright v. Diehl, 13 Grant Ch. (U. C.) 360. See McLaughlin v. McLaughlin, 1 Ont. W. R. 378.

4. Schierloh v. Schierloh, 14 Hun (N. Y.) 572. But see Tibbits v. Tibbits, 7 Paige (N. Y.) 204; Phelps v. Green, 3 Johns. Ch. (N. Y.) 302.

[a] Costs incurred in an adversary proceeding to determine plaintiff's right to partition cannot be charged against the property sought to be partitioned. Hunt v. Meeker, 128 Minn. 539, 151 N. W. 1102.

[b] The proceeds of the sale of one tract cannot be applied in payment of the costs of another tract sold in a separate proceeding. Dale v. Dale, 88 Mo. 462; Liberty Sav. Assn. v. Commercial Sav. Bank, 87 Mo. 225.

5. Coles v. Coles, 13 N. J. Eq. 365.

[a] This course is followed when there is a division of the property, and no sale is had. **Ill.**—Searl v. Searl, 122 Ill. App. 129. **Ia.**—McGuire v. Luckey, 129 Iowa 559, 105 N. W. 1004; Duncan v. Duncan, 63 Iowa 150, 18 N. W. 858. **Ky.**—Cooper v. Trout, 31 Ky. L. Rep. 444, 102 S. W. 798; Mead v. Mead, 31 Ky. L. Rep. 70, 101 S. W. 330. **Mo.** Cooper v. Garesche, 21 Mo. 151. **Neb.** Johnson v. Emerick, 74 Neb. 303, 104 N. W. 169. **N. J.**—Coles v. Coles, 13 N. J. Eq. 365. **N. Y.**—Davis v. Davis, 3 N. Y. St. 163; Smith v. Smith, 10 Paige 470. **Pa.**—Boyer's Estate, 8 Pa. Co. Ct. 177, 423. **S. C.**—Gibson v. Brown, 1 McCord 162; Wallace v. Gill,

Rich. Eq. Cas. 141. **Tex.**—Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Collins v. Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432. **Eng.** Ball v. Kemp-Welch, 14 Ch. Div. 512, 49 L. J. Ch. 528, 43 L. T. N. S. 116; Cannon v. Johnson, L. R. 11 Eq. 90, 40 L. J. Ch. 46, 23 L. T. N. S. 583, 19 Wkly. Rep. 175.

6. **Cal.**—Lacoste v. Eastland, 117 Cal. 673, 49 Pac. 1046. **Mo.**—McManus v. Burrows, 246 Mo. 438, 152 S. W. 3. **N. J.**—Keeney v. Henning (N. J. Eq.), 55 Atl. 88. **N. Y.**—*In re Cavanagh*, 37 Barb. 22, 14 Abb. Pr. 258, 23 How. Pr. 358; Tibbits v. Tibbits, 7 Paige 204.

[a] Only when the party against whom the costs are rendered was served with process within the jurisdiction of the court. Watson v. McClane, 18 Tex. Civ. App. 212, 45 S. W. 176. Necessity for process, see *supra*, V, and generally the title "Process."

[b] Order for costs should state, therefore, that (1) it is allowed out of the property partitioned (Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372), (2) otherwise the judgment will be treated as one in personam (Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372), (3) and the court be without authority to award costs against non-resident or unknown owners. **U. S.**—Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; Foote v. Sewall, 81 Tex. 659, 17 S. W. 373; Pool v. Lamon (Tex. Civ. App.), 28 S. W. 363.

[c] Fees of the commissioners are also collectible by execution. McManus v. Burrows, 191 Mo. App. 594, 177 S. W. 671.

[d] Separate executions must be issued against each defendant for the amount chargeable against him. Brown v. Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545. See generally the title "Judgments and Decrees, Enforcement of."

Against whom costs awarded, see generally *infra*, XIII, C.

pay their respective proportion of the costs.⁷ And where there is a sale of the property, the final judgment should make provision for the payment of the costs.⁸

B. ITEMS TAXABLE AS COSTS.—All costs accruing in consequence of the trial of any of the facts alleged in the bill or complaint to which a plea of denial was interposed and upon which the petitioner prevailed are properly taxable.⁹

C. AGAINST WHOM COSTS AWARDED.—When costs are incurred because the partition is resisted or by reason of the necessity of establishing title, the party causing the inquiry will be charged with costs.¹⁰ When plaintiff is defeated on an issue presented by him, he may be

7. Ill.—*Habberton v. Habberton*, 156 Ill. 444, 41 N. E. 222. **N. C.**—*Hinnant v. Wilder*, 122 N. C. 149, 29 S. E. 221. **Vt.**—*Strong v. Hobbs*, 20 Vt. 192.

But see *Virginia Iron, etc. Co. v. Roberts*, 103 Va. 661, 49 S. E. 984.

8. D. C.—*Arnold v. Carter*, 19 App. Cas. 259. **N. Y.**—*Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901, *affirming* 27 Misc. 595, 59 N. Y. Supp. 86. **Eng.**—*Davis v. Turvey*, 32 Beav. 554, 8 L. T. N. S. 378, 2 N. Rep. 151, 11 Wkly. Rep. 679, 55 Eng. Reprint 217.

[a] No payment of costs is to be made (1) until after entry of final judgment. *Flynn v. Kennedy*, 62 Hun 26, 16 N. Y. Supp. 361, 41 N. Y. St. 359. (2) There is no authority for inserting costs in the interlocutory judgment. *Flynn v. Kennedy*, 62 Hun 26, 16 N. Y. Supp. 361, 41 N. Y. St. 359. But see *Ham v. Ham*, 43 Me. 285. As to interlocutory judgment or decree, see *supra*, IX.

As to final judgment, see *infra*, XIV.

9. Strong v. Hobbs, 20 Vt. 192.

[a] Thus (1) the master's commissions (*Bryan v. Reams*, 59 S. C. 340, 37 S. E. 921), (2) the fees of commissioners or referees (**N. J.**—*Coles v. Coles*, 13 N. J. Eq. 365. **N. Y.**—*Flynn v. Kennedy*, 62 Hun 26, 16 N. Y. Supp. 361, 41 N. Y. St. 359. **N. C.**—*Williamson v. Bitting*, 159 N. C. 321, 74 S. E. 808; *Ray v. Banks*, 120 N. C. 389, 27 S. E. 28), (3) charges for preparing a "field-book" of the property (*Coles v. Coles*, 13 N. J. Eq. 365), (4) expenses for surveys (*Meserole v. Furman*, 38 Hun [N. Y.] 355), (5) the expenses of conducting the sale (*Keim v. Keim*, 43 App. Div. 88, 59 N. Y. Supp. 366, 30 Civ. Proc. 184; *Flynn v. Kennedy*, 62 Hun 26, 16 N. Y. Supp. 361, 41 N. Y. St. 359), (6) except the fees of real

estate agents (*Rutherford v. Rutherford*, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799), (7) but including auctioneer's fees (*Succession of Von Hoven*, 48 La. Ann. 620, 19 So. 766; *Salin's Estate*, 10 Pa. Dist. 97) are taxable as costs. (8) So also the fees of a guardian ad litem (*Huhlien v. Huhlien*, 87 Ky. 247, 8 S. W. 260; *Whitsett v. Wamack*, 95 Mo. App. 296, 69 S. W. 24), (9) all necessary witness fees (*St. Peter's Church v. Zion Church*, 2 Clark [Pa.] 349), are taxable.

[b] The amount expended for outstanding leasehold interests has been allowed, when the purchase thereof was necessary in order to accomplish the sale. *Rutherford v. Rutherford*, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799.

[c] An indebtedness incurred because of the agreement of the parties cannot afterwards be objected to by a party to the agreement. *Succession of Von Hoven*, 48 La. Ann. 620, 19 So. 766.

As to allowance of attorney's fees as costs, see *infra*, XIII, D.

10. Ill.—*Le Moyne v. Harding*, 132 Ill. 23, 23 N. E. 414. **Ky.**—*Stansberry v. Simmons*, 1 Dana 413. **Me.**—*Fisk v. Keene*, 46 Me. 225. **Mass.**—*Powell v. Jenny*, 11 Allen 104. **Mo.**—*Neal v. Smith*, 22 Mo. 349. **N. J.**—*McMullin v. Doughty*, 69 N. J. Eq. 649, 61 Atl. 265. **N. Y.**—*Beller v. Antisdell*, 84 Hun 252, 32 N. Y. Supp. 575; *Stephenson v. Cotter*, 5 N. Y. Supp. 749, 23 N. Y. St. 74. **S. C.**—*Williams v. Jones*, 74 S. C. 258, 54 S. E. 558. **Tex.**—*Keener v. Moss*, 66 Tex. 181, 18 S. W. 447; *Johns v. Northcutt*, 49 Tex. 444. **Eng.**—*Lyne v. Lyne*, 21 Beav. 318, 52 Eng. Reprint 882; *Morris v. Timmins*, 1 Beav. 411, 48 Eng. Reprint 999. **Can.**—*Cartwright v. Diehl*, 13 Grant Ch. (U. C.) 360.

charged with costs.¹¹ Costs may be allowed against the guardian ad litem of an infant.¹² But they cannot be awarded against one who has been improperly made a party and is not bound to appear or plead;¹³ nor against a party who is neither entitled to, nor claims any relief.¹⁴ When after the death of a party his administrator is erroneously allowed to prosecute the action he cannot be allowed costs.¹⁵ One who becomes a purchaser pendente lite, does not become personally liable for costs incurred prior to the purchase.¹⁶

D. ATTORNEY'S FEES cannot usually be allowed to the attorneys in the suit out of the proceeds of lands sold for partition unless authorized by statute.¹⁷ But in some jurisdictions they are included as part of the costs in the absence of express statutory provision,¹⁸ though to entitle a party to have them taxed as costs against the entire property partitioned, the attorney should be employed and act for the common benefit of all parties.¹⁹ If it is necessary for the other tenants in

11. **Ill.**—*Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701. **Mo.**—*Appleman v. Appleman*, 140 Mo. 309, 41 S. W. 794, 62 Am. St. Rep. 732. **N. Y.**—*Goebbles v. Morrissey*, 53 Misc. 421, 103 N. Y. Supp. 386.

[a] **Defendants cannot recover costs** where a verdict and judgment in their favor is rendered on the plea of non tenant insimul. *Shaw v. Irwin*, 25 Pa. 347.

12. *Muller v. Struppman*, 6 Abb. N. C. (N. Y.) 343.

13. *Bradshaw v. Callaghan*, 5 Johns. (N. Y.) 80, reversed on other grounds, 8 Johns. 558.

14. *Tanner v. Niles*, 1 Barb. (N. Y.) 560. See *Walker v. Porter*, 66 Hun 634, 21 N. Y. Supp. 723, 49 N. Y. St. 849.

15. *Richards v. Richards*, 136 Mass. 126.

16. *Kalteyer v. Wipff*, 92 Tex. 673, 683, 52 S. W. 63.

17. **Ala.**—*Jordon v. Farrow*, 130 Ala. 428, 30 So. 338. **Ind.**—*Hutts v. Martin*, 134 Ind. 587, 33 N. E. 676. **Ia.**—*McClain v. McClain*, 52 Iowa 272, 3 N. W. 60. **Kan.**—*Swartzel v. Rogers*, 3 Kan. 380. **Ky.**—*Lang v. Constance*, 20 Ky. L. Rep. 502, 46 S. W. 693. **Mo.**—*Parish v. Treadway*, 267 Mo. 91, 183 S. W. 580. **Neb.**—*Branson v. Branson*, 84 Neb. 288, 121 N. W. 109. **N. J.**—*Coles v. Coles*, 13 N. J. Eq. 365. **S. C.**—*Butler v. Butler*, 73 S. C. 402, 53 S. E. 646. **Wash.**—*Legg v. Legg*, 34 Wash. 132, 75 Pac. 130.

[a] **Though statute allows fees when there is no contest**, they cannot be allowed in contested partition suits. *Finch v. Garrett*, 102 Iowa 381, 7 N. W.

429; *Everett v. Croskrey*, 101 Iowa 17, 69 N. W. 1125.

18. **Mich.**—*Greusel v. Smith*, 85 Mich. 574, 48 N. W. 616. **Minn.**—*Hanson v. Ingwaldson*, 84 Minn. 346, 87 N. W. 915. **Neb.**—*Johnson v. Emerick*, 74 Neb. 303, 104 N. W. 169. **Ohio.** *Lowe v. Phillips*, 21 Ohio St. 657. **R. I.** *Redecker v. Bowen*, 15 R. I. 52, 23 Atl. 62.

See also *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, 127 Am. St. Rep. 601. *Contra*, *Gehrke v. Gehrke*, 190 Ill. 166, 60 N. E. 59.

19. **Ark.**—*Gardner v. McAuley*, 105 Ark. 439, 151 S. W. 997. **Ill.**—*Metheny v. Bohn*, 164 Ill. 495, 45 N. E. 1011; *Swann v. Moore*, 193 Ill. App. 419; *Switzer v. Honn*, 184 Ill. App. 348. **Ia.** *Berry v. Donald*, 168 Iowa 744, 150 N. W. 1048; *Kuhn v. Downs*, 156 Iowa 247, 136 N. W. 199; *Finch v. Garrett*, 102 Iowa 381, 71 N. W. 429. **Ky.** *Bailey's Admr. v. Barclay*, 22 Ky. L. Rep. 1244, 60 S. W. 377; *Lang v. Constance*, 20 Ky. L. Rep. 502, 46 S. W. 693. **Miss.**—*Hoffman v. Smith*, 61 Miss. 544. **Mo.**—*Ernst v. Ernst*, 192 Mo. App. 256, 182 S. W. 103; *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, 127 Am. St. Rep. 601; *Forsee v. McGuire*, 109 Mo. App. 701, 83 S. W. 548. **Mont.** *Murray v. Conlon*, 19 Mont. 389, 48 Pac. 743. **Neb.**—*Oliver v. Lansing*, 57 Neb. 352, 77 N. W. 802. **Ohio.**—*Young v. Stone*, 55 Ohio St. 125, 45 N. E. 57. **Pa.**—*Fidelity Ins. Trust, etc. Co.'s Appeal*, 108 Pa. 339; *In re Grubb's Appeal*, 82 Pa. 23, 29; *McNeile's Estate*, 17 Pa. Dist. 1066. **R. I.**—*Robinson v. Robinson*, 24 R. I. 222, 52 Atl. 992.

common to employ counsel to protect their interests, complainant is not entitled to have his attorney's fees taxed as costs in the case.²⁰

The allowance, where made, should be to the party, not to the attorney.²¹ The amount to be allowed rests, as a rule, with the court.²² Provision for their allowance should be made in the final judgment.²³

XIV. FINAL JUDGMENT OR DECREE.—A. GENERALLY.—A final judgment must be entered in a partition suit, such judgment operating to vest title in the various distributees to whom the several

[a] **Services rendered by the attorney on contested and antagonistic issues** should not be included in the allowance against all interests in the suit. *Parrish v. Treadway*, 267 Mo. 91, 183 S. W. 580; *Ernst v. Ernst*, 192 Mo. App. 256, 182 S. W. 103; *Liles v. Liles*, 116 Mo. App. 413, 426, 91 S. W. 983.

[b] **Attorney's fees will not be allowed a cross-complainant** when the cross-bill is for relief other than partition. *Rathje v. Waterloo*, 270 Ill. 640, 110 N. E. 816.

[c] **Parties to the suit whose interests are not assailed, and who employ their own counsel** must pay them. *Pate v. Maples* (Tenn.), 43 S. W. 740.

[d] **An attorney who acts for himself** cannot be allowed fees. *Fla. Girtman v. Starbuck*, 48 Fla. 265, 37 So. 731. **Ill.**—*Cheney v. Ricks*, 168 Ill. 533, 48 N. E. 75, although he also appears for other parties. **N. J.**—*Shipman v. Shipman*, 65 N. J. Eq. 556, 56 Atl. 694.

20. Ill.—*Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401; *Joest v. Adel*, 209 Ill. 432, 70 N. E. 638; *Bliss v. Seeley*, 191 Ill. 461, 61 N. E. 524. **Ind.**—*St. Clair v. Marquell*, 161 Ind. 56, 67 N. E. 693; *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240; *Tieben v. Hapner*, 62 Ind. App. 650, 111 N. E. 644, 113 N. E. 310. **Ia.**—*Lawley v. Keyes*, 172 Iowa 575, 154 N. W. 940; *Berry v. Donald*, 168 Iowa 744, 150 N. W. 1048. **Ky.**—*Fristoe v. Gilen*, 26 Ky. L. Rep. 149, 80 S. W. 823. **Miss.**—*Hoffman v. Smith*, 61 Miss. 544. **Mont.**—*Murray v. Conlon*, 19 Mont. 389, 48 Pac. 743. **Pa.**—*In re Grubbs' Appeal*, 82 Pa. 23; *McNeile's Estate*, 17 Pa. Dist. 1066; *Bell v. Reel*, 8 Pa. Dist. 346. **S. C.**—*Westmoreland v. Martin*, 24 S. C. 238.

[a] **When the defense set up is not substantial**, plaintiff will be allowed attorney's fees. *Madaj v. Madaj*, 181 Ill. App. 478.

[b] **When statute directs that an**

attorney's fees be allowed plaintiff, court is without power to order each party to pay his own costs. *Plant v. Fate*, 114 Iowa 283, 86 N. W. 276.

21. Ill.—*McMullen v. Reynolds*, 209 Ill. 504, 70 N. E. 1041; *Lilly v. Shaw*, 59 Ill. 72. **Ia.**—See *Kuhn v. Downs*, 156 Iowa 247, 136 N. W. 199. **Pa.** *Gibb's Estate*, 20 Pa. Dist. 50.

But see *McKenna v. Duffy*, 64 Hun 597, 19 N. Y. Supp. 248, 22 Civ. Proc. 366, 46 N. Y. St. 691.

[a] **Statutes Permit an Allowance for Attorneys to Both Plaintiff and Defendant.**—See the statutes, and *Crossman v. Wyckoff*, 64 App. Div. 554, 72 N. Y. Supp. 337.

22. Cal.—*Watson v. Sutro*, 103 Cal. 169, 37 Pac. 201. **Ill.**—*Poulter v. Poulter*, 193 Ill. 641, 61 N. E. 1056; *Tatro v. Tatro*, 74 Ill. App. 189. **Ind.**—*Bell v. Shaffer*, 154 Ind. 413, 56 N. E. 217; *Burger v. Schnaus*, 61 Ind. App. 614, 112 N. E. 246. But see *Tieben v. Hapner*, 62 Ind. App. 650, 111 N. E. 644, 113 N. E. 310. **Mich.**—*Greusel v. Smith*, 85 Mich. 574, 48 N. W. 616. **Minn.**—*Hanson v. Ingwaldson*, 84 Minn. 346, 87 N. W. 915. **Mo.**—*Padgett v. Smith*, 206 Mo. 303, 103 S. W. 943; *Forsee v. McGuire*, 109 Mo. App. 701, 83 S. W. 548. **Neb.**—*Johnson v. Emerick*, 74 Neb. 303, 104 N. W. 169. **N. J.** *Keeney v. Henning* (N. J. Eq.), 55 Atl. 88. **N. Y.**—*Wells v. Venderwerker*, 45 App. Div. 155, 60 N. Y. Supp. 1089, 7 N. Y. Ann. Cas. 73. **Ohio.**—*Young v. Stone*, 55 Ohio St. 125, 45 N. E. 57; *Lowe v. Phillips*, 21 Ohio St. 657. **R. I.**—*Redecker v. Bowen*, 15 R. I. 52, 23 Atl. 62.

[a] **But allowances in excess of the amount authorized by statute are unauthorized.** *Servin v. Perry*, 168 App. Div. 243, 153 N. Y. Supp. 3; *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901; *Defendorf v. Defendorf*, 42 App. Div. 166, 59 N. Y. Supp. 163; *Ehalt's Estate*, 21 Pa. Dist. 290.

23. Cal.—*Harrington v. Goldsmith*, 136 Cal. 168, 68 Pac. 594. **N. Y.**

parcels have been allotted.²⁴ It cannot be rendered until all the issues have been determined and the court is able either to make the several allotments, if the partition be in kind, or distribute the proceeds, if the partition be by sale.²⁵

Default Decree.—Where the chancery practice still prevails, a decree pro confesso must be entered before partition can be decreed.²⁶ But judgment cannot be entered on a default, until plaintiff has established his right to partition, notwithstanding the fact that a decree pro confesso against some of the defendants may have been entered.²⁷

B. FORM AND SUFFICIENCY.—The general rules obtain that the judgment must be supported by and conform to the pleadings,²⁸ as well as conform to the proof,²⁹ and to the verdict or findings.³⁰ The final judgment must be consistent with the interlocutory judgment.³¹

Wells v. Vanderwerker, 45 App. Div. 155, 60 N. Y. Supp. 1089, 7 N. Y. Ann. Cas. 73; *Weeks v. Cornwell*, 38 Hun 577; *Saffron v. Saffron*, 11 N. Y. St. 471. But see *Johnson v. Weir*, 36 Misc. 737, 74 N. Y. Supp. 358, *affirmed*, 72 App. Div. 325, 76 N. Y. Supp. 76. **Vt.** *Strong v. Hobbs*, 20 Vt. 192.

[a] But the matter of costs may be reserved and judgment awarding them made subsequently. *Lacoste v. Eastland*, 117 Cal. 673, 49 Pac. 1046.

As to final judgment, see *infra*, XIV.

24. Ala.—*Morgan v. Farned*, 83 Ala. 367, 3 So. 798. **Mass.**—*White v. Clapp*, 8 Mete. 365. **Mich.**—*Parkinson v. Parkinson*, 139 Mich. 530, 102 N. W. 1002. **N. C.**—*Wahab v. Smith*, 82 N. C. 229. **Pa.**—*Dewart v. Purdy*, 29 Pa. 113; *Fromberger v. Greiner*, 5 Whart. 350.

[a] No ruling of the court as to the manner of allotting property is final and beyond recall by the court, except its final decree. *Hamlin v. Hamlin*, 90 Wash. 467, 156 Pac. 393.

[b] When a party dies subsequent to the decision on a bill for partition, the decree should be dated as of the date of the submission of the case. *Havens v. Seashore Land Co.*, 57 N. J. Eq. 142, 41 Atl. 755; *Molineux v. Raynolds*, 55 N. J. Eq. 187, 36 Atl. 276. See also 14 STANDARD PROC. 782, et seq.

25. *Seay v. White*, 5 Dana (Ky.) 255; *Billups v. Riddick*, 53 N. C. 163. See also 8 STANDARD PROC. 496.

[a] There are some instances when the court is unable to enter a final judgment as to some matters until the happening of a future event, in which event those matters will be allowed to remain in abeyance, and a final judgment

entered as to all other matters. **Cal.**—*Grant v. Murphy*, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188. **Ky.** See *Vanderpool's Heirs v. Vanderpool's Heirs*, 171 Ky. 381, 188 S. W. 461. **Minn.**—*Howe v. Spalding*, 50 Minn. 157, 52 N. W. 527. **Pa.**—*Poundstone v. Everly*, 31 Pa. 11.

26. *Ropes v. McCabe*, 40 Fla. 388, 25 So. 273; *Benner v. Street*, 32 Fla. 274, 13 So. 407.

27. *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867.

28. See generally 15 STANDARD PROC. 35.

[a] On default plaintiff in a partition suit is confined to the averments of his petition and the proofs in support thereof. *Oviatt v. Oviatt*, 174 Iowa 512, 156 N. W. 687. See 14 STANDARD PROC. 904.

[b] Cannot grant or refuse relief contrary to an admission in the pleadings. *Reinhart v. Lugo*, 75 Cal. 639, 18 Pac. 112.

29. *Harness v. Harness*, 63 Ind. 1. See also 14 STANDARD PROC. 788.

30. *Allen v. Hall*, 50 Me. 253.

[a] It is sometimes advisable that the findings be set forth in the judgment for the purpose of rendering it more clear and specific. *McClaskey v. Barr*, 48 Fed. 130.

[b] The report of a referee as to the value of the property involved is merely advisory and the court in its final decree may make its own findings with respect to such matters. *MacDonald v. Bernal*, 25 Cal. App. Dec. 240.

31. *White v. Mitchell*, 60 Tex. 164. But see *Long v. Schowe*, 181 Ind. 13, 103 N. E. 785 (holding that in aid of a final judgment, the court will as-

The description of the property must be sufficiently definite to enable the land to be located therefrom;³² the judgment cannot be extended to cover property not described in the pleadings.³³

When the partition is by allotment, the final judgment should refer to the interlocutory decree and the report of the commissioners, and adjudge that their report be approved and affirmed, and the allotments made by them to the respective parties be declared effectual forever.³⁴ When the proceeding is in chancery, the decree should direct the execution of mutual conveyances by the parties, if sui juris and by a commissioner for those non sui juris.³⁵ The statutes in some jurisdictions have obviated the necessity for such a direction, by authorizing the appointment of a commissioner to execute the conveyances in the names of the parties and in other cases the statute declares that the decree itself shall operate as a conveyance of title.³⁶ The court may award part of the property in kind and direct a sale of the remainder, giving to such party a part of the proceeds of sale to make up any inequality resulting from the partition in kind.³⁷ The final judgment should also, when necessary, adjudge

if necessary that the interlocutory judgment was modified to conform to the final one); *Loring v. Groomer*, 110 Mo. 632, 19 S. W. 950.

As to interlocutory judgment, see *supra*, IX.

32. *Hector v. Horrell*, 248 Mo. 166, 154 S. W. 96.

33. **Ill.**—*Prichard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10. **N. Y.**—*Corwithe v. Griffing*, 21 Barb. 9. **W. Va.**—*Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482.

34. See *Seale v. Soto*, 35 Cal. 102 (where material portions of the judgment are set out); also *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227.

[a] Court may make such changes (1) as will render the report of the commissioners free from ambiguity and uncertainty (*Burger v. Schnaus*, 61 Ind. App. 6f4, 112 N. E. 246), and (2) may correct any erroneous computation or inaccuracy in the report of the commissioners. *Wright v. Marsh*, 2 G. Gr. (Iowa) 94.

35. **U. S.**—*Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. ed. 256. **Ala.**—*Deloney v. Walker*, 9 Port. 497. **Ark.**—*Harris v. Preston*, 10 Ark. 201. **Ill.**—*Chickering v. Failes*, 29 Ill. 294. **Ky.**—*Smith v. Moore's Heirs*, 6 Dana 417. **Va.**—*Bolling v. Teel*, 76 Va. 487; *Christian's Devisee v. Christian*, 6 Munf. (20 Va.) 534.

[a] In chancery the decree does not transfer or convey title even after the allotment of the respective shares

of each of the parties. In this respect a decree is unlike the writ of partition at common law which in such cases operates on the title only by way of estoppel. In chancery this difficulty is remedied by a decree that the parties shall make the necessary conveyances to each other and they may be compelled to do so by attachment, imprisonment and other powers of the court over them in person. *Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. ed. 256; *Whaley v. Dawson*, 2 Sch. & Lef. (Eng.) 367.

36. See the statutes, and **U. S.**—*Gay v. Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. ed. 256. **Ill.**—*Street v. McConnell*, 16 Ill. 125. **Md.**—*Young v. Frost*, 1 Md. 377. **N. Y.**—*Young v. Cooper*, 3 Johns. Ch. 295. **Pa.**—*Griffith v. Phillips*, 3 Grant Cas. 381. **Eng.**—*Shepherd v. Churchill*, 25 Beav. 21, 53 Eng. Reprint 543; *Beckett v. Sutton*, 19 Ch. Div. 646, 51 L. J. Ch. 432, 46 L. T. N. S. 481, 30 Wkly. Rep. 490; *Basnett v. Moxon*, L. R. 20 Eq. 182, 44 L. J. Ch. 557, 23 Wkly. Rep. 945.

[a] The chancery court may by statute confirm titles in the parties in cases of partition, without the interchange of deeds, but when the court instead of exercising the statutory power proceeds according to the old chancery practice, the title is not vested without interchange of deeds. *Smith v. Crawford*, 81 Ill. 296.

37. *Lucy v. Kelly*, 117 Va. 318, 84 S. E. 661. See also *supra*, XI, C.

cate any other necessary matters, such as the enforcement of such equities as may have been established,³⁸ the enforcement of owelty,³⁹ and the enforcement of any direction as to the payment of money due from one to the other on account of undue benefits received from the common estate.⁴⁰ The decree may also provide that if one or the other party should lose any part of the property allotted to him by an adverse claim, there should be conveyed to him a proportional quantity.⁴¹ The decree may provide for an investment of the proceeds belonging to remaindermen, according to their interests.⁴² The court may protect the rights of unknown persons.⁴³

A final judgment of partition may be amended to conform to what was actually done,⁴⁴ in accordance with general rules elsewhere discussed.⁴⁵

C. ENFORCEMENT OF. — When partition is made by allotment, the distributee may, when the proceeding is in a court possessing chancery jurisdiction, obtain a writ of assistance to place him in possession of the property allotted.⁴⁶ An injunction may issue upon proper case made, to prevent any of the parties to the suit interfering with or molesting any other party in the possession of his share.⁴⁷

D. RELIEF FROM. — The obtaining of relief from a judgment in partition is subject to the same rules as any other judgment.⁴⁸

XV. PARTITION AS PART OF DISTRIBUTION OF ESTATE OF DECEDENT. — A. JURISDICTION OF COURTS GENERALLY.⁴⁹ — Under statutes in some states, courts having jurisdiction over the administration of the property and estates of decedents have, as incident to that jurisdiction, when property is vested in two or more co-

38. *Evans v. Johnson*, 68 Fla. 350, 352, 67 So. 190. See *Halferty v. Karr*, 188 Mo. App. 241, 175 S. W. 146; *Herchenroeder v. Herchenroeder*, 75 Mo. App. 283.

Incidental relief generally, see *supra*, X.

[a] When a conveyance is annulled, as part of the relief, and the final judgment allots the property covered by such conveyance, it is sufficient to set out all the facts necessary to annul the deeds in the findings; a formal annulment of the conveyance in the judgment is not essential. *Sullivan v. Lumsden*, 118 Cal. 664, 50 Pac. 777.

39. La.—*Jones v. Crocker*, 4 La. Ann. 8. Pa.—*Kletzly v. Marks*, 22 Pa. Co. Ct. 71. Va.—*Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

Enforcing owelty, see generally *supra*, X, E.

[a] A judgment for owelty should not be charged against a party personally. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726.

40. *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63.

41. *Devour v. Johnson*, 3 Bibb (Ky.) 409.

42. *Culley v. Elford*, 187 Ala. 165, 65 So. 381.

43. *Fox v. Fee*, 24 App. Div. 314, 49 N. Y. Supp. 292.

44. *Loring v. Groomer*, 110 Mo. 632, 19 S. W. 950. See also 15 STANDARD PROC. 127.

[a] Amendment Nunc Pro Tunc. *Loring v. Groomer*, 110 Mo. 632, 19 S. W. 950. See also 15 STANDARD PROC. 129.

45. See generally 15 STANDARD PROC. 98, et seq.

46. Fla.—*Keil v. West*, 21 Fla. 508. Miss.—*Gibson v. Marshall*, 64 Miss. 72, 8 So. 205. Pa.—*In re Church's Appeal*, 10 Sad. 230, 13 Atl. 756; *Kelsey v. Church*, 4 C. Pl. 105.

47. *King v. Wilson*, 54 N. J. Eq. 247, 34 Atl. 394; *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. 745.

48. Opening and vacating, see generally 15 STANDARD PROC. 151, et seq.

Equitable relief by an independent proceeding. See generally 15 STANDARD PROC. 256, et seq.

49. See *supra*, III.

tenants, the right to decree a partition of the property by allotment, or if such disposition cannot be made, then by a sale.⁵⁰ Jurisdiction in such cases is limited to the particular estate, and those courts are without jurisdiction to make partition unless the decedent died seized in severalty of the property.⁵¹ Adverse claims to the property can neither be considered nor determined.⁵² And in some jurisdictions the probate court is without jurisdiction to partition property when the shares or proportions of the respective parties is in dispute between them or appears to be uncertain by reason of depending upon the construction of a devise or conveyance, or upon other questions which are deemed proper for the consideration of a court of common law and a jury.⁵³ When the jurisdiction is invoked as a probate court,

50. See the following: **Cal.**—*De Castro's Est. v. Barry*, 18 Cal. 96. **Me.** *Earl v. Rowe*, 35 Me. 414, 58 Am. Dec. 714. **Ohio.**—*Dabney v. Manning*, 3 Ohio 321, 17 Am. Dec. 597.

Jurisdiction of probate courts, see III, B, and the title "Probate Courts."

[a] The authority of the court is statutory and is limited (1) in its objects and extent and in all the steps of its proceedings thereby. *Brown v. Seeggell*, 22 N. H. 548. (2) But the jurisdiction of the court is not exclusive. *Bozone v. Daniel* (Ala.), 39 So. 774; *Donnor v. Quartermas*, 90 Ala. 164, 8 So. 715, 24 Am. St. Rep. 778; *Wilkinson v. Stuart*, 74 Ala. 198; *Kelly v. Kelly*, 41 N. H. 501. (3) The court that first obtains jurisdiction will retain it, and such proceeding will bar any subsequent proceeding in the concurrent tribunal. *Finch v. Smith*, 146 Ala. 644, 41 So. 819; *Wilkinson v. Stuart*, 74 Ala. 198; *Hanbest's Estate*, 6 Pa. Dist. 681.

[b] Proceeding for partition in the orphans' court is merely ancillary to the settlement of the estate; no title is transferred; the object of the partition is to divide what descends to the heirs. *Marsh v. French*, 159 Mass. 469, 34 N. E. 693; *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; *Dresher v. Allentown Water Co.*, 52 Pa. 225, 91 Am. Dec. 150. See also *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415; *Rosenberg v. Frank*, 58 Cal. 387.

51. **U. S.**—*Buckley v. San Francisco Superior Court*, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135. **Cal.**—*Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227. **Mass.**—*Union Trust Co. v. Reed*, 213 Mass. 199, 99 N. E. 1093. **P. R.**—See *In re Vidal*, 19 Porto Rico 601.

But see *Penn v. Case*, 36 Tex. Civ. App. 4, 81 S. W. 349; also *Brennan v. Hill*, 2 Rich. (S. C.) 593, note.

[a] This rule though formerly in force (1) in Pennsylvania (*Snyder's Appeal*, 36 Pa. 166, 78 Am. Dec. 372; *In re Keisel's Appeal*, 7 Pa. 462), (2) has been abrogated by statute (*Sanders' Estate*, 16 Montg. Co. Rep. [Pa.] 190. See also *Stewart v. Alleghany Nat. Bank*, 101 Pa. 342), (3) but the rule that decedent must have been seized of the land still prevails. *Guido's Estate*, 10 Kulp (Pa.) 150.

[b] When the realty consisted of property owned by the decedent in common as well as in severalty, the court must require the commissioner appointed to make partition to first divide and sever that part of the estate which the decedent owned in severalty from that which he owned in common. *In re Parson's Estate*, 64 Vt. 193, 23 Atl. 519.

52. **N. H.**—*Kelly v. Kelly*, 41 N. H. 501; *Gage v. Gage*, 29 N. H. 533. **N. Y.** *In re Walker*, 136 N. Y. 20, 32 N. E. 633. **Pa.**—*In re Eell's Estate*, 6 Pa. 457; *Brownfield's Estate*, 30 Pa. Co. Ct. 40; *Buchanan's Estate*, 25 Pa. Dist. 844. **Wash.**—*Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

But see *King's Estate*, 215 Pa. 59, 64 Atl. 324; *Gatewood v. Toomer*, 14 Rich. Eq. (S. C.) 139, that the power to distribute includes the power to decide all questions necessary to a proper distribution.

[a] A false claim will not oust the court of jurisdiction. *Ballard v. Johns*, 80 Ala. 32.

53. *Langley v. Langley*, 196 Ala. 566, 72 So. 91; *Marsh v. French*, 159 Mass. 469, 34 N. E. 693.

[a] It must appear that the dispute

the general common law and jurisdiction possessed by the court cannot be exercised.⁵⁴ Jurisdiction is sometimes limited to lands within the county in which the court is held.⁵⁵

B. TIME WHEN PROCEEDINGS MAY BE BEGUN.⁵⁶—Being an ancillary proceeding, the jurisdiction cannot be exercised until a valid appointment of an executor or administrator has been made;⁵⁷ nor subsequent to the entry of the final decree of distribution,⁵⁸ or discharge of the executor or administrator,⁵⁹ though in some jurisdictions the jurisdiction of the court to make partition is not limited either by the lapse of time or the final disposition of the estate.⁶⁰

C. PARTIES.⁶¹—An heir or devisee or his alienee may file the petition for a partition.⁶² So may a life tenant.⁶³ A minor may do so through his guardian.⁶⁴

All persons having any interest in the property derived through the decedent must be made parties.⁶⁵

D. PETITION.—An application or petition must be filed for the

and controversy as to the title is substantial and not merely imaginary. *Marsh v. French*, 159 Mass. 469, 34 N. E. 693; *Dearborn v. Preston*, 7 Allen (Mass.) 192; *Rosenberry's Estate*, 20 Pa. Dist. 1047.

[b] When the court has assumed jurisdiction, it may retain same although subsequently the shares or proportions of the respective parties do appear to be uncertain. *Potter v. Hazard*, 11 Allen (Mass.) 187.

54. *In re Haas' Estate*, 97 Cal. 232, 31 Pac. 893, 32 Pac. 327; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *In re Allgier*, 65 Cal. 228, 3 Pac. 849; *Theller v. Such*, 57 Cal. 447.

55. *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

56. See generally *supra*, II.

57. *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; *Theilacker's Estate*, 12 Pa. Dist. 230, 28 Pa. Co. Ct. 368. See *Myer's Estate*, 25 Pa. Co. Ct. 235.

58. Cal.—*Buckley v. San Francisco Superior Court*, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135. Minn.—*Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912. P. R.—*Graham v. Crossas*, 19 Porto Rico 184.

Compare *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415.

59. *McMicking v. Sy Conbieng*, 21 Phil. Isl. 211; *Cox v. Ingleston*, 30 Vt. 258; *Collamer v. Hutchins*, 27 Vt. 733.

60. *Earl v. Rowe*, 35 Me. 414, 58 Am. Dec. 714; *Merklein v. Trapnell*, 34 Pa. 42, 75 Am. Dec. 634.

[a] Provided There Is No Adverse

Possession.—*Merklein v. Trapnell*, 34 Pa. 42, 75 Am. Dec. 634.

61. See generally *supra*, IV.

62. *De Castro's Est. v. Barry*, 18 Cal. 96; *Stewart's Appeal*, 56 Pa. 241; *In re Mealy's Estate*, 1 Ashm. (Pa.) 363.

[a] That an heir is the administrator and signs the petition as administrator is no objection. *Robinson v. Fair*, 124 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415.

[b] One who has failed to establish his claim as an heir, cannot maintain the proceeding. *In re Kate's Estate*, 148 Pa. 471, 24 Atl. 77.

[c] The conveyance by an heir of his interest during the pendency of the proceeding does not avoid the proceeding. *Cook v. Davenport*, 17 Mass. 345.

[d] The application must be made by the executor or administrator under some statutes. See the statutes, and *Bland v. Bowie*, 53 Ala. 152.

63. *In re Rankin's Appeal*, 95 Pa. 358.

64. *Eckert v. You's Admr.*, 2 Rawle (Pa.) 136.

65. Ala.—*Whitman v. Reese*, 59 Ala. 532. Mich.—*Merrill v. Montgomery*, 25 Mich. 73, alienee of interest of heir. Pa.—*Thompson v. Stitt*, 56 Pa. 156; *Gross' Estate*, 26 Pa. Co. Ct. 219.

[a] Creditors Are Not Parties. *Dresher v. Allentown Water Co.*, 52 Pa. 225, 91 Am. Dec. 150. But see *Ballard v. Johns*, 80 Ala. 32.

[b] Life Tenant Necessary Party. *In re Rankin's Appeal*, 95 Pa. 358.

purpose of partitioning the property.⁶⁶ The petition should conform generally to a declaration in partition.⁶⁷

E. NOTICE or rule to show cause why partition should not be made must be served on all the interested parties,⁶⁸ the proceedings being void as to all necessary parties who are without notice.⁶⁹

F. COMMISSIONERS OR REFEREES.⁷⁰—Statutes usually provide for the appointment of commissioners or referees to make the partition.⁷¹

But see *Barelay v. Kerr*, 110 Pa. 130, 1 Atl. 220.

[c] **Personal representative** of deceased, owner not necessary party. *Myer's Estate*, 25 Pa. Co. Ct. 235.

[d] **If minors are interested**, guardians must be appointed. *Brown v. Seeggell*, 22 N. H. 548. But see *Whitman v. Reese*, 59 Ala. 532, that when there are infants the probate court is without jurisdiction unless an equitable partition can be made.

66. *Whitman v. Reese*, 59 Ala. 532; *Brown v. Seeggell*, 22 N. H. 548.

[a] **This must appear by the records**, unless a sufficient time has elapsed to justify the presumption of an application having been made. *Brown v. Seeggell*, 22 N. H. 548.

[b] **Copy of will must be annexed** to the petition where it is the basis thereof. *Drum's Estate*, 22 Pa. Co. Ct. 551.

67. *Walton v. Willis*, 1 Dall. (U. S.) 351, 1 L. ed. 171.

As to bill or complaint in suit for partition, see *supra*, VI, B.

[a] **Must set forth names of persons interested** in the property, including the petitioner. *Wolfe v. Loeb*, 98 Ala. 426, 13 So. 744; *Ballard v. Johns*, 80 Ala. 32; *Richards v. Rote*, 68 Pa. 248.

[b] **Must aver that there are no other parties interested** therein save those named in petition. *Danhouse's Estate*, 130 Pa. 256, 18 Atl. 621; *Kantner's Estate*, 24 Pa. Co. Ct. 310.

[c] **If the name of an interested party is unknown**, that fact must appear. *Richards v. Rote*, 68 Pa. 248.

[d] **Relation of persons to deceased**. *Lauer's Estate*, 16 York Leg. Rec. (Pa.) 153.

[e] **Residence of Parties**.—*Ballard v. Johns*, 80 Ala. 32.

[f] **Interest of Each Person**.—*Wolfe v. Loeb*, 98 Ala. 426, 13 So. 744; *Johnson v. Ray*, 67 Ala. 603.

[g] **If the petition shows that one of the tenants in common has died**, it must show to whom his interest has

descended or in whom it has become vested. *Ballard v. Johns*, 80 Ala. 32.

[h] **When minority of some of co-owners is basis of jurisdiction**, the petition must name the minors and allege their minority. *Curtis v. Jenkins*, 20 N. J. L. 679.

[i] **A general description of the property** is sufficient. *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814, *affirming* 61 S. W. 93C. See also *Marsh v. French*, 159 Mass. 469, 34 N. E. 693. But see *Bland v. Bowie*, 53 Ala. 152.

[j] **May Be Amended**.—Landmesser Estate, 9 Kulp (Pa.) 524.

68. *Vensel's Appeal*, 77 Pa. 71; *Richards v. Rote*, 68 Pa. 248; *Horam's Estate*, 59 Pa. 152. See also: *U. S. Robinson v. Fair*, 126 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415. **Mass.**—*Thayer v. Thayer*, 7 Pick. 209. **Tex.**—*Rye v. J. M. Guffey Petroleum Co.*, 42 Tex. Civ. App. 185, 95 S. W. 622.

69. **Cal.**—*Moore v. Lauff*, 30 Cal. App. 452, 158 Pac. 557. **Me.**—*Dean v. Hooper*, 31 Me. 107. **Mass.**—*Procter v. Newhall*, 17 Mass. 181; *Smith v. Rice*, 11 Mass. 507. **Minn.**—*Wood v. Myrick*, 16 Minn. 494. **N. H.**—*Brown v. Seeggell*, 22 N. H. 548. **Pa.**—*Kantner's Estate*, 24 Pa. Co. Ct. 310. **Tex.**—*Cryer v. Andrews*, 11 Tex. 170. **Wis.**—*Ruth v. Oberbrunner*, 40 Wis. 238; *Bresee v. Stiles*, 22 Wis. 120. **Can.**—*Biggar v. Biggar*, 8 Ont. Pr. 488.

70. See generally the title "References."

71. See the statutes.

[a] **When the estate consists of money**, commissioners need not be appointed. *Davenport v. Richards*, 16 Conn. 310.

[b] **Authority to make such appointment** (1) rests with the court (*Clement v. Brainard*, 46 Conn. 174), (2) though when permitted by statute they may be named by the testator in his will. *Strong v. Strong*, 8 Conn. 408.

[c] **The number to be appointed** is fixed by the statute. See the statutes.

These commissioners or referees have similar duties and proceed similarly to those appointed in partition suits strictly.⁷²

G. SALE.⁷³—The general rules applying to sales in partition proceedings generally obtain herein.⁷⁴

Distribution. —The proceeds of a sale in partition in the probate court is held by the administrator or executor for the purpose of distribution.⁷⁵

XVI. REVIEW OF PARTITION PROCEEDINGS.—A. BILL OF REVIEW. —In some jurisdictions, a bill of review may be resorted

72. In partition suit generally, see *supra*, XI.

73. See generally the title "Judicial Sales."

74. See generally *supra*, XII.

[a] Judicial Sale.—*Bland v. Bowie*, 53 Ala. 152.

[b] When an equitable allotment cannot be made, the statutes invariably provide for a sale of the property. See the statutes, and the following: *U. S.*—*Robinson v. Fair*, 124 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415. *Ala.* *Finch v. Smith*, 146 Ala. 644, 41 So. 819; *Bozone v. Daniel*, 39 So. 774; *Edwards v. Edwards*, 142 Ala. 267, 39 So. 82. *Pa.*—*McCall's Appeal*, 56 Pa. 363.

[c] Application for order must state the ground or necessity of sale. *Bland v. Bowie*, 53 Ala. 152.

[d] Unless proof is made showing a sale is necessary, the order is void. *Bland v. Bowie*, 53 Ala. 152; *Satcher v. Satcher's Admr.*, 41 Ala. 26, 91 Am. Dec. 498.

[e] Order of sale should recite what was proven regarding the necessity for sale, and not merely refer to the depositions of record. *Bland v. Bowie*, 53 Ala. 152.

[f] The executor or administrator may be directed to make the sale. *Arble's Estate*, 161 Pa. 373, 29 Atl. 32; *Rawle's Appeal*, 119 Pa. 100, 12 Atl. 809.

[g] An auctioneer may conduct the sale under the authority of the person directed to make the sale. *Guido Estate*, 10 Kulp (Pa.) 150.

[h] The terms of sale cannot be changed by the person designated to make the sale. *Eshelman v. Witmer*, 2 Watts (Pa.) 263; *Schneider's Estate*, 11 Kulp (Pa.) 201.

[i] The holding of a public sale at a place other than that designated by the statute is not for that reason void. *Calloway v. Kirkland*, 57 Ala. 476.

[j] Land may be offered for sale in subdivisions, though it was not possible to subdivide it for the purpose of allotment. *Schneider's Estate*, 11 Kulp (Pa.) 201.

[k] If an heir be the purchaser he may be credited with a sum equivalent to his share, but otherwise payment of the bid is indispensable to complete the purchase. *Del.*—*Townsend v. Rees*, 2 Harr. 324. *La.*—*Bayhi v. Bayhi*, 35 La. Ann. 527; *Hollier v. Gonor*, 13 La. Ann. 591. *Pa.*—*McRee's Estate*, 6 Phila. 75.

[l] The court is without jurisdiction to vacate an order of sale (1) except on notice to the heirs or devisees (*Bland v. Bowie*, 53 Ala. 152; *Louisiana Bank v. Delery*, 2 La. Ann. 648); (2) nor can the order be vacated at the instance of the purchaser. *Bland v. Bowie*, 53 Ala. 152.

[m] Necessity for confirmation, see *Rye v. J. M. Guffey Petroleum Co.*, 42 Tex. Civ. App. 185, 95 S. W. 622.

[n] Rights of Purchaser.—(1) Upon confirmation of the sale by the probate court, the purchaser is entitled to a conveyance of the title, on the payment of the purchase money. *Bland v. Bowie*, 53 Ala. 152. (2) If the sale be not confirmed or is set aside, he is entitled to a return of the purchase money. *Bland v. Bowie*, 53 Ala. 152.

75. *Matter of Landis' Estate*, 2 Phila. (Pa.) 217, when no debts exist, they are no part of estate.

[a] In the distribution of such proceeds (1) it is necessary to ascertain the respective interests of the parties, and if questions of advancement arise that court has the authority to decide them. *Matter of Landis' Estate*, 2 Phila. (Pa.) 217. (2) A party who has succeeded to the claim of a distributee may appear and show his right to a distributive share. *In re Coombs' Estate*, 8 N. J. Eq. 78.

[b] An established claim may be

to for the purpose of reviewing proceedings in partition.⁷⁶ But frequently the statutes limit the right to file such a bill, both as to persons and grounds.⁷⁷ The procedure applicable generally to bills of review are treated elsewhere in this work.⁷⁸

B. WRIT OF ERROR.⁷⁹ — In some jurisdictions, a writ of error is proper method of securing a review in a partition suit;⁸⁰ while in others, either writ of error or appeal will lie.⁸¹

C. CERTIORARI may be invoked when it is claimed that the court making the partition was without jurisdiction.⁸² Such remedy is also available when the commissioners to make partition acted in excess of their jurisdiction in setting off the lands.⁸³ The statutes sometimes permit a review by certiorari of partition proceedings in the orphan's court.⁸⁴

D. APPEAL.⁸⁵ — 1. **Generally.** — Following the general rule, no appeal will usually lie in partition proceedings, except from the final judgment or decree.⁸⁶ So in some jurisdictions, no appeal will lie

set off or deducted from a distributive share, but the door is not thrown open to general creditors of the distributees. *Matter of Landis' Estate*, 2 Phila. (Pa.) 217.

76. **Ind.**—*Bundy v. Hall*, 60 Ind. 177. **Miss.**—*Armistead v. Barber*, 82 Miss. 788, 35 So. 199. **Mo.**—*Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368.

[a] **Such a bill must set forth** (1) the interest of all the parties (*Armistead v. Barber*, 82 Miss. 788, 35 So. 199), (2) join all the parties to the original suit or show the facts justifying their nonjoinder (*Armistead v. Barber*, 82 Miss. 788, 35 So. 199), (3) and show the facts justifying the joinder of persons not parties to the original suit, if any be joined. *Armistead v. Barber*, 82 Miss. 788, 35 So. 199.

77. See the statutes, and *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368.

[a] **An infant defendant who has no guardian, or whose guardian fails to attend and approve the partition, cannot maintain the proceeding until he attains his majority. Nor can the proceeding be maintained by his guardian.** *Bundy v. Hall*, 60 Ind. 177.

78. See 4 STANDARD PROC. 413, et seq.

79. See generally the title "Writ of Error."

80. *Brown v. Cranberry Iron, etc. Co.*, 72 Fed. 96, 18 C. C. A. 444; *Cooper v. Armstrong*, 3 G. Gr. (Iowa) 120.

[a] **Exclusive Remedy.** — *Robinson v. Baruff*, 6 Ohio Dec. (Reprint) 1107,

10 Am. L. Rec. 485; *Jordan v. Jordan*, 8 Ohio Cir. Ct. 431, 4 Ohio Cir. Dec. 290; *Laird v. Walkinshaw*, 1 Monag. (Pa.) 755, 15 Atl. 898. See also *Cooper v. Armstrong*, 3 G. Gr. (Iowa) 120.

[b] **Will not lie because there was error in proceedings of commissioners in setting off the lands.** *Dyer v. Lowell*, 30 Me. 217.

[c] **When the proceeding is in the probate or orphans' court, writ will not lie.** *Bryant's Heirs v. Stearns*, 16 Ala. 302.

[d] **A defendant as to whom a bill in partition has been dismissed, cannot on error have the decree in partition reviewed.** *Clark v. Zaleski*, 268 Ill. 427, 109 N. E. 321.

81. *Smith v. Rice*, 11 Mass. 507.

Review by appeal, see *infra*, XVI, D.

82. *Bryant's Heirs v. Stearns*, 16 Ala. 302. See generally 4 STANDARD PROC. 887, et seq.

83. *Dyer v. Lowell*, 30 Me. 217.

84. See the statutes.

85. See generally the title "Appeals."

86. **U. S.**—*Clark v. Roller*, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. ed. 300; *Green v. Fisk*, 103 U. S. 518, 26 L. ed. 485, followed in 154 U. S. 668, 14 Sup. Ct. 1193, 26 L. ed. 486. **Cal.** *Peck v. Vandenberg*, 30 Cal. 11; *Gates v. Salmon*, 28 Cal. 320. **Fla.**—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77. **Ga.** *Berryman v. Haden*, 112 Ga. 752, 38 S. E. 53. *Compare* *Lochrane v. Equitable Loan & Sec. Co.*, 122 Ga. 433, 50

from the interlocutory judgment;⁸⁷ but other jurisdictions adopt the view that the interlocutory judgment is in effect a final judgment and therefore appealable, because the interests of the parties are therein declared and partition directed.⁸⁸ The right of appeal from an interlocutory judgment in partition is statutory in some jurisdictions.⁸⁹ When the interlocutory judgment or decree is subject to review, it will not be reviewed on an appeal from the final decree.⁹⁰ On the other hand when an appeal can only be taken from a final

- S. E. 372. **Ind.**—*Davis v. Davis*, 36 Ind. 160. **Ky.**—*Talbot v. Todd*, 7 J. J. Marsh. 456. **Md.**—*Wickes v. Wickes*, 98 Md. 307, 56 Atl. 1017; *Johnson v. Hoover*, 75 Md. 486, 23 Atl. 903. **Mass.** *Boyce v. Wheeler*, 133 Mass. 554. **Miss.** *Gilleylen v. Martin*, 73 Miss. 695, 19 So. 482. **Mo.**—*Durham v. Darby*, 34 Mo. 447; *Pipkin v. Allen*, 29 Mo. 229. **Neb.**—*Atwood v. Atwood*, 45 Neb. 201, 63 N. W. 362. **N. Y.**—*Beebe v. Griffing*, 6 N. Y. 465. **N. C.**—*Albemarle Steam Nav. Co. v. Worrell*, 133 N. C. 93, 45 S. E. 466; *Medford v. Harrell*, 10 N. C. 41. **Ore.**—*Sterling v. Sterling*, 43 Ore. 200, 72 Pac. 741. **Tenn.**—*Cawthon v. Searcy*, 12 Lea 649; *Thruston v. Belote*, 12 Heisk. 249; *Meek v. Mathis*, 1 Heisk. 534.
87. **U. S.**—*Clark v. Roller*, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. ed. 300; *Green v. Fisk*, 154 U. S. 668, 14 Sup. Ct. 1193, 26 L. ed. 486, following 103 U. S. 518, 26 L. ed. 485. **Fla.**—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; *Putnam v. Lewis*, 1 Fla. 455. **Ga.**—*Berryman v. Haden*, 112 Ga. 752, 38 S. E. 53. **Ind.**—*Rennick v. Chandler*, 59 Ind. 354; *Kern v. Maginniss*, 41 Ind. 398, 55 Ind. 459; *Davis v. Davis*, 36 Ind. 160. *Compare* *Mayer v. Haggerty*, 138 Ind. 628, 38 N. E. 42; *Jackson v. Myers*, 120 Ind. 504, 22 N. E. 90, 23 N. E. 86; *Kreitline v. Franz*, 106 Ind. 359, 6 N. E. 912. **Ky.**—*Talbot v. Todd*, 7 J. J. Marsh. 456; *Beatty v. Beatty's Admr.*, 10 Ky. L. Rep. 72, 5 S. W. 771. **Md.** *Lee v. Pindle*, 11 Gill & J. 362. **Mass.** *Boyce v. Wheeler*, 133 Mass. 554. *Compare* *Joyce v. Dyer*, 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. 603; *Lowd v. Brigham*, 154 Mass. 107, 26 N. E. 1004. **Miss.**—*Gilleylen v. Martin*, 73 Miss. 695, 19 So. 482. **Mo.**—*Buller v. Linzee*, 100 Mo. 95, 13 S. W. 344; *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; *Durham v. Darby*, 34 Mo. 447; *Gudgell v. Mead*, 8 Mo. 53, 40 Am. Dec. 120.
- Neb.**—*Atwood v. Atwood*, 45 Neb. 201, 63 N. W. 362. **N. Y.**—*Tilton v. Vail*, 117 N. Y. 520, 23 N. E. 120; *Beebe v. Griffing*, 6 N. Y. 465. **N. C.**—*Albemarle Steam Nav. Co. v. Worrell*, 133 N. C. 93, 45 S. E. 466; *Medford v. Harrell*, 10 N. C. 41. **Pa.**—*In re Wistar's Appeal*, 115 Pa. 241, 8 Atl. 797; *In re Christy's Appeal*, 110 Pa. 538, 5 Atl. 205; *In re Gesell's Appeal*, 84 Pa. 238. **Tex.**—*White v. Mitchell*, 60 Tex. 164. **Wis.**—*Vesper v. Farnsworth*, 40 Wis. 357, order for sale is appealable.
88. **U. S.**—*East Coast Cedar Co. v. People's Bank of Buffalo*, 111 Fed. 446, 49 C. C. A. 422, when a sale is ordered.
- III.—*Ames v. Ames*, 148 Ill. 321, 36 N. E. 110; *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537. **Ia.**—*Williams v. Wells*, 62 Iowa 740, 16 N. W. 513; *Ramsay v. Abrams*, 58 Iowa 512, 12 N. W. 555. **La.**—*Ruthenberg v. Helberg*, 43 La. Ann. 410, 9 So. 99; *Blanchard v. Blanchard's Heirs*, 7 La. Ann. 529; *McCullum v. Palmer*, 1 Rob. 512. And see *Hewes v. Baxter*, 45 La. Ann. 1059, 13 So. 821. **Mich.**—*Damouth v. Klock*, 28 Mich. 163. **Ohio.**—*McRoberts v. Lockwood*, 49 Ohio St. 374, 34 N. E. 734. **Va.**—*Stevens v. McCormick*, 90 Va. 735, 19 S. E. 742, when it decrees a sale of the land.
- [a] An appeal from an interlocutory order will lie when an error of law is committed which will prejudice the appellant in his trial, and which error of law goes to the root of the matter. *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711. See also 2 STANDARD PROC. 169, et seq.
89. See the statutes, and *Bloom v. Gordan*, 150 Cal. 762, 90 Pac. 115; *Dore v. Klumpke*, 140 Cal. 356, 73 Pac. 1064; *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88; *Barry v. Barry*, 56 Cal. 10.
90. **Cal.**—*Barry v. Barry*, 56 Cal. 10; *Regan v. McMahon*, 43 Cal. 625. **Ill.**—*Haines v. Hewitt*, 129 Ill. 347, 21 N. E. 930; *Holderman v. Graham*, 61

judgment, all antecedent orders or proceedings, to which an objection or exception has been preserved, will be reviewed.⁹¹

Orders entered after final judgment are, as a rule, appealable,⁹² unless it is an order carrying into effect a final judgment.⁹³

2. Who May Appeal, Parties, etc.—The rules applicable generally as to who may appeal are the same in partition, as in other cases.⁹⁴ In the absence of a statute conferring such right, the purchaser at a partition sale has no right of appeal from an order setting aside the sale or failing to confirm it, either at the time the order was made or at any other time.⁹⁵

Ill. 359. **Mass.**—*Pierce v. Oliver*, 13 Mass. 211. **Mich.**—*Austin v. Austin*, 132 Mich. 453, 93 N. W. 1045; *Hunt v. Hunt*, 109 Mich. 399, 67 N. W. 510; *Shepherd v. Rice*, 38 Mich. 556.

91. **Md.**—*Bull v. Pyle*, 41 Md. 419. **Mass.**—*Sever v. Sever*, 8 Mass. 132. **Minn.**—*Dobberstein v. Murphy*, 44 Minn. 526, 47 N. W. 171. **Ore.**—*Sterling v. Sterling*, 43 Ore. 200, 72 Pac. 741. **Pa.**—*In re Christy's Appeal*, 110 Pa. 538, 5 Atl. 205; *In re Bierly's Estate*, 81 Pa. 419. **Tex.**—*Scheiner v. Probandt*, 73 Tex. 532, 11 S. W. 538.

92. *Comstock v. Purple*, 49 Ill. 158 (order setting aside a sale); *Hollett v. Evans*, 28 Ind. 61, order allowing attorney's fee.

93. *Murphy v. Murphy*, 45 La. Ann. 1482, 14 So. 212.

[a] **On appeal from such an order a prior final decree in partition settling the rights of the parties before the court will not be reviewed.** *Navigato v. Navigato*, 268 Ill. 453, 109 N. E. 267.

94. See the following: **Cal.**—*Younger v. Santa Cruz County Superior Court*, 136 Cal. 682, 69 Pac. 485. **Ill.** *Kloss v. Wylezalek*, 207 Ill. 328, 69 N. E. 863, 99 Am. St. Rep. 220. **La.** *Maguire v. Fluker*, 112 La. 76, 36 So. 231. **Md.**—*Lurman v. Hubner*, 75 Md. 268, 23 Atl. 646. **N. J.**—*Raleigh v. Rogers*, 25 N. J. Eq. 506; *Conover v. Walling*, 15 N. J. Eq. 167.

See generally 2 STANDARD PROC. 194, et seq.

[a] **Parties to a partition suit whether they be plaintiffs or defendants may appeal when aggrieved, and make the other parties to the suit, whether plaintiffs or defendants, respondents to the appeal.** *Kemp v. Hein*, 48 Wis. 32, 3 N. W. 831.

[b] **A co-tenant who is not injuriously affected by a provision of the decree, and which, as to him, would be**

immaterial, cannot complain of error, *East Shore Co. v. Richmond Belt Ry.*, 172 Cal. 174, 155 Pac. 999; *Gates v. Salmon*, 46 Cal. 361, 375. See also 2 STANDARD PROC. 200, et seq.

[c] **Waiver of Right.**—(1) Acceptance of the benefit of the judgment is a waiver of the right to appeal therefrom. *McGrew v. Grayston*, 144 Ind. 165, 41 N. E. 1027; *Pockman v. Meatt*, 49 Mo. 345. (2) The right of appeal may also be lost by gross laches (see *Chinn v. Murray*, 4 Gratt. [45 Va.] 348), (3) by failure to inaugurate the appeal within the period fixed by statute (*Van Buskirk v. Stover*, 162 Ind. 448, 70 N. E. 520), or (4) by conduct which creates an estoppel against the person desiring to appeal. *Rochester Loan, etc. Co. v. Morse*, 181 Ill. 64, 54 N. E. 628.

95. *Thomas v. Elliott*, 215 Mo. 598, 114 S. W. 987, *overruling* *Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970. Compare *Prince v. Mottman*, 84 Wash. 287, 146 Pac. 841.

[a] **Reason.**—The purchaser at a partition sale "acquires an incipient right which may develop into a perfect right on confirmation or may be set at naught by a refusal to confirm, but the confirmation or refusal rests in the judgment of the trial court and no appeal from that judgment is given by statute. To allow the purchaser in such case an appeal from the refusal of the court to confirm the sale or from the order of the court setting the sale aside and ordering a resale, would, if he takes his appeal immediately and before the final judgment be rendered, result in hanging up the proceeding in partition pending the appeal, or if he be given the right to file his bill of exceptions and wait until final judgment and then take his appeal, he embarrasses the whole proceeding and discredits the title to be acquired at the

Parties. — The purchaser is a proper party to an appeal from the order confirming the sale.⁹⁶ When there are several defendants, and only one appeals, it is necessary in order to perfect the appeal, that notice must be given to all the other parties to the action.⁹⁷ When the appeal is from specific parts of the judgment, notice need only be given to those parties who are interested in those specific parts or whose rights are in anywise affected thereby.⁹⁸

3. Time for Taking. — The notice must be given within the time fixed by statute.⁹⁹ It cannot properly be given prior to the entry of the order or judgment appealed from.¹

4. Necessary Proceeding in Lower Court. — In accordance with the general rule, an objection or exception must be taken in the lower court in order that the question may be presented on appeal.² When the ruling of the court is adverse, it is necessary to save the exception by a bill of exceptions.³

5. Effect of Proceedings. — When an appeal is allowed from an

resale. The general assembly has not given such a right; it has wisely withheld a power that could be used to cloud a title and embarrass judicial proceedings." *Thomas v. Elliott*, 215 Mo. 598, 114 S. W. 987.

96. See *Kemp v. Hein*, 48 Wis. 32, 3 N. W. 831.

97. *Hunt v. Hawley*, 70 Iowa 183, 30 N. W. 477; *Gay v. Marionneaux*, 20 La. Ann. 358; *Farrar v. Newport*, 17 La. 346. See also 2 STANDARD PROC. 220.

[a] **Proof of service** must be filed with the clerk. *Hunt v. Hawley*, 70 Iowa 183, 30 N. W. 477.

98. *Miller v. Thomas*, 71 Cal. 406, 12 Pac. 432; *Miller v. Rea*, 71 Cal. 405, 12 Pac. 431.

99. See *Kern v. Maginniss*, 41 Ind. 398; *Griffin v. Griffin*, 10 Ind. 170; *Holderman v. Holderman's Heirs*, 5 B. Mon. (Ky.) 384, and generally 2 STANDARD PROC. 301, et seq.

1. *McDade v. McDade*, 56 Ala. 598; *Regan v. McMahon*, 43 Cal. 625. See also 2 STANDARD PROC. 305.

2. **U. S.**—*Brown v. Cranberry Iron, etc. Co.*, 72 Fed. 96, 18 C. C. A. 444. **Cal.**—*San Fernando Farm, etc. Assn. v. Porter*, 58 Cal. 81; *Regan v. McMahon*, 43 Cal. 625. **Ill.**—*Jespersion v. Mech*, 213 Ill. 488, 72 N. E. 1114; *Ward v. Ward*, 174 Ill. 432, 51 N. E. 806. **Ind.**—*Van Buskirk v. Stover*, 162 Ind. 448, 70 N. E. 520; *Jones v. Jones*, 91 Ind. 72; *Griffin v. Lynch*, 10 Ind. 217. **Ia.**—*Ruby v. Downs*, 113 Iowa 574, 85 N. W. 808. **Md.**—*Godwin v. Banks*, 89 Md. 679, 43 Atl. 863. **Mo.**—*Hiles v. Rule*,

121 Mo. 248, 25 S. W. 959; *Goode v. Lewis*, 118 Mo. 357, 24 S. W. 61. **Neb.**—*Burke v. Cunningham*, 42 Neb. 645, 60 N. W. 903. **N. Y.**—*Bowen v. Sweeney*, 143 N. Y. 349, 38 N. E. 271; *Howell v. Mills*, 7 Lans. 193, affirmed, 56 N. Y. 226. **N. C.**—*Epley v. Epley*, 111 N. C. 505, 16 S. E. 321. **Pa.**—*In re Mason's Appeal*, 41 Pa. 74. **Tex.**—*McFarlin v. Leaman* (Tex. Civ. App.), 29 S. W. 44.

See generally 2 STANDARD PROC. 247, et seq.

[a] **On an appeal from the commissioner's report** (1) it must appear that objections to the report were made and evidence offered in support of the objections (**Ill.**—*Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115; *Ward v. Ward*, 174 Ill. 432, 51 N. E. 806; *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306. **Ind.**—*Quick v. Brenner*, 101 Ind. 230. **Ky.**—*Stith v. Carter*, 22 Ky. L. Rep. 1488, 60 S. W. 725. **Md.**—*Claude v. Handy*, 83 Md. 225, 34 Atl. 532; *Stallings v. Stallings*, 22 Md. 41. **Pa.**—*Black v. Black*, 206 Pa. 116, 55 Atl. 847. **Va.**—*Martin v. Martin*, 95 Va. 26, 27 S. E. 810. **W. Va.**—*Rust v. Rust*, 17 W. Va. 901); (2) nor will objections to the master's report be heard on review when objections thereto were not made in the trial court. *Severy v. McDougall*, 190 Ill. App. 193.

[b] **Objection that fees of commissioner excessive** waived unless objected to and assigned as error. *Navigato v. Navigato*, 268 Ill. 453, 109 N. E. 267. See also 8 STANDARD PROC. 521.

3. *Clark v. Stephenson*, 73 Ind. 489.

interlocutory order or judgment, the effect is to oust the lower court of jurisdiction to proceed further until the appeal is disposed of.⁴ If the order or judgment is not appealable, proceedings will not be stayed.⁵ When an appeal is taken from a judgment for costs or when the relief granted is enforceable by fieri facias, security is usually required to stay proceedings for enforcement of the judgment.⁶

6. Judgment on Appeal. — When the court finds the partition as made is unequal, the judgment must be reversed, as the appellate court cannot render a judgment equalizing the allotments or imposing a charge in favor of one allotment and against another.⁷ In some instances, it will instruct the commissioners or the court below as to their mode of proceeding.⁸ An error in imposing or refusing to impose a charge upon a parcel of land may be corrected by modifying the decree, without reversing the judgment.⁹ So also, a clerical mistake in the description of the land, disclosed by the judgment itself, may be reformed by the appellate court without reversing the judgment.¹⁰ When the judgment must be reversed as to one of the parties, it is generally necessary that a reversal as to all be directed.¹¹

See also *Van Buskirk v. Stover*, 162 Ind. 448, 70 N. E. 520, and the title "**Bills of Exceptions.**"

4. *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711. See *Thomas v. Thomas*, 73 Iowa 657, 35 N. W. 693.

5. *In re Wistar's Appeal*, 115 Pa. 241, 8 Atl. 797.

6. *Randles v. Randles*, 67 Ind. 434; *Bromagham v. Clapp*, 6 Cow. (N. Y.) 611.

7. *Lucas v. Peters*, 45 Ind. 313, that court should appoint new commissioners to make another partition, or if they report that the land be not

susceptible of division without damage to the owners, may order a sale.

8. See *Logan v. McChord's Heirs*, 5 Litt. (Ky.) 159.

[a] **When the cause is still pending in the lower court**, the appellate court may direct that an omission in the decree be supplied. *Pierson v. Glass* (Tex. Civ. App.), 84 S. W. 272.

9. *Gass v. Waterhouse* (Tenn. Ch.), 61 S. W. 450.

10. *Hanrick v. Hanrick* (Tex. Civ. App.), 81 S. W. 795.

11. *Kremer v. Haynie*, 67 Tex. 450, 3 S. W. 676.

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